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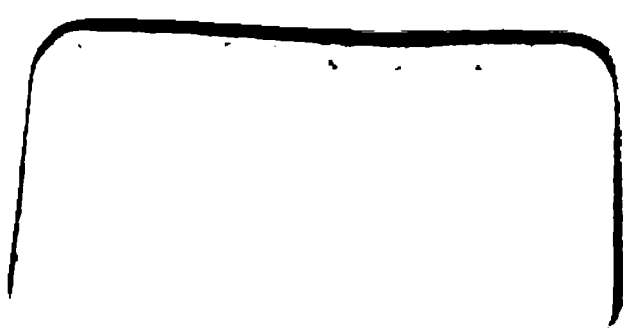
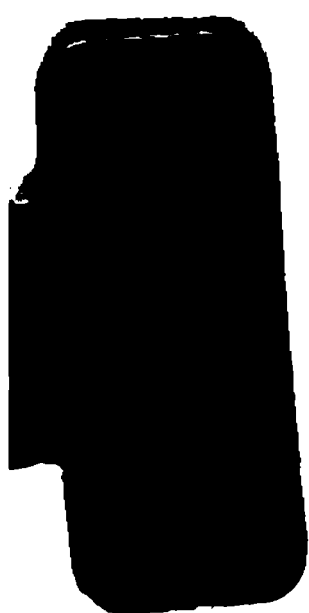
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THE  
AMERICAN AND ENGLISH  
ENCYCLOPÆDIA  
OF  
LAW.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

JOHN HOUSTON MERRILL,

*Late Editor of the American and English Railroad Cases and the American and English Corporation Cases.*

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# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

## **CARRIERS OF LIVE STOCK.** (See also ANIMALS; BAILMENTS; CARRIERS OF GOODS.)

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**1. Carriers of Live Stock as Common Carriers.**—Common carriers of goods, as has been already shown,<sup>1</sup> assume in their undertaking to carry what are practically the obligations of insurers. As usually expressed, they insure against loss or injury from whatever cause arising, excepting only acts of God or the public enemy. While sufficiently accurate for practical purposes, this statement of the rule is subject to the further qualifications that common carriers of goods are not liable when the loss or injury results from the neglect of the consignor, or from the intrinsic qualities of the articles consigned.<sup>2</sup> Under this last-named exception, the law of common carriers of live stock is properly classified.

1. CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law, 778.

3 C. of L.—1

2. CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law, 787, 841, 853.

The justice of a distinction based upon the character of the freight is scarcely open to question. In the same way that a carrier is not held to a like responsibility for the safe carriage of a bale of cotton and a box of fruit, his liability in the transportation of live stock is modified. The most scrupulous and painstaking performance of his duties could not guarantee an owner against loss. Railroad companies—the class of carriers almost exclusively in question—must use the cattle-car and the locomotive. In addition to many other possible causes of damage, the following must be considered: Animals, whatever their species, must be crowded or partitioned to avoid slipping, and the former process is likely to result in suffocation, while the latter would be too expensive for the shipper; they must have light and air, and the open car means exposure to the weather, often under conditions unfavorable to their health; they must be fed and watered, which necessitates unloading and reloading, with the attendant dangers; add to these difficulties many others which are attributable to the natures and habits of animals—they become frightened and unmanageable; they kick or gore, or fall down and cannot rise; they crowd upon and suffocate the weak; they suffer from the unnatural mode of locomotion with its attendant hardships, and often with the length of the journey. These and similar considerations have brought about not only a unanimous holding among the authorities that carriers of live stock were not insurers against loss or injury arising from the inherent nature, habits, etc., of animals, but have produced some difference of opinion as to whether carriers of animals were common carriers, liable to their duties and subject to their responsibilities.<sup>1</sup>

(a) *England*.—It is sometimes asserted that by the English law the transportation of live stock by railroad does not come within the reasons of the rules applied to common carriers, so far as relates to the care of the property and responsibility for its loss or injury.<sup>2</sup> The considerations already adverted to have clearly resulted in some difference of opinion among English judges, but an examination of the conflicting, and more particularly the latest cases, will

1. There is a conflict of opinion as to whether the common-law rule of liability as applied to common carriers should be extended to include carriers of animals. Doubts were expressed upon the subject in the following cases: *McManus v. Lancashire, etc., R.*, 2 H. & N. 693; 27 L. J. Exch. 201; 4 Jur. N. S. 144; 4 H. & N. 328; *Carr v. Lancashire, etc., R.*, 7 Exch. 712; *Pardington v. South Wales R.*, 38 Eng. L. & Eq. 432; 1 H. & N. 392.

In other cases the question has been made to depend upon the existence of a special contract of transportation limiting the carrier's liability. In the absence

of such a contract the common-law rule should be applied. *Palmer v. Grand Junction R.*, 4 Mee. & W. 749; 7 Dow. P. C. 232; 1 H. & H. 489; 3 Jur. 559. See, generally, *Michigan Southern R. v. McDonough*, 21 Mich. 169; *Lake Shore, etc., R. v. Perkins*, 25 Mich. 329; *Louisville, etc., R. v. Hedger*, 9 Bush (Ky.), 645; *Nashville, etc., R. v. Jackson*, 6 Heisk. (Tenn.) 273; *Baker v. Louisville, etc., R.*, 10 Lea (Tenn.), 304; s. c., 16 Am. & Eng. R. R. Cas. 149.

2. *Michigan Southern R. v. McDonough*, 21 Mich. 169; *Lawson's Contracts of Carriers*, § 16.

scarcely bear out these statements.<sup>1</sup> An accepted authority, after a review of the decisions, lays down the following:

1. **English Authorities.** — *Blower v. Great Western, etc.*, R., L. R. 7 C. P. 655; 41 L. J. C. P. 268; 27 L. T. N. S. 883; 20 W. R. 776; *Nugent v. Smith*, L. R. 1 C. P. Div. 423; 45 L. J. C. P. 697; 34 L. T. N. S. 827; 25 W. R. 117, reversing s. c., L. R. 1 C. P. Div. 19; 45 L. J. C. P. 19; 33 L. T. N. S. 731; 24 W. R. 237; *Kendall v. London, etc.*, R., L. R. 7 Exch. 373; 41 L. J. Ex. 184; 26 L. T. N. S. 735; 20 W. R. 880; *Roberts v. Great Western R.*, 4 Ad. & El. N. S. 506.

In *Palmer v. Grand Junction R.*, 4 M. & W. 749, Parke, B., mooted the point, as appears on page 758 of the report, putting the following question to defendant's counsel: "Does the rule as to negligence apply to live animals as to men or horses? Of course where they are stolen, it would; but is it so, where they are delivered, although hurt or damaged? If misdelivered the carrier would be liable; but they would not be liable for a mere accident to a live animal supposing the carriage to be safe and good and properly conducted."

Remarks of the same judge looking to a modified form of liability are to be found in *Carr v. Lancashire & Yorkshire R.*, 7 Ex. 707, and the court in *McManus v. Lancashire & Yorkshire R.*, 2 H. & N. 693-702, refer to the opinion expressed in this latter case as entitled to "much consideration."

In the last case cited reported on appeal, 4 H. & N. 346, Earle, J., declared he found "neither reason nor principle for holding that defendants were bound to receive living animals as common carriers." See also similar remarks by Pollock, C. B., and Martin, B., in *Pardington v. South Wales R.*, 1 H. & N., at page 396; and by the judges in *Harrison v. London & Brighton R.*, 2 B. & S. 122, 152.

In *Blower v. Great Western R.*, L. R. 7 C. P. 655, the question arose on the following facts. Thirty-three head of cattle were delivered to defendant for transportation from one point on its line to another. They were loaded in a proper way. A bullock escaped from one of the trucks, and was found dead on the track. Its death was caused solely by its escape from the truck, and it had made its escape either by climbing over the top rail or forcing its way between the iron bars of the truck. All actual negligence on the part of the company was

negated. The court, Willes and Keating, JJ., held that the company was not liable. Willes, J., said: "The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves, or disposition producing unruliness or frenzy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing whether we say that one who carries live animals is not liable in the one event, but is liable in the other; or that is, he is not a common carrier at all, because there are some accidents other than those falling within the exception of the act of God and the queen's energies for which he is not responsible. By the expression 'vice,' I mean that sort of vice which, by its internal development, tends to the destruction or injury of the animal or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties."

Shortly afterwards the same point arose in *Kendall v. London & Southwestern R.*, L. R. 7 Ex. 373. There a saddled horse was placed in a proper horse-box. According to the usual custom, the saddle was left on with the stirrups hanging down. At the end of the journey the horse was found injured in the forearm and fetlock. The ruling in the preceding case was cited and followed, Bramwell, B., adding: "But if it so hurt itself from the defendants' negligence or from any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, then the defendants would, as insurers, be liable."

In *Blower v. Great Western, etc.*, R., L. R. 7 C. P. 655; 41 L. J. C. P. 268; 27 L. T. N. S. 883; 20 W. R. 776, Mr. Justice Willes remarked that the conflict of opinion found in the authorities respecting the liabilities of carriers of animals "may turn out after all to be a mere controversy of words."

In *Clarke v. Rochester, etc.*, R. Co., 14 N. Y. 570; s. c., 67 Am. Dec. 205; Denio, C. J., held that a railroad company acting as a common carrier of animals is

not liable for their dying or being injured from causes arising from their animal nature and propensities, and which diligent care could not have prevented; but is liable, in the absence of special agreement or proof of inevitable accident, for loss or damage which might have been avoided by use of care and foresight, whether due to the conduct of the animals themselves or to incidents of the company's business. "A bale of goods or other inanimate chattel may be so stowed as that absolute safety may be attained, except in transportation by water, where the carrier usually excepts the perils of the navigation, and except in cases of inevitable accident. The rule established from motives of policy which charges the carrier in almost all cases is not, therefore, unreasonable in its application to such property. But the carrier of animals by a mode of conveyance opposed to their habits and instincts, has no much means of securing absolute safety. They may die of fright or by refusing to eat, or they may—notwithstanding every precaution—destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss. . . . Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach."

"*Palmer v. Grand Junction R. Co., 4 Mee. & W. 749*, was the case of an action against a railway company for negligence in carrying horses, by which one was killed and others injured; but the damage was occasioned by the carriages running off the track of the road down an embankment, and the case did not turn at all on the peculiarity of the freight, but mainly on the question whether the defendants had limited their responsibility by a notice. The jury found that notice had not been given, and that the defendants had been guilty of gross negligence. Mr. Baron Parke, in giving the opinion of the court, declared that the common law duty of carriers was cast upon the defendants. The precise question now before us was not discussed, but it was assumed that the law of carriers applied to the case. There is no reason why it should not, in all cases of

accident unconnected with the conduct of the animals. But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee for hire of animals is bound to exercise, and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule, and considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exception requires."

In *Kansas, etc., R. Co. v. Reynolds, 8 Kan. 623*, the court observes: "It is claimed there is a difference between live stock and other property, as to the responsibility assumed by a carrier in its transportation; that the voluntary motion of the stock introduces an element of danger in the transportation against which neither reason nor authority requires that the carrier insure; that, inasmuch as it is customary that the shipper, or some one for him, accompany the stock, there is only a qualified or partial delivery to the carrier; and also, that proof that a railroad company has suitable cars, and is engaged in the business of carrying cattle, is not proof that it is a common carrier as to such cattle, because to insure their safe transportation requires yards and stables, with conveniences for feeding both at the termini and along the route, as well as a corps of experienced stockmen to take care of them in the transit. These last, as it seems to us, are duties incident to the employment and not elements to determine its character. Engaging in the business of transporting cattle, it becomes a duty to provide suitable facilities therefor. Not the manner of doing the work, but the fact of an engaging in the business, is the test laid down in the books for determining the character of the carrier."

In *Kimball v. Rutland, etc., R., 26 Vt. 247*, Isham, J., observes: "It is immaterial whether transportation of cattle is regarded as their (railroad companies') principal employment, or whether it is incidental and subordinate: the fact that they have undertaken such transportation for hire, and for such persons as

"These cases have been considered as establishing in the English law the principle, whatever doubts might have been previously cast upon the question by the opinions of learned judges, that the carriers of live animals incur the responsibilities of common carriers as to such freight; but that, at the same time, where an injury has happened to them it is competent for the carrier to show that it occurred through the 'proper vice' of the animal, and not from any negligence on his part. And in this country, with great unanimity, the duty and liability of the common carrier as to such freight have been defined with exactly the same limitations and exceptions."<sup>1</sup>

Under another branch of this title will be found the statutory limitations placed upon the carriers' freedom to contract in England. Aside from the fact that such regulations are founded upon the assumption that carriers of live stock are common carriers, the judicial construction placed upon these provisions seems to permit no alternative opinion.

(b) *Michigan*.—In *Michigan* the law is settled to the effect that cattle, being in their nature much more liable to injury and loss in transportation than property generally transported by that mode of conveyance, impose greater risks, of a different character, demanding more labor and special arrangements for their protection, and do not come within the reasons which, by the common law, imposed upon common carriers the obligation to receive and transport, and the duty of care and custody of property, and made them insurers against loss or injury.<sup>2</sup> Accordingly, in that State,

choose to employ them, establishes their relation of common carriers, and with it the duties and obligations which grow out of it."

It has been pointed out that where injury or loss occurs to live stock being transported by a railroad, a slight difference in the facts of the occurrence may change the liability. A horse slips or falls, or kicks or plunges, or in some way hurts itself. If it does so from no cause other than its own inherent propensities—its "proper vice"—that is to say, from fright or temper, or struggling to keep its legs, the carrier is not liable. But if it so hurts itself from any act of negligence of the carrier, or from any misfortune happening to the train, though not through any negligence of the carrier, as for instance from the horse-box leaving the line, owing to some obstruction maliciously put on it, then the carrier as an insurer would be liable. Redman's Law of Railway Carriers (2d Ed.), p. 123; *Kendall v. London, etc., R. Co.*, 41 L. J. Ex. 184; L. R. 7 Ex. 373, *per* Bramwell, B.; *Nugent v. Smith*, 45 L. J. C. P. 697; L. R. 1 C. P. D. 423.

The carrier may exclude the carrying of live stock from their public profession as carriers, and receive and carry them only on special contracts as ordinary bailees for hire. *North Eastern, etc., R. Co. v. Richardson*, 4 L. J. C. P. 60; L. R. 7 C. P. 75.

**Presumptions.**—The presumption where an accident occurs to a horse on the rail is that it has happened through the vice of the animal, it being shown that it is quiet and accustomed to travel, and also that no accident has occurred likely to harm it. *Kendall v. London, etc., R. Co.*, L. R. 7 Exch. 373.

1. *Hutchinson on Carriers*, § 221.

2. *Michigan*.—In *Michigan Southern, etc., R. Co. v. McDonough*, 21 Mich. 165. Christiancy, J., observes: "But the transportation of cattle and live stock by common carriers by land was unknown to the common law, when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property



railroad companies are not common carriers of live stock unless they have assumed that character, and cannot be compelled by law to carry it as freight nor be held responsible for it as common carriers.<sup>1</sup>

(c) *Kentucky and Tennessee*.—In *Kentucky* and *Tennessee* carriers of live stock are not insurers, though if an injury occurs to an animal *en route* the *prima facie* presumption is that the accident was occasioned by the fault of the company.<sup>2</sup>

(d) *United States Generally*.—In nearly all the States the rule is now well established that the liability of carriers of live stock is the common-law liability of common carriers of other property, subject only to the qualification that the carrier may be excused from liability where the loss is attributable to the intrinsic qualities or nature of the animals, provided he is himself free from negligence, or is exempted by a valid contract protecting him.<sup>3</sup> This rule seems to have been affirmed in the following States: *Alabama, California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Ne-*

involving, in their transportation, much fewer risks, and of quite a different kind, from those which are incident to the transportation of live stock by railroad. Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of the cars, in their frenzy injure each other by trampling, plunging, goring, or throwing down; and frequently on long routes, their strength exhausted by hunger and thirst, fatigue and fright, the weak easily fall and are trampled upon, and, unless helped up, must soon die. Hogs also swelter and perish. See *per Parke, Baron*, in *Carr v Lancashire & Y. R. Co.*, 7 Exch. 712; *Denio, J.*, in *Clarke v. Rochester & S. R. Co.*, 14 N. Y. 573. It is a mode of transportation which, but for its necessity, would be gross cruelty and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property, that I do not think this kind of property falls within the reasons upon which the common law liability of common carriers was fixed."

1. *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329; overruling *Michigan, etc.,*

*R. Co. v. Hall*, 6 Mich. 243; and *Great Western, etc., R. Co. v. Hawkins*, 18 Mich. 427.

2. *Kentucky and Tennessee*.—In *Kentucky* and *Tennessee*, carriers of live stock are not insurers, though if an injury occurs to an animal *en route* the *prima facie* presumption is that the accident has been occasioned by the fault of the company. *Louisville, etc., R. Co. v. Hedger*, 9 Bush (Ky.), 645; *Baker v. Louisville & N. R. Co.*, 10 Lea (Tenn.), 304; s. c., 16 Am. & Eng. R. R. Cas. 149, where it was held that railroads are not bound as common carriers of live stock, and only relieved of liability by the act of God or the public enemy. As carriers of live stock they are bound to use due and proper care, and deliver in reasonable time. See also *Nashville, etc., R. Co. v. Jackson*, 6 Heisk. 273.

3. Carrier is not liable where the injury arose from the viciousness, unruliness, fright, refusal to eat, restiveness, and similar causes, attributable to the nature and propensities of the animals themselves, provided the carrier has been guilty of no negligence causing the loss. *Evans v. Fitchburg, etc., R. Co.*, 111 Mass. 142; *Penn v. Buffalo, etc., R. Co.*, 49 N. Y. 204; s. c., 10 Am. Rep. 355; *Cragin v. New York, etc., R. Co.*, 51 N. Y. 61; s. c., 10 Am. Rep. 559; *Chicago, etc., R. Co. v. Harmon*, 12 Ill. App. 54; *Indianapolis, etc., R. Co. v. Jurey*, 8 Ill. App. 160; *Wabash, etc., R. Co. v. McCasland*, 11 Ill. App. 491; *Illinois, etc., R. Co. v. Breisford*, 13 Ill. App. 251;

*braska, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia, Wisconsin,*<sup>1</sup>

*Hall v. Renfro*, 3 Metc. (Ky.) 51; *Maslin v. Baltimore, etc.*, R. Co., 14 W. Va. 180.

1. **Alabama.**—*South Alabama, etc.*, R. Co. *v. Henlein*, 52 Ala. 606; *East Tennessee, etc.*, R. Co. *v. Johnston*, 75 Ala. 596; s. c., 51 Am. Rep. 489.

**California.**—*Agnew v. Contra Costa R. Co.*, 27 Cal. 425.

**Georgia.**—*East Tenn., etc.*, R. Co. *v. Whittle*, 27 Ga. 535; *Georgia, etc.*, R. Co. *v. Spears*, 66 Ga. 489; s. c., 42 Am. Rep. 81; *Georgia, etc.*, R. Co. *v. Beattie*, 66 Ga. 438; s. c., 42 Am. Rep. 75; *Mitchell v. Georgia, etc.*, R. Co., 68 Ga. 644.

**Illinois.**—*Illinois Central, etc.*, R. Co. *v. Crabtree*, 19 Ill. 136; *Ohio, etc.*, R. Co. *v. Dunbar*, 20 Ill. 623; *St. Louis, etc.*, R. Co. *v. Dorman*, 72 Ill. 504.

**Indiana.**—*In Lake Shore, etc.*, R. Co. *v. Bennett*, 6 Am. & Eng. R. R. Cas. 391, it was held that where a person ships cattle over a railway under a special contract of carriage, he cannot elect to charge the railroad company with the liabilities of a common carrier.

**Iowa.**—*German v. Chicago, etc.*, R. Co., 38 Iowa, 127; *McCoy v. Keokuk, etc.*, R. Co., 44 Iowa, 424.

By the Iowa code carriers are forbidden to exempt themselves by any contract, receipt, rule or regulation, from the liability of a common carrier. Code of Iowa, sec. 1308; *McDaniel v. Chicago, etc.*, R. Co., 24 Iowa, 412. *Compare Kinnick v. Chicago, etc.*, R. Co., 27 Am. & Eng. R. R. Cas. 55.

Reed, J., observes: "Counsel for appellant contend that, as the cause of the injury in question was connected with the natural propensities and characteristics of the property, it was one against which the carrier is not held to be an insurer, and that the instruction is erroneous on that ground. It was held, in effect, by this court in *McCoy v. Keokuk & D. M. R. Co.*, 44 Iowa, 424, that, when the cause of damage for which recompense is sought is connected with the character or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier does not attach. The reasons for the exception to the general rule as to the liability of the carrier, which arises when he undertakes to transport live stock, are very apparent. There are dangers incident to the transportation of that character of

property which are created entirely by the disposition and propensities of the animals, and against which it is often impossible for the carrier to make adequate provision. But the rule of the common law is modified only so far as is rendered necessary by the character of the property in this respect. In every other respect the carrier is held to be an insurer of the property. In our opinion, the present case is not within the exception to the rule. The injury was caused by the 'piling up' of the hogs while struggling to get near to or away from the doors of the car. The propensity, however, was to do this only when the train was standing. Owing to the obstruction of the track, it was kept standing at a station for twelve hours, and, without doubt, it was during that time that the injury occurred. But the danger was not one against which provision could not be made. The injury might have been prevented, either by unloading the hogs or giving them personal attention while in the car. There is no claim that this could not have been done, and we think defendant was bound to do it. As there was nothing shown which tended to take the case out of the general rule, the court did right in instructing that defendant was bound by that rule."

In an action against a railroad company for injuries to a "thoroughbred short-horn cow" shipped over their road, evidence that railroad companies in Iowa do not, and never have by uniform custom, held themselves out as common carriers of live stock of this description, is inadmissible, as such a custom is under Iowa Code, § 1308, void: nor can the defendant show that plaintiff, in previous shipments, had signed contracts releasing the company from any liability above the value of common stock, and that he shipped the cow under the same arrangement. *McCune v. B., C. R. & N. R. Co.*, 52 Iowa, 600.

**Kansas.**—*Kansas, etc.*, R. Co. *v. Reynolds*, 8 Kans. 623; *Kansas, etc.*, R. Co. *v. Nicholls*, 9 Kans. 235; *St. Louis, etc.*, R. Co. *v. Piper*, 13 Kans. 510.

**Louisiana.**—*Peters v. New Orleans, etc.*, R. Co., 16 La. Ann. 222.

**Maine.**—*Sager v. The Railroad*, 31 Me. 228.

**Massachusetts.**—*Smith v. New Haven, etc.*, R. Co., 12 Allen, 531; *Evans v. Fitchburg, etc.*, R. Co., 111 Mass. 142;

*United States Courts.*<sup>1</sup>

(e) *Injuries Arising from Intrinsic Qualities of Live Stock.*—The following are instances in which the carrier has been excused for an injury or loss resulting from the intrinsic qualities and propensities of the live stock transported, or from the owner's negligence: Where a horse's shoes were not removed, or a halter was attached to his jaw in such a manner as to cause restiveness;<sup>2</sup> where the consignor assumed to load the cars and did so improperly;<sup>3</sup> where an animal dies or is injured by heat or cold, or want of food, while in course of transportation, without any negligence on the part of the carrier;<sup>4</sup> where one of a pair of horses kicks and kills or injures the other in the car, if the car was suitable, and proper care was taken to prevent such injuries;<sup>5</sup> where a mule, being transported in a railroad car, kicks through the slats at the side of the car and is killed, without fault of the carrier, it being the nature of the mule to kick;<sup>6</sup> where an unruly jackass is thrown or falls from a ferry-boat, through his own restlessness or viciousness, the

*Squire v. New York Central, etc., R. Co.,* 98 Mass. 239.

*Minnesota.*—*Moulton et al. v. St. Paul, etc., R. Co.,* 31 Minn. 85; s. c., 12 Am. & Eng. R. R. Cas. 13; *Lindsley v. Chicago, etc., R. Co.,* 33 N. W. Rep. 7.

*Mississippi.*—*Chicago, etc., R. Co. v. Abelo,* 60 Miss. 117.

*Missouri.*—*Clark v. St. Louis, etc., R. Co.,* 64 Mo. 440; *Rice v. Kansas Pacific R. Co.,* 63 Mo. 314; *Oxley v. St. Louis, etc., R. Co.,* 65 Mo. 629; *Dawson v. St. Louis, etc., R. Co.,* 76 Mo. 514; *St. Louis, etc., R. Co. v. Cleary,* 77 Mo. 634.

*Nebraska.*—*Atchison, etc., R. Co. v. Washburn,* 5 Neb. 117.

*New Hampshire.*—*Rexford v. Smith,* 52 N. H. 355.

*New York.*—*Cragin v. New York, etc., R. Co.,* 51 N. Y. 61; *Penn v. Buffalo, etc., R. Co.,* 49 N. Y. 204; *Harris v. Northern, etc., R. Co.,* 20 N. Y. 232; *Mynard v. Binghamton & N. Y. R. Co.,* 71 N. Y. 180; *Holsapple v. Rome, W. & O. R. Co.,* 3 Am. & Eng. R. R. Cas. 487.

In *Clarke v. Rochester, etc., R. Co.,* 14 N. Y. 750, it was held that the carrier is responsible for any injury which can be prevented by foresight, vigilance, and care, although arising from the conduct of the animals.

Where live stock is killed under circumstances exonerating the carrier, he is not liable for not delivering their carcasses. *Lee v. Marsh,* 28 How. Pr. 275.

*North Carolina.*—*Lee v. The Railroad,* 72 N. Car. 236.

*Ohio.*—*Wilson v. Hamilton,* 4 Ohio St. 722; *Welsh v. Pittsburgh, etc., R. Co.,* 10 Ohio St. 65.

*Pennsylvania.*—*Kitz v. Pennsylvania R. Co.,* 3 Phila. 82; *Powell v. Pennsylvania R. Co.,* 32 Pa. St. 414.

*South Carolina.*—*Bamberg v. South Carolina R. Co.,* 9 S. Car. 61.

*Vermont.*—*Kimball v. Rutland, etc., R. Co.,* 26 Vt. 247.

*Virginia.*—*Virginia, etc., R. Co. v. Sayers,* 26 Gratt. 328.

*West Virginia.*—*Maslin v. Baltimore, etc., R. Co.,* 14 W. Va. 180.

*Wisconsin.*—*Morrison v. Phillips, etc., Constr. Co.,* 44 Wis. 405.

1. *United States Courts.*—In *Michigan Central, etc., R. Co. v. Myrick (U. S.),* 9 Am. & Eng. R. R. Cas. 25, it was held that as far as the route is concerned, the duty of a railroad as a carrier of live animals is the same as its duty as a carrier of goods.

2. *Evans v. Fitchburg, etc., R. Co.,* 111 Mass. 142.

3. *Ohio, etc., R. Co. v. Dunbar,* 20 Ill. 723; *East Tennessee, etc., R. Co. v. Whittle,* 27 Ga. 535; *Chicago, etc., R. Co. v. Van Dresor,* 22 Wis. 511; *East Tennessee, etc., R. Co. v. Johnston,* 75 Ala. 596; s. c., 51 Am. Rep. 489.

4. *Maslin v. Baltimore, etc., R. Co.,* 14 W. Va. 180; *Kirby v. Great Western, etc., R. Co.,* 18 L. T. N. S. 658.

5. *Evans v. Fitchburg, etc., R. Co.,* 111 Mass. 142.

6. *Indianapolis, etc., R. Co. v. Jurey,* 8 Ill. App. 160.

ferryman being guilty of no negligence; <sup>1</sup> where the animal takes fright, after the journey is ended, at a light displayed by a servant of the company, and dashes upon the track and is killed; <sup>2</sup> where a bullock escapes, by his own exertions, from the truck in which he is being transported, without negligence by the carrier, the truck itself being sufficient, and is lost; <sup>3</sup> where an animal while being carried perishes, partly through its own unruly conduct, and partly from the effects of a storm, the carrier being chargeable with no negligence; <sup>4</sup> where horses being transported by water, in consequence of a storm, break down the partitions between them, and by kicking each other some of them are killed. <sup>5</sup>

(f) *Carrier's Liability where his Negligence is Primary Cause of Loss or Injury.*—Where the negligence of the carrier is the primary cause of the injury, although but for the nature and propensities of the live stock carried no loss need have resulted, the carrier is responsible. <sup>6</sup>

The following are examples of cases holding the carrier liable under such circumstances: Where the contract of transportation contained a clause providing that the carrier should be free from liability for any accident occasioned by the animal's restiveness, and an accident occurred through such restiveness, but the latter resulted from the negligence of the railroad company; <sup>7</sup> where hogs in course of transportation became heated from being overcrowded, and the carrier when informed of the fact neglected to apply water to them, alleging that his pump was out of repair; <sup>8</sup> where, owing to the wreck of a passenger train, a car load of hogs was delayed twelve hours without being unloaded or receiving attention, and injury resulted from "piling up" of the animals, or their struggling to get near to or away from the car doors, which

1. Hall v. Renfro, 3 Metc. (Ky.) 51.

2. Roberts v. Great Western, etc., R. Co., 4 Ad. & El. N. S. 506.

3. Blower v. Great Western, etc., R. Co., L. R. 7 C. P. 655; 41 L. J. C. P. 268; 27 L. T. N. S. 883; 20 W. R. 776.

4. Nugent v. Smith, L. R. 1 C. P. Div. 423; 45 L. J. C. P. 697; 34 L. T. N. S. 827; 25 W. R. 117.

5. Gabay v. Lloyd, 3 B. & C. 793; Lawrence v. Aberdeen, 5 B. & Ald. 107.

6. Powell v. Pennsylvania R. Co., 32 Pa. St. 414; Ritz v. Pennsylvania R. Co., 3 Phila. 82; East Tennessee, etc., R. Co., v. Whittle, 27 Ga. 535; Ohio, etc. R. Co., v. Dunbar, 20 Ill. 623; St. Louis, etc., R. Co. v. Dorman, 72 Ill. 504; Indianapolis, etc., R. Co. v. Strain, 81 Ill. 504; Welch v. Pittsburg, etc., R. Co., 10 Ohio St. 65; Great Western, etc., R. Co., v. Hawkins, 18 Mich. 427; s. c., 17 Mich. 57; Clarke v. Rochester, etc., R. Co., 14 N. Y. 570; Conger v. Hudson River, etc., R.

Co., 6 Duer (N. Y.), 375; Harris v. Northern, etc., R. Co., 20 N. Y. 232; Smith v. New Haven, etc., R. Co., 12 Allen (Mass.), 531; Evans v. Fitchburg, etc., R. Co., 111 Mass. 142; Pratt v. Ogdensburg, etc., R. Co., 102 Mass. 557; Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.), 688; Peters v. New Orleans, etc., R. Co., 16 La. Ann. 222.

7. Moore v. Great Northern, etc., R. Co., L. R. 10 Irish, 95; Gill v. Manchester, etc., R. Co., 42 L. J. Q. B. 89; L. R. 8 Q. B. 186. See also Kendall v. London, etc., R. Co., L. R. 7 Ex. 373.

8. In Illinois, etc., R. Co. v. Adams, 42 Ill. 474, the hogs being transported by the carrier became heated from being overcrowded, and the carrier when informed of the fact, neglected to apply water to them, and was held liable for the injury resulting from such neglect, in spite of his excuse that his pump was out of repair. See also Toledo, etc., R. Co., v. Thompson, 71 Ill. 434.

propensity is only exhibited when the train is standing;<sup>1</sup> where, because of an unreasonable or negligent delay, animals perish of cold;<sup>2</sup> where, by leaving a car window open, or like negligence, in consequence of which the animals escape, even though the contract expressly stipulates against liability for escapes.<sup>3</sup>

**2. Carriers' Duty to Receive Live Stock.**—The first important consequence of the rule that carriers of live stock are common carriers is that which imposes upon them the duty to receive and transport the animals consigned, and they are liable in damages for a refusal without reasonable excuse.<sup>4</sup> The carrier cannot excuse his failure in this duty upon the ground that the live stock was received from a connecting line on Sunday;<sup>5</sup> or because of a statute prohibiting railroad companies from carrying Texas or Cherokee cattle, such statute being unconstitutional.<sup>6</sup>

In *Michigan*, in accordance with the doctrines there in force, a railroad company is not bound to receive and carry live stock unless it has held itself out as a common carrier.<sup>7</sup>

**3. Notices Limiting Liability.**—The carrier in transporting live stock cannot restrict its common-law liability by notice on a placard, bill of lading, or receipt; the notice must be embodied in a special contract with the shipper.<sup>8</sup>

**4. Contracts Limiting Liability.**—The consideration of the nature and validity of the contracts of carriers of live stock would involve the repetition of what properly belongs under other subdivi-

1. In *Kinnick v. Chicago, etc., R. Co.*, 27 Am. & Eng. R. R. Cas. 55, the defendant railway company received a car load of hogs from the plaintiff for shipment. Owing to the wreck of a passenger train, the train on which plaintiff's hogs were shipped was delayed twelve hours. When the train arrived at its destination a number of the hogs were dead and others badly injured. The defendant offered to prove on the trial that the delay occurred without fault on its part, and that it caused the train to be sent forward as soon as possible, but the evidence was excluded. The defendant claimed that the car was overloaded, and that the injury was caused by such overloading. Held, that a common carrier of hogs is an insurer against injury caused by the "piling up" of the hogs while struggling to get near to or away from the car doors, that as their propensity to do this is only while the train is standing, they should be unloaded or given personal attention while the train is delayed.

2. *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85; s. c., 47 Am. Rep. 781; 12 Am. & Eng. R. R. Cas., 13.

3. *Indianapolis, etc., R. Co., v. Allen*, 31 Ind. 394; *Oxley v. St. Louis, etc., R.*

*Co.*, 65 Mo. 629. See also for numerous other examples of the application of the same principle, cases cited *infra*, under other branches of this title.

4. *South Alabama, etc., R. Co. v. Henlein*, 52 Ala. 606; *Ballentine v. North Missouri, etc., R. Co.*, 40 Mo. 491; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613; *Wabash, etc., R. Co. v. Black*, 11 Bradw. (Ill.) 465.

5. *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613; *Guinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453.

6. *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613.

7. *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329; s. c., 12 Am. Rep. 275.

8. Art. "Transportation of Live Stock," 19 Cent. L. J. 163; Code of Georgia, § 2068; Ill. Rev. Stats. p. 1159, § 82; Railway & Canal Traffic Act, 17 & 18 Vict. c. 31; Georgia, etc., R. Co. v. Spears, 66 Ga. 485; Indianapolis, etc., R. Co. v. Jurey, 8 Bradw. (Ill.) 160; Wabash, etc., R. Co. v. Black, 11 Bradw. (Ill.) 465; Chicago, etc., R. Co. v. Harmon, 12 Bradw. (Ill.) 54.

sions of this title. The limitations upon the carrier's freedom to contract have likewise been stated under another title.<sup>1</sup> For reasons already explained, these limitations are somewhat modified in their application to carriers of live stock, and it is these modifications only which now need to be mentioned.

(a) *English Statutes and their Construction.*—Under the English Railway and Canal Traffic Act,<sup>2</sup> the contract of the carrier must be "just and reasonable" in order to be valid. It is evident that limitations of liability secured to the carrier by contract might be just and reasonable where live stock is in question, and the same conditions still amount to a contract securing against liability for negligence if he undertook the transportation of other goods. There is no such thing as reasonableness in the abstract,<sup>3</sup> and a condition in a contract applying to live animals and dead stock may be good as to the one and void as to the other.<sup>4</sup>

The following conditions in the contracts of carriers of live stock have been held to be "just and reasonable:" Conditions exempting the carrier from "all liability," "all risk," etc., in some of the earlier cases;<sup>5</sup> releasing the carrier from liability for "loss of market;"<sup>6</sup> from "loss or damage in the loading or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit," the claim being for suffocated and injured cattle sent by rail;<sup>7</sup> where, with consignor's knowledge of the carrier's rates, the latter imposed a condition that horses should be carried at owner's risk by passenger train and in horse-boxes, but at lower rates by goods train and in cattle trucks, and the horses were injured while being carried subject to former conditions, but that such contract would not protect the carrier from non-delivery where the contract was to deliver within a reasonable time;<sup>8</sup> where

1. CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law.

2. The Railway and Canal Traffic Act. 17 and 18 Vict. c. 31, s. 7, 1854, provides as follows: "Every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void; provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the

court or judge before whom any question relating thereto shall be tried to be just and reasonable."

3. *Lewis v. Great Western, etc., Ry.*, 47 L. J. Q. B. 131; L. R. 3 Q. B. D. 45.

4. *Rooth v. North East Ry.*, 36 L. J. Ex. 83; L. R. 2 Ex. 173.

5. *Gannell v. Ford*, 5 L. T. N. S. 604; *McCance v. London, etc., R.*, 7 H. & N. 477; 31 L. J. Ex. 65; 7 Jur. N. S. 1304; 10 W. R. 154; *Pardington v. South Wales, etc., R.*, 1 H. & N. 392; 26 L. J. C. P. 105; 2 Jur. N. S. 1210; *Chippendale v. Lancashire, etc., R.*, 7 Eng. L. & Eq. 395; 21 L. J. Q. B. 22; 15 Jur. N. S. 1106.

6. *White v. Great Western Ry.*, 26 L. J. C. P. 158; 2 C. B. N. S. 7.

7. *Pardington v. South Wales Ry.*, 26 L. J. Ex. 105; 1 H. & N. 392. Compare *Rooth v. North Eastern Ry.*, 36 L. J. Ex. 83.

8. *Robinson v. Great Western Ry.*, 35 L. J. C. P. 123; *D'Arc v. London,*

a declaration of the value of an animal worth more than a specified sum was demanded and a higher rate imposed, and the condition was added that by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared.<sup>1</sup> This decision was subsequently overruled, and the condition construed to be unreasonable, as framed to cover even the wilful misconduct of the carrier.<sup>2</sup>

Conditions in a contract for the carriage of animals, although *prima facie* unreasonable, become just and reasonable if a reasonable alternative is offered to the consignor.<sup>3</sup>

The following conditions in contracts of carriers of live stock have been held to be unjust and unreasonable limitations of their liability: Conditions providing against liability for any injury by over-carriage, detention or delay, "however caused;"<sup>4</sup> injuries caused by the default or negligence of the masters and crews of certain vessels operated by the company;<sup>5</sup> where owner assumes "all risks of conveyance, loading and unloading whatsoever, as the company will not be liable for any injury or damage, however caused;"<sup>6</sup> where condition exempted from liability for accident

etc., Ry., L. R. 9 C. P. 325; 22 W. R. 919.

1. *Harrison v. London, etc., Ry.*, 31 L. J. Q. B. 113; 2 B. & S. 152.

2. *Ashenden v. London, etc., Ry.*, 28 W. R. 511.

3. *Corrigan v. Great Northern, etc., R.*, L. R. 6 Ir. 90; *Ruddy v. Midland, etc., R.*, L. R. 8 Ir. 232; *Gallagher v. Great Western, etc., R.*, L. R. 8 Ir. C. L. 326; *Manchester, etc., R. v. Brown*, L. R. 8 H. L. Cas. 703; s. c., 16 Am. & Eng. R. R. Cas. 174.

The burden of showing reasonableness of the condition in the contract or in the alternative contract is on the carrier. *Ruddy v. Midland, etc., R.*, L. R. 8 Ir. 232; *Lewis v. Great Western R.*, 47 L. J. Q. B. 131; L. R. 3 Q. B. Div. 45.

In *Pardington v. South Wales R.*, 1 H. & N. 392, the facts were these: The plaintiff despatched certain cattle by railway in charge of a drover. At the time of shipping the cattle the drover sent a memorandum to him by the servants of the company containing the following stipulations: "The company is to be held free from all risks or responsibility in respect to any loss or damage arising in the loading or unloading, from suffocation or being trampled on, bruised or otherwise injured in transit, from fire, or from any other cause whatsoever, and the company is not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market." The drover was

then given a free pass, and the cattle were placed not in the usual cattle trucks, but into two vans usually employed for the transportation of goods; these vans were tightly shut in on every side and could only be opened by a sliding lid. The drover having superintended the shipping of the cattle and having raised no objections to the vans, was placed in a railway carriage and transit was begun. On arriving at the point of destination it was found that by accident the top of one of the vans had become closed, and most of the cattle therein were discovered to be dead. It was held, however, that the stipulation as to carriage signed by the drover was just and reasonable in its terms, and exempted the railway company from liability. Compare *Rooth v. North Eastern, etc., R.*, 36 L. J. Exch. 83.

4. *Allday v. Great Western, etc., R.*, 5 B. & S. 903.

5. *Doolan v. Directors, etc., of the Midland R. Co.*, L. R. 2 App. Cas. 792.

6. In *McManus v. Lancashire, etc., R. Co.*, 4 H. & N. 327, a person upon delivering certain horses to a railroad company signed a ticket containing the following: "This ticket is issued, subject to the owner's undertaking all risks of conveyance, loading and unloading, whatsoever, as the company will not be liable for any injury or damage, however caused, occurring to live stock of any description, travelling upon the railway or in their vehicles." This was ruled not



caused by the animal's restiveness, and such restiveness was the result of the carrier's negligence;<sup>1</sup> conditions exempting from "all liability" or from liability "in any case;"<sup>2</sup> that owner shall assume all risks from negligence, default or defects in the stations or cars, etc.; conditions exempting from liability for "kicking, plunging, or restiveness," and carrier permitted the animal to escape when excited, so that she jumped the fence, ran upon the track, and was killed; where carrier was not accountable for the "correct selection of the owner's cattle, or loading or unloading;"<sup>4</sup> where carrier is not liable "in any case" for loss of an animal above a specified value unless the value is declared;<sup>5</sup> where condition exempts carrier from the liability for loss, however occasioned.<sup>6</sup>

(b) *United States Generally.*—In the *United States* it is the well-settled rule, that while the carrier may protect himself against the unusual risk of transporting live stock by reasonable conditions in limitation of his common-law liability, he cannot exempt himself from liability for loss or injury resulting from his own negligence.<sup>7</sup>

to be a just and reasonable condition, and the truck upon which the horses were placed being defective and the animals injured in consequence, the railway company was held liable accordingly.

1. *Moore v. Great Northern, etc., R., L. R. 10 Ir. 95.*

2. *Gregory v. West Midland R., 2 H. & C. 944; 33 L. J. Ex. 155; 10 Jur. N. S. 243; 12 W. R. 528; Lloyd v. Walesford, etc., R., 15 Ir. C. L. 37; 9 L. T. N. S. 89; Ashendon v. London, etc., R., L. R. 5 Ex. Div. 190; 42 L. T. N. S. 586; 28 W. R. 511; 44 J. P. 203.*

A condition that the owner shall assume all risks from negligence, default or defects in the station or cars is unreasonable. *Rooth v. North Eastern R. Co., L. R. 2 Ex. 173; 36 L. J. Ex. 83; 15 L. T. N. S. 62.*

3. *Gill v. Manchester, etc., R. Co., L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; 28 L. T. N. S. 587; 21 W. R. 525.*

4. In *McNally v. Lancashire, etc., R. Co., L. R. 8 Ir. 81*, the contract released the carrier from accountability for the "correct selection of the owner's cattle or loading or unloading," but the exemption was held unreasonable because releasing from liability for negligence, although the contract was an alternative one.

5. *Ashendon v. London, etc., R. Co., L. R. 5 Ex. Div. 190; 42 L. T. N. S. 586; 28 W. R. 511; 44 J. P. 203.*

6. *Booth v. N. E. R. Co., L. R. 2 Exch. 173.*

Or that the company "is to be free from all risk and responsibility with re-

spect to any loss or damage arising in the loading and unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in the transit, from fire, or from any other cause whatsoever." Or that the owner of the cattle shall be bound to see to the efficiency of the conveyance used. *Gregory v. West Midland R. Co., 2 H. & C. 944.*

7. *Squire v. New York Central, etc., R. Co., 98 Mass. 239; Powell v. Pennsylvania R. Co., 32 Pa. St. 414; Kimball v. Rutland, etc., R. Co., 26 Vt. 247; Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328; South., etc., R. Co. v. Henlein, 52 Ala. 606; East Tennessee, etc., R. Co. v. Johnston, 75 Ala. 596; s. c., 51 Am. Rep. 489; Nashville, etc., R. Co. v. Jackson, 6 Heisk. (Tenn.) 271; Chicago, etc., R. Co. v. Abels, 60 Miss. 1017; Georgia, etc., R. Co. v. Spears, 66 Ga. 485; Georgia, etc., R. Co. v. Beattie, 66 Ga. 438; Mitchell v. Georgia, etc., R. Co., 68 Ga. 644; Rice v. Kansas, etc., R. Co., 63 Mo. 314; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629; St. Louis, etc., R. Co. v. Cleary, 77 Mo. 634; s. c., 16 Am. & Eng. R. R. Cas. 122; Dawson v. St. Louis, etc., R. Co., 76 Mo. 514; Sturgeon v. St. Louis, etc., R. Co., 65 Mo. 569; St. Louis, etc., R. Co. v. Piper, 13 Kans. 510; Goggin v. Kansas, etc., R. Co., 12 Kans. 416; Kansas, etc., R. Co. v. Simpson, 30 Kans. 645; s. c., 16 Am. & Eng. R. R. Cas. 158; Illinois, etc., R. Co. v. Morrison, 19 Ill. 136; Wabash, etc., R. Co. v. Black, 11 Ill. App. 465; Welsh v. Pittsburg, etc., R. Co., 10 Ohio St. 65; Indianapolis, etc., R. Co. v. Allen, 31*

The following are examples of reasonable conditions limiting the carrier's responsibility: A stipulation in a contract that the owner shall care for the live stock during the journey, feed and water and load and unload them;<sup>1</sup> a stipulation against

Ind. 394; *Betts v. Farmers', etc., Co.*, 21 Wis. 80; *Morrison v. Phillips, etc., Co.*, 44 Wis. 405; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85; s. c., 12 Am. & Eng. R. R. Cas. 13; *Maslin v. B. & O. R. Co.*, 14 W. Va. 180; *Louisville, etc., R. Co. v. Hedges*, 9 Bush (Ky.), 445; s. c., 15 Am. Rep. 740; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.), 688.

Some cases go even so far as to say that the company cannot by contract exempt itself from liability for the performance of any of the duties which it owes. *Weish v. Pittsburg & C. R. Co.*, 10 Ohio St. 65; *Adams Ex. Co. v. Nock*, 2 Duv. (Ky.) 562; *Louisville & C. R. Co. v. Hedges*, 9 Bush (Ky.), 645.

Where, therefore, the owner of cattle signed a contract whereby he agreed "to take all risk of loss, injury, damage and other contingency in loading, unloading, conveyance, or otherwise," and the railroad company in the course of the transit ran the cattle upon a side track and there kept them four days and four nights without food or water, whereby many of them died, it was held that notwithstanding the special contract the company was liable. *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430. And see to the same effect *Keeney v. Grand Trunk R. Co.*, 59 Barb. (N. Y.) 104.

So where a contract provided that the company should not be liable in case of loss from delay of trains or any damage the property might sustain from collision, and during the transit the cars in which the animals were confined were thrown from the track by a broken rail, it was held that the company was liable for the injury sustained. *Illinois Central R. Co. v. Owens*, 53 Ill. 391.

Where cattle were shipped at a reduced rate under a contract that the carrier should not be liable for any injury unless occasioned by wilful negligence or fraud, it was held that the company was, under the circumstances, exempt from liability for injuries occasioned in any other way. *Lee v. Marsh*, 43 Barb. (N. Y.) 102.

But in *B. & O. R. Co. v. Brady*, 32 Md. 333, it was held necessary for the defendant to show affirmatively in such case that the terms of the contract were known and assented to by the shipper of the cattle.

In *Penn v. Buffalo R. Co.*, 49 N. Y. 204, the owner of the cattle transported agreed to assume all the risk from delays or in consequence of the animals being crowded in the cars, and agreed to load and unload them at his own risk, the company furnishing the necessary laborers to assist. A drover accompanied the cattle on the train. While in transit a snow-storm occurred whereby the train was delayed several days. The cattle might have been unloaded by building a proper platform, but this the servants of the company declined to do. In consequence several of the cattle died and the rest were seriously depreciated in value. The court held, however, that under the particular clauses in the contract the company had discharged its full duty and was not liable to respond in damages for the loss.

If the owner contracts to take care of the cattle and the railroad company stipulates that it shall not be liable in case of injury to them while *en route*, this is held to afford no exemption from liability if the cattle escape in consequence of a defect of the vehicle in which they are placed. *Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.), 688; *Hawkins v. Great West. R. Co.*, 17 Mich. 57; s. c., 18 Mich. 427.

And even if the contract of transportation contain a clause specially exempting the railroad company from liability in case of escape, this will afford no protection if the company fail to remedy a defect in the vehicle which has been pointed out by the agent of the shipper. *Indianapolis, etc., R. Co. v. Allen*, 31 Ind. 394.

An exception imposed by carriers of cattle relieving them from all liability for negligence less than gross, is invalid. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; s. c., 51 Am. Rep. 489.

Jettison of deck animals not unreasonable contract. *The Enrique*, 5 Hughes C. Ct. 275.

1. *South, etc., R. Co. v. Henlein*, 52 Ala. 606; s. c., 23 Am. Rep. 578; *Squire v. New York Central, etc., R. Co.*, 98 Mass. 239; *Penn v. Buffalo, etc., R. Co.*, 49 N. Y. 204; *Heineman v. Grand Trunk, etc., R. Co.*, 31 How. Pr. (N. Y.) 430; *Cragin v. New York Central, etc., R. Co.*, 51 N. Y. 61. Compare *Bills v. New York*

liability for loss by overcrowding, heat, suffocation, and the like.<sup>1</sup>

(c) *New York*.—In *New York*, as has already been mentioned under another title, it is well settled that the carrier may make a contract the effect of which will be to release him from liability for his own negligence. In accordance with this rule, where railroad company contracts for exemption from liability for the negligence of its servants or the insecurity of its cars, it will not be liable for an injury to stock carried in a grain car, unsafe for stock but suitable for grain.<sup>3</sup>

(d) *Notices of Claim for Damages*.—The carrier may stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, and such a stipulation is regarded as reasonable. The construction upon these stipulations must be reasonable, and adapted to the circumstances of each case.<sup>4</sup>

*Central, etc., R. Co.*, 84 N. Y. 5; *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268; *Bryant v. S. W. R. Co.*, 6 Am. & Eng. R. R. Cas. 388.

The shipper of cattle by railway having assumed by special contract the duty of loading and unloading, and having accepted and loaded a car without objection, knowing that it was not "bedded," cannot hold the railroad company liable for negligence in failing to bed, or for insufficient bedding of the car. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 506; s. c., 51 Am. Rep. 489.

1. A carrier of animals, in consideration of a reduced rate of freight and a free pass to the shipper, may stipulate with the shipper for exemption from liability by reason of overloading, suffocation, heat, fire, and the like. *Georgia, etc., R. Co. v. Beatie*, 66 Ga. 438; s. c., 42 Am. Rep. 75. So also for exemption from liability except for damage by collision, or running off the track. *Georgia, etc., R. Co. v. Spears*, 66 Ga. 485; s. c., 42 Am. Rep. 81.

A railroad company transporting live stock may contract with the shipper for a consideration that the company shall be released from all liability for damages accruing to the stock, disconnected and apart from the conduct or running of its trains, such as damages from overloading or heat. *Mitchell v. Georgia, etc., R. Co.*, 68 Ga. 646.

2. See CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law.

3. Under an agreement to transport stock at reduced rate, the railroad company was released "from all liability for injuries which the animals may receive in consequence of . . . the negligence of

said company's servants, . . . or of insecurity of cars." One of the animals was injured by a defective car-door. *Held*, that the company was not liable, the agreement exempting them even from the consequences of their own negligence. *Wilson v. New York Central, etc., R. Co.*, 27 Hun (N. Y.). 149.

4. A stipulation in a contract of shipment that no claim for loss or damage will be allowed unless the same is put in "before or at the time the stock is unloaded, is valid, and will be sustained." The object of such a condition is to prevent frauds on the company. *Goggin v. Kansas, etc., R. Co.*, 12 Kans. 416; *Rice v. Kansas, etc., R. Co.*, 63 Mo. 314; *Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514; *Wabash, etc., R. Co. v. Black*, 11 Bradw. (Ill.) 465; *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634; s. c., 16 Am. & Eng. R. R. Cas. 122; *Moore v. Great Northern, etc., R. Co.*, L. R. 8 Ir. 95.

It seems, however, that this clause will not be strictly construed, and that if the notice of loss be given within such a reasonably short time after the loss as to completely secure the company from fraud, this is sufficient. The agents of the company may also waive the benefit of this clause. See *Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629.

It is reasonable for a railroad company to stipulate with a shipper of horses that a claim for damages shall be made before the horses are mingled with other stock. *Sprague v. Missouri Pacific R. Co.*, 34 Kans. 347.

A carrier of live stock may limit his liability by requiring a demand for damages to be made within five days after

Where such a notice required that claim for damages be made before the stock were unloaded, it was held to be unreasonable and void as applied to an injury from illness which might not be discovered before removal of the animals from the cars.<sup>1</sup> Where to such a provision the stipulation was added that notice should be given before mingling the animal with other stock, the carrier was held to be still liable where the consignee declined to receive an injured mule which the carrier had turned out upon a common, on the ground that there was no removal or mingling in the sense of the contract.<sup>2</sup> Where the consignment arrived at midnight, a verbal notice at the time, and one in writing three days later, were considered a compliance with the contract where the stock was removed to premises where the company could examine them.<sup>3</sup> A stipulation that "claims for loss and damage must be presented in thirty days from date of shipment in order to receive attention," was held to be too vague because it did not distinctly state that no right of action was to exist after failure to give the notice.<sup>4</sup>

(e) *Drovers' Passes*.—The fact that it is customary to furnish those accompanying stock with passes which contain a release of the carrier from liability for their personal safety, does not alter the carrier's obligation to treat them as passengers.<sup>5</sup> The contract of shipment and the pass are read together as a single contract, and the drover is therefore not considered a gratuitous passenger.<sup>6</sup>

the unloading of stock. *Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514.

A contract between a railroad company and a shipper of horses stipulated that for injury to the animals shipped over the line of the road the owner should make a demand, in writing, of the agent of the company before removing them from the place of destination or from the place of delivery. *Held*, that this clause was not applicable where the injury was the illness of the animals, and the extent of such illness could not be known until their removal from the cars, and probably not for some time after such removal. *Ormsby v. Union Pacific R. Co.*, 2 McCrary C. C. 48.

A provision in a contract for the transportation of cattle, that, in consideration of paying at a reduced rate, any claim for damages should be made in writing, sworn to and delivered to the general freight agent of the railroad, at a certain place, within five days from the time the cattle were unloaded, *held* reasonable and binding, and none the less so because plaintiff neglected to read the contract before signing it. *Wabash, etc., R. Co. v. Black*, 11 Ill. App. 465.

An owner may bring his action against the carrier for injury done to his animal while in transit, although he has given

no notice to the carrier of the animal's injury, nor offered it to be cared for. *Evans v. Dunbar*, 117 Mass. 546.

1. *Ormsby v. Union Pacific R. Co.*, 2 McCrary (C. C.), 48.

2. *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017.

3. *Rice v. Kansas Pacific R. Co.*, 63 Mo. 314.

4. *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 868.

5. *New York Central, etc., R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *I. & St. L. R. Co. v. Horst*, 93 U. S. 291; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Goldey v. Pennsylvania R. Co.*, 30 Pa. St. 242; *Virginia, etc., R. Co. v. Sayers*, 26 Gratt. (Va.) 328; *Fleim v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 469; *O. & M. R. Co. v. Selby*, 47 Ind. 471; *O. & M. R. Co. v. Nickless*, 71 Ind. 271; *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180; *C. P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285; s. c., 21 Am. & Eng. R. R. Cas. 384. But see *Poucher v. New York Central, etc., R. Co.*, 49 N. Y. 263.

6. *C., P. & A. R. Co. v. Curran*, 19 Ohio St. 1; and cases cited in preceding note.

In the absence of a special contract,

**5. Carrier's Liability During Transit.—(a) Duty to Furnish Safe Cars and Appliances.**—The carrier is bound to provide safe and suitable cars and appliances for transporting live stock. Cattle-cars must be sufficiently strong to resist their struggles, and the carrier is liable for loss occasioned by his neglect in this regard, in spite of the fact that the animals are vicious and unruly, upon the principle that it is within his power to provide those which are actually and absolutely sufficient.<sup>1</sup> In such case the carrier cannot defend upon the ground that the defective cars belonged to a connecting carrier.<sup>2</sup> It seems, however, that if the consignor

the fact that the shipper of a horse is allowed to pass on the same train, is not conclusive that he is to attend to its safety during the journey. *Clark v. Rochester, etc., R. Co.*, 14 N. Y. 571.

In *Bissell v. New York, etc., R. Co.*, 25 N. Y. 442, it was held that public policy is satisfied by holding a railroad company bound to take the risk when the passenger chooses to pay the fare established by the legislature. If he voluntarily, and for any valuable consideration, waives the right to indemnity, the contract is binding. So held where a cattle driver paid no independent consideration for the conveyance of himself, but accompanied his cattle under a contract stating them to be carried at a reduced rate, and providing that "the persons riding free to take charge of the stock, do so at their own risk of personal injury, from whatever cause."

1. *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.), 531; *Pratt v. Ogdensburg R. Co.*, 102 Mass. 557; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504; *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504; *Indianapolis, etc., R. Co. v. Jurey*, 8 Bradw. (Ill.) 160; *Wabash, etc., R. Co. v. Black*, 11 Bradw. (Ill.) 465; *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232; *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 65; *Hawkins v. Great Western, etc., R. Co.*, 17 Mich. 57; s. c., 18 Mich. 427; *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.), 688; *Peters v. New Orleans, etc., R. Co.*, 16 La. Ann. 222; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa, 412; *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247; *Shaw v. Great Southern, etc., R. Co.*, L. R. 8 Ir. 10; *McManus v. Lancashire, etc., R. Co.*, 4 H. & N. 327; *Combe v. London, etc., R. Co.*, 31 L. T. 613; *Great Western, etc., R. Co. v. Blower*, 41 L. J. C. P. 268; L. R. 7 C. P. 655. See also *Wilson v. Hamilton*, 4 Ohio St. 722; *Willoughby v. Horridge*,

12 Ad. & El. N. S. 742; 22 L. J. C. P. 90; 17 Jur. 323; *Laws of Kansas, 1883*, ch. 124, sec. 9; *Harrison v. Missouri Pacific R. Co.*, 74 Mo. 364; s. c., 7 Am. & Eng. R. R. Cas. 382.

In *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.), 534, the court observes: "The sufficiency of a car door to resist the struggles of animals, however unruly, it is in the power of a railroad company to secure. And its obligation in this respect is not satisfied by furnishing a reasonably strong car. The company is bound to have one absolutely and actually sufficient. It is practicable to make a car so thoroughly strong that cattle cannot break it down and fall out. For any failure to do so the carrier is responsible."

The excuse will not avail a carrier that he was acting in obedience to a government regulation where he furnishes cars which have been washed with lime and not properly cleaned, and an injury to pigs consigned to his care results therefrom. *Shaw v. Great Southern, etc., R. Co.*, L. R. 8 Ir. 10.

2. In an action against a railroad company for injury to stock shipped in a defective car, it is no defence that the car belonged to another company, a connecting carrier. *Wallingford v. Columbia, etc., R. Co. (S. Car.)*, 2 Southeastern Rep. 19.

A connecting carrier is not bound to transport live stock in the same cars in which they were received. *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351; s. c., 7 Am. & Eng. R. R. Cas. 373; *Combe v. London, etc., R. Co.*, 31 L. T. N. S. 613.

In an action to recover damages for an alleged injury to cattle in transportation to quarantine grounds by the use of improper cars, evidence that the defendant had always used similar cars for this purpose is inadmissible, although the defendant was the only road in the com-

has made his own selection of vehicles, the carrier will not be liable for defects therein.<sup>1</sup>

(b) *Duty to Load and Unload.*—The duty to load and unload live stock is primarily upon the carrier, but he may impose this duty upon the consignor by express contract.<sup>2</sup> If, however, in

monwealth engaged in the transportation of cattle to quarantine. *Leonard v. Fitchburg, etc., R. Co. (Mass.)*, 9 North-eastern Rep. 667.

1. *Illinois Central, etc., R. Co. v. Hall*, 58 Ill. 409; *Chicago, etc., R. Co. v. Van Dresar*, 22 Wis. 511; *Harris v. Northern Indiana, etc., R. Co.*, 20 N. Y. 232.

It has been held that the carrier may, by a provision to that effect in the contract, impose upon the consignor the duty of determining whether the cars and appliances are suitable and safe for the transportation of live stock. *Squire v. New York Central, etc., R. Co.*, 98 Mass. 239; *Harris v. Northern Indiana, etc., R. Co.*, 20 N. Y. 232. Compare *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 65.

"This suggests the query whether it is not the duty of the carrier to run cars that are secure and no others, and whether in its business of transporting animals it should not be more familiar than the shipper with the construction and safeguards that make cars suitable. This view seems to be supported in England. *Gregory v. West Midland, etc., R. Co.*, 2 H. & C. 944." Article "Transportation of Live Stock," 19 Central Law Journal, 165.

In *Peters v. New Orleans, etc., R. Co.*, 16 La. Ann. 222, where the owner accompanied the live stock, but was not permitted to nail slats across the doors of box-cars used to transport them, and his suggestion to this effect was not followed, and in consequence of the use of solid doors the cattle were suffocated, it was held that the carrier was liable, and could not offer as an excuse that the owner accompanied the animals and at least permitted the use of these cars.

A railroad company is liable for breach of a parol contract to receive cattle for transportation on a day certain, though no bill of lading had been signed. *Texas Rev. Stats. arts. 281-283*, making a carrier's liability begin when the bill is signed, do not apply. *Texas, etc., R. Co. v. Nicholson*, 51 Tex. 491.

In *Richardson v. Chicago, etc., R. Co.*, 18 Am. & Eng. R. R. Cas. 530, it was held that a railroad company, as a common carrier, and independent of any contract between it and a shipper, is not lia-

ble for loss and expense occasioned by its failure to have cars in readiness to ship live stock on the day that the shipper notified the agent of the company he would tender them for shipment, when it is not shown that the notice given was a "reasonable notice" within the meaning of Revised Statutes of Wisconsin, sec. 1798, providing that "every railroad corporation shall, upon reasonable notice, when within its power to do so, furnish suitable cars to any person applying therefor for the transportation of freight."

In *Wilson v. New York Central, etc., R. Co.*, 97 N. Y. 87; s. c., 21 Am. & Eng. R. R. Cas. 148, plaintiff shipped two horses by defendant's road under a contract by which he released the company from liability for damages resulting from the negligence of its servants or which should be occasioned by the insecurity of its cars. The horses were transported in a grain car, which was out of repair, and, while sufficient for the use for which it was intended, unsafe for the transportation of live stock. In consequence of such defect one of the horses was injured. In an action to recover damages, it did not appear but that other safe and secure cars were provided by defendant and were on hand ready for use, so that the injury might have been caused by carelessness on the part of its servants in selecting an insecure car. *Held*, that the only negligence shown was that of defendant's servants, from the consequences of which it was released by the contract; and that plaintiff was not entitled to recover.

2. *Squire v. New York Central, etc., R.*, 98 Mass. 239; *South, etc., R. v. Henlein*, 52 Ala. 606; s. c., 23 Am. Rep. 578; *Dawson v. St. Louis, etc., R.*, 76 Mo. 514; *Penn v. Buffalo, etc., R.*, 49 N. Y. 204; *Bills v. New York, etc., R.*, 84 N. Y. 5; *Myers v. Wabash, etc., R.*, 27 Am. & Eng. R. R. Cas. 53; *Combe v. London, etc., R.*, 31 L. T. N. S. 613. See also cases cited in succeeding notes.

Where a railroad company makes a contract to convey cattle, providing that two men in charge of the cattle may pass free of charge on the train, there being no express stipulation that the cattle shall be unloaded on the way, *held*, that the

pursuance of a contract the consignor undertakes the duty to load or unload, and loss or injury result from his performance of the undertaking the carrier is released from liability.<sup>1</sup> Whatever the terms of the contract of shipment, circumstances may impose upon the carrier the duty to unload and reload, or, at least, to furnish the consignor with facilities for doing so.<sup>2</sup>

cattle may be unloaded, and the men in charge have no right to decide when.

Where the unloading occurred in a State where such cattle were prohibited, and plaintiff was arrested and fined for bringing the cattle there, *held*, that he could not recover for damages thus incurred, though the statute under which he was fined was unconstitutional.

Where a carrier improperly surrendered the plaintiff's cattle to an officer, *held*, that he was not liable, the writ not being invalid on its face. *McAlister v. Chicago, etc., R.*, 74 Mo. 351; s. c., 7 Am. & Eng. R. R. Cas. 373.

1. *Chicago, etc., R. v. Dresor*, 22 Wis. 511; *Ohio, etc., R. v. Dunbar*, 20 Ill. 723; *Texas, etc., R. v. Whittle*, 27 Ga. 535. See also *Evans v. Fitchburg, etc., R.*, 111 Mass. 142; s. c., 15 Am. Rep. 19; *Bowie v. Baltimore, etc., R.*, 1 *McArthur (C. C.)*, 94; *Richardson v. North Eastern, etc., R.*, L. R. 7 C. P. 75; 41 L. J. C. P. 60; 26 L. T. N. S. 131; 20 W. R. 461. Compare *Stuart v. Crawley*, 2 Stark. 323.

It was agreed that a shipper of stock should load it on the cars. His men permitted the train to start before there was time for them to close the door, and a steer jumped out and was killed. *Held*, that the railroad company was not liable. *Newby v. Chicago, etc., R.*, 19 Mo. App. 391.

In *Squire v. New York Central, etc., R.*, 98 Mass. 239, where under a contract imposing upon the consignor the duty of loading live stock, he permitted the carrier's servants to do so, and to so crowd the animals that loss resulted, the carrier was held to be released from liability.

In *Mitchell v. Georgia, etc., R.*, 68 Ga. 644, the contract exempted the carrier from liability for loss from overcrowding, but did not require the consignor to load. The carrier, in loading the hogs, so crowded them that loss resulted, but was nevertheless excused from liability. See this case doubted in 19 Cent. L. J. 165.

In an action against a railroad company to recover damages for the loss of

sheep, caused by the negligence of defendant, where it appears that, in consideration of a reduction of freight rates, plaintiff agreed to take all risks of transportation, and to load and unload the sheep at his own expense and risk, and that the loss occurred by reason of the sheep being kept in the cars over night after reaching their destination. *Held*, that defendant is not liable, although the sheep were kept in the cars, because defendant refused to furnish men to herd the sheep during the night, and the stockpens were too small to hold them, where it further appears that defendant consented to ship the cars over a transfer track of another road to the stockpens of such other road, so that plaintiff could unload the sheep there, if the plaintiff would get the consent of the officers of that road to the use of the track for that purpose, and, on plaintiff's failure to get such consent, offered to haul the cars up to its own stockpens, so that plaintiff could unload the sheep there. *Meyers v. Wabash, etc., R. (Mo.)*, 2 So. Western Rep. 263.

2. *Bills v. New York Central, etc., R.*, 84 N. Y. 5; *Dunn v. Hannibal, etc., R.*, 68 Mo. 268; *Dawson v. St. Louis, etc., R.*, 76 Mo. 514; *Bryant v. South Western, etc., R.*, 68 Ga. 805. But see *P nn v. Buffalo, etc., R.*, 49 N. Y. 204.

In a suit to recover damages to plaintiff's cattle, delayed upon defendant's train by a flood which submerged the track, the court upon a previous trial held that, under the contract, defendants were not bound to unload the cattle when the train was stopped by water, but that, upon reasonable request, their duty was to place the cars, if practicable, so as to enable plaintiff to unload his cattle, and that for a failure to do so they were liable. It appeared that plaintiff's agent made such a request; that the engine drawing the train was disabled, but that other engines might have been readily obtained; that defendant's conductor did not send for them. *Held*, that the question of negligence was properly for the jury; and that this was so even if the jury might infer from the charge that it



(c) *Duty to Feed and Water.*—The carrier is likewise primarily bound to provide food and water, a place for sleeping, and, if necessary a place for exercise,<sup>1</sup> but he may transfer such duty to the owner by express contract.<sup>2</sup> He may even then become liable for failure to furnish proper facilities to the consignor for such purposes.<sup>3</sup>

(d) *Duty to Care for Live Stock Generally.*—The measure of the carrier's duty to care for live stock generally must depend upon circumstances and the nature of his contract, but includes such attentions and precautions as the following: He must securely fasten an animal, such as a dog, to prevent its escape;<sup>4</sup> he is guilty of negligence in placing a car bedded with straw so near to the en-

was negligence not to send forty-three miles for another engine. *Bills v. New York Central, etc., R.*, 84 N. Y. 5.

1. *Illinois Central R. Co. v. Adams*, 42 Ill. 474; *Toledo, etc., R. Co. v. Thompson*, 71 Ill. 434; *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268; *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232; *Cragin v. New York, etc., R. Co.*, 51 N. Y. 61; *Taff Vale R. Co. v. Giles*, 23 L. J. Q. B. 43; *Great Northern, etc., R. Co. v. Swaffield*, 43 L. J. Ex. 89; *L. R.* 9 Ex. 132.

In *Cragin v. N. Y. Central R. Co.*, 51 N. Y. 61, it was said that there was no obligation on the part of a railway company to water cattle transported on its line unless it had specially contracted to do so. This, however, was not the doctrine of *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268, where it was held that a railroad company which transports live stock ought not only to have the proper machinery and facilities for unloading them whenever, in the course of transit, it may be necessary to unload them for exercise and refreshment, but also to unload, feed and water them at the journey's end, if there be delay in making delivery over and discharging the carrier from liability, and the health of the animals requires this to be done.

2. *South, etc., v. R. Co. v. Henlein*, 52 Ala. 606; *Heineman v. Grand Trunk, etc., R. Co.*, 31 How. Pr. (N. Y.) 430; *Cragin v. New York Central, etc., R. Co.*, 51 N. Y. 61.

3. A shipper agreed to accompany his stock, and feed and water them at his own risk. *Held*, that the carrier was liable for loss because of its failure to furnish him proper facilities for so doing. *Wabash, etc., R. Co. v. Pratt*, 15 Ill. App. 177.

A railroad company received a car load of mules, to be delivered at A. It was

agreed that the company was not to feed or water the mules, but that the shipper was to be afforded facilities for this. The company negligently carried the mules to D., forty miles beyond A., and they stood there in cars two days, without food, water, or care. *Held*, that the company was liable for the damage done. *Bryant v. Southwestern R. Co.*, 68 Ga. 805; s. c., 6 Am. & Eng. R. R. Cas. 388; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 571. See also *Porterfield v. Humphreys*, 8 Humph. (Tenn.) 497.

A contract to ship stock by railroad provided "that in case of accident to, or delay of time from any cause whatever, the owners are to feed, water, and take proper care of the stock." *Held*, that it was error in the presiding judge to charge, upon the trial of an action brought to recover for injury to the stock, that in all cases, except of unavoidable delay, accident or collision, the railroad company was bound by the contract to feed and water the stock; that the contract did not, in terms, so provide. *Louisville, etc., R. Co. v. Trent*, 11 Lea (Tenn.), 82; s. c., 16 Am. & Eng. R. R. Cas. 170.

4. *Stuart v. Crawley*, 2 Stark. 323; *Porterfield v. Humphreys*, 8 Humph. (Tenn.) 497. Compare *Blower v. Great Western, etc., R. Co.*, L. R. 7 C. P. 655.

In *Stuart v. Crawley*, 2 Stark. 323, the carrier was held liable where he accepted a dog consigned to him tied by a string around the neck, and the dog subsequently slipped away.

In *Richardson v. North Eastern, etc., R. Co.*, L. R. 7 C. P. 75, the dog was consigned fastened by a leather collar and strap, and subsequently escaped by slipping his head through the collar. It was held that the loss was by the owner's act, since the dog was fastened by means provided by the owner and apparently



engine as to permit sparks therefrom to set it on fire;<sup>1</sup> he is responsible for leaving open a car window, or for any like negligence, by which an animal escapes, although the contract releases him from liability for escapes;<sup>2</sup> he must throw water upon hogs who have become overheated,<sup>3</sup> or take measures to prevent their "piling up" or crowding towards or away from the car doors when the train is unavoidably brought to a long stop;<sup>4</sup> he is liable for suffocation resulting from his negligence;<sup>5</sup> or for a horse's strangling by means of a halter when his attention might have prevented it.<sup>6</sup>

(e) *Liability for Delay.*—The carrier is bound to transport live stock within a reasonable time, and without unnecessary delay.<sup>7</sup>

sufficient, and that the carrier was exonerated.

1. *McFadden v. Missouri Pacific R. Co.* (Mo.), 4 S. Western Rep. 689.

Where the hay or straw in the bottom of cattle cars catches fire while the animals are in transit, and the cattle are injured in consequence, the company is liable. *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275; s. c., 3 Am. & Eng. R. R. Cas. 487. See also *Tucker v. Pacific, etc., R. Co.*, 50 Mo. 385.

2. *Indianapolis, etc., R. Co. v. Allen*, 31 Ind. 394; *Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629.

3. *Toledo, etc., R. Co. v. Thompson*, 71 Ill. 434; *Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393; *Illinois Central, etc., R. Co. v. Adams*, 42 Ill. 474.

4. *Kinnick v. Chicago, etc., R.*, 27 Am. & Eng. R. R. Cas. 55.

5. *Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569.

6. In *Harrison v. Missouri Pacific, etc., R. Co.*, 74 Mo. 364, a horse while being transported was strangled by his halter. In the absence of a special contract defining the duties and liabilities of the carrier, it was left to the jury to say whether the carrier should not have required his servants to examine the condition of the horse from time to time during the transit.

In *Myers v. Wabash, etc., R. Co.*, 27 Am. & Eng. R. R. Cas. 53, the defendant railroad company entered into a special contract with plaintiffs to transport a flock of sheep to a certain point, there to be transferred to another railroad for transportation to their ultimate destination. Under the terms of the contract plaintiffs were to take charge of and care for the sheep while in transit, and were charged with the duty of unloading them for the purposes of the transfer, and with all the risks incident thereto. They were

not prevented from performance of this duty by any act or refusal of defendant to act. *Held*, that defendant cannot be held liable for not caring for the stock after they were unloaded; that such a contract cannot be so construed as to cast such duty upon the defendant.

7. *Illinois, etc., R. Co. v. Waters*, 41 Ill. 73; *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623; *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613; *Wabash, etc., R. Co. v. Black*, 11 Bradw. (Ill.) 465; *Wabash, etc., R. Co. v. McCasland*, 11 Bradw. (Ill.) 491; *Toledo, etc., R. Co. v. Lockhart*, 71 Ill. 627; *Tucker v. Pacific, etc., R. Co.*, 50 Mo. 385; *Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569; *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85; s. c., 47 Am. Rep. 781; *Baker v. Louisville, etc., R. Co.*, 10 Lea (Tenn.), 304; s. c., 16 Am. & Eng. R. R. Cas. 149; *East Tennessee, etc., R. Co. v. Hale*, 27 Am. & Eng. R. R. Cas. 36.

In *Michigan Southern & N. Ind. R. Co. v. McDonough*, 21 Mich. 165, it was however, held, that the statute of that State passed in 1855, which requires freight to be transported in the order in which it is received, was not violated by the passage of a full cattle train past a way station where cattle were awaiting transportation, which cattle could not have been forwarded without making up an extra train.

Where a common carrier was sued for the deterioration in the value of cattle between the time when they were first offered for shipment and the time when they were shipped, *held*, to be no defence or the refusal to ship that Ill. Rev. Stat. 1874, pp. 141, 144, forbade the transportation of Texas or Cherokee cattle, as said statute to that extent was unconstitutional. *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613.

It is no excuse that a bridge was broken down,<sup>1</sup> or that the live stock were received on Sunday.<sup>2</sup>

For mere loss of weight in cattle occasioned by delay a railroad company will not be held liable.<sup>3</sup> A delay caused by an exceptional press of business need not be unreasonable.<sup>4</sup> A delay caused by a strike, a riot, or a mob will be excused.<sup>5</sup>

(f) *Loss of Market*.—The carrier is not liable for a loss of market resulting from delay, unless he had actual knowledge, or such knowledge might be reasonably inferred from the circumstances of shipment, that the consignment was intended for a particular market.<sup>6</sup>

**6. Connecting Carriers.**<sup>7</sup>—In *England* it is the rule that the right of action lies only against the first of several connecting carriers.<sup>8</sup> In the *United States* the opposite doctrine has the support of perhaps the weight of authority, so that where the contract of the first carrier includes a delivery beyond the terminus, but stipulates against liability beyond its own line, and a loss occurs on the line of a connecting carrier, the right of action is against the latter, who is at liberty to claim the benefit of any exemptions in the original contract.<sup>9</sup>

P. sued a railroad company for delay in transportation of cattle. The cattle were received February 12, and on February 14 duplicate contracts were executed for their transportation. *Held*, that proof of delay on the part of the company before the signing of the written contracts was admissible. *Cleveland, etc., R. Co. v. Perkins*, 17 Mich. 296.

1. *Guinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453.

2. *Guinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209.

3. *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623. See also, on the subject of delay, *Frazier v. Kansas City, etc., R. Co.*, 48 Iowa, 571.

4. In an action against a railroad company, as a carrier of cattle, for delay in delivering them at their destination, an instruction that the carrier was under a duty to carry within a reasonable time is not material error, when in another instruction the jury are told that, in determining what was a reasonable time, all the surrounding circumstances must be kept in view, and that a delay caused by an unusual and exceptional press of business was not to be considered as unreasonable. *Illinois Central, etc., R. Co. v. Haynes*, 1 Southern Rep. (Miss.) 765.

5. A railroad company was delayed for eleven days in its carriage of live stock by strikers who had left the employ

of the company because of a reduction of wages. The company had employees enough left to take the stock through but for the mob of strikers. *Held*, that the company was not liable, and that it was immaterial that the strike was conceived and organized while the strikers were in the employ of the company. (Reversing s.c., 34 Hun (N.Y.), 50.) *Greismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563; s. c., 26 Am. & Eng. R. R. Cas. 287; *Lake Shore, etc., R. Co. v. Bennett*, 6 Am. & Eng. R. R. Cas. 391.

See also CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law, 847.

6. *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; s. c., 6 Am. & Eng. R. R. Cas. 194; *Horne v. Midland, etc., R. Co.*, L. R. 8 C. P. 131; *Leonard v. Fitchburg, etc., R. Co.*, 9 North East. Rep. (Mass.) 667.

In *Conger v. Hudson R. R. Co.*, 6 Duer (N. Y.), 375, it was held that where delay in shipment is excused, the carrier is not liable for any damage resulting from such delay, nor it seems where there is no stipulation to carry by a particular train or in season for a particular market day.

7. See this whole subject reviewed in CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law, 859.

8. *Coxon v. Great Western, etc., R. Co.*, 5 H. & N. 615.

9. *Halliday v. St. Louis, etc., R. Co.*,

**7. Statutory Regulations as to Transportation of Live Stock.**—In the following States statutes forbid that animals in course of transportation by a railroad company shall be confined for a longer time than so many hours without unloading: *Maine*,<sup>1</sup> *Massachusetts*,<sup>2</sup> *New Hampshire*,<sup>3</sup> *Vermont*,<sup>4</sup> *New York*,<sup>5</sup> *South Carolina*,<sup>6</sup> *Iowa*.<sup>7</sup>

In *Maine*,<sup>8</sup> railroad companies are to give cars containing cattle a continuous passage, in preference to other freight. Animals are to be loaded so as to be able to stand comfortably, animals of one kind only are to be loaded in the same compartment, and young animals are not to be loaded with those large and mature, except in the case of dams with their own sucklings.

In *Ohio*,<sup>9</sup> carriers of live stock, upon the discovery of contagious diseases among the stock in their possession, are to take active measures to prevent its spread, and are to disinfect cars and stalls.

In *Nebraska*,<sup>10</sup> railroads are required to keep their stock cars clean, and to see that they are clean when they enter the State.

In *Pennsylvania*,<sup>11</sup> the owner, drover, or shipper of live stock shall have the right at all seasonable hours to enter stock yards and feed and care for their animals, and also to provide suitable bedding, after the cars have been designated, provided it is of the usual kind, and does not increase the carrier's risk.

In *Iowa*,<sup>12</sup> a statute prevents the carriers of live stock from exempting themselves by any contract, receipt, rule, or regulation from the liability of the common carrier.

**8. Actions Against Carriers of Live Stock.**—(a) *Burden of Proof.*—The burden of proof where loss or injury has occurred in the carriage of live stock is primarily upon the carrier. He is

74 Mo. 159. Compare *St. Louis, etc., R. Co. v. Piper*, 13 Kans. 505.

A railroad company receiving goods to be transported over several lines of railroad is not responsible for the negligence of other carriers beyond its terminus, unless it has contracted to transport the property beyond its own line. Receiving live stock consigned by marks on the bill of lading to a point beyond its own terminus does not import an agreement to carry to the destination named. *Ort v. Minneapolis, etc., R. Co. (Minn.)*, 31 N. W. Rep. 519.

In *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; s. c., 6 Am. & Eng. R. R. Cas. 194, it was held that if the defendant had been guilty of such negligence in the transportation of live stock as to render it liable, it could not relieve itself by showing that a connecting road

might have made up for its default. See also *Myrick v. Michigan Central, etc., R. Co.*, 107 U. S. 102.

1. *Maine Rev. St. ch. 124, § 36.*

2. *Mass. Pub. St. ch. 207, § 55.*

3. *Gen. Laws New Hampshire, ch. 281, § 28.*

4. *Vermont Rev. Laws, § 4185.*

5. *New York Rev. St. p. 1605.*

6. *S. Car. Gen. St. § 1479.*

7. *Code of Iowa, § 4032.*

8. *Maine Rev. St. ch. 124, § 35.*

9. *Code of Ohio, § 4212.*

10. *Laws of Neb. 1877, ch. 149.*

11. Act 16, Dec. 1863, § 1. P. L. 1124; *Purd. Dig. tit. Common Carriers, p. 221.*

12. *Code of Iowa, § 1308; McDaniel v. Chicago, etc., R. Co.*, 24 Iowa, 412; *McCune v. Burlington, etc., R. Co.*, 52 Iowa, 600; article "Transportation of Live Stock," 19 Cent. Law Jour. p. 168.

bound to show that such loss or injury resulted from one of the perils excepted by the rules of law applicable to the case or by the terms of a valid and special contract.<sup>1</sup> Where it appears that the negligence of the carrier has combined with the cause of loss excepted by law or the terms of the contract, the carrier is none the less liable.<sup>2</sup>

A contract imposing upon the consignor the duty to care for the stock in transit will shift to him the burden of proving negligence.<sup>3</sup>

(b) *Evidence.*—The evidence admissible in cases involving carriers of live stock will sufficiently appear from the other branches of this title, but some decisions are mentioned in the notes.<sup>4</sup>

(c) *Measure of Damages.*—The English Railway and Canal Traffic Act limits the liability of carriers of live stock to a certain sum per head, unless a special valuation is placed upon the animal, and an increased charge paid for its transportation.<sup>5</sup>

1. *Evans v. Fitchburg, etc., R. Co.*, 111 Mass. 142; *Toledo, etc., R. Co. v. Durkin*, 76 Ill. 395; *McCoy v. K. & D. M. R. Co.*, 44 Iowa, 424; *St. Louis, etc., R. Co. v. Abels*, 60 Miss. 1017; *South, etc., R. Co. v. Henlein*, 52 Ala. 606.

2. *Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629.

3. Where by special contract the carrier of stock has agreed to take charge of it, the burden of proving negligence is on the owner. *McBeath v. Wabash, etc., R. Co.*, 20 Mo. App. 445.

Where an owner specially contracts to load and unload and to take care of the stock, the burden of proving negligence on the part of the railroad company in case of injury to his stock while *en route* is upon him. *Clark v. St. Louis, etc., R. Co.*, 64 Mo. 440; *Bankard v. B. & O. R. Co.*, 34 Md. 197; *St. Louis, etc., R. Co. v. Piper*, 13 Kans. 510; *Louisville, etc. R. Co. v. Hedger*, 9 Bush (Ky.), 645.

Where a horse in apparent good health was shipped on board a steamer, and was delivered in a sick and dying condition, but without any external injuries, *held*, that some negligence on the part of the carrier must be shown by the shipper before the burden would be thrown on the carrier to show he was not in fault. *The Saragossa*, 3 Woods C. C. 380.

4. A common carrier may by special contract limit his liability, and in the absence of fraud or mistake a contract for the transportation of cattle, signed by the

shipper, is the sole evidence of the agreement, although it differs from the previous oral agreement, and the shipper did not read it. *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634; s. c., 16 Am. & Eng. R. R. Cas. 122.

Under the ordinary counts against a railroad company as a carrier, it has been held that the owner of cattle cannot recover for injuries occasioned him by the misrepresentations of the company's agent, whereby he was induced to place his animals on a slow train instead of a fast one. *Maslin v. B. & O. R. Co.*, 14 W. Va. 180.

Where in an action to recover for injuries done to cattle while in transit, the carrier gives evidence of a custom that in all cases the owner shall accompany the cattle and take care of them, the plaintiff will be permitted to testify that he never heard of such a custom. *Evansville, etc., R. Co. v. Young*, 28 Ind. 216.

And in a like case, where the plaintiff sought to recover for injuries done to a short-horned cow, it was held that evidence was inadmissible on the part of the company. Defendant should show a usage not to transport such animals. *McCune v. B. C. B. & N. R. Co.*, 52 Iowa, 600. Compare *Bills v. New York Central, etc., R.*, 84 N. Y. 5; s. c., 3 Am. & Eng. R. R. Cas. 318.

5. 17 & 18 Vict. c. 31, sec. 7, provides that no greater damages shall be recovered for the loss of, or for any injury done to any of such animals beyond the

If a false declaration of value is made it estops the consignor from proving any value beyond that declared.<sup>1</sup>

Where the carrier incidentally acquires information as to the value of animals consigned, but the consignor does not declare that value, the carrier cannot refuse to transport the animal because the additional charges are not paid as provided in the act.<sup>2</sup> The limitation of the carrier's liability to a specified sum holds good, under this statute, even though there be no special contract,<sup>3</sup> or where the contract or delivery is incomplete.<sup>4</sup>

The ordinary measure of damages, where the time for delivery has been specified, is the difference in value of the live stock when finally delivered, and the market value at such specified time.<sup>5</sup> To these damages may be added such legitimate charges for expenses arising out of the detention as appear to be just and reasonable.<sup>6</sup>

In estimating the value of animals it has been held allowable to

sums hereinafter mentioned, that is to say: For any horse, £50; for any neat cattle, per head, £15; for any sheep or pigs, per head, £2, unless the person sending or delivering the same to such company shall at the time of such delivery have declared them to be respectively of higher value than as above mentioned, paid an increased charge, etc.

The reasonableness of the percentage charged for extra value is for the jury. *Harrison v. London, etc.*, R. Co., 31 L. J. Q. B. 113; 2 B. & S. 122.

Where cattle become out of condition during the journey, this amounts to "injury" within the meaning of the act. *All-day v. Great Western, etc.*, R. Co., 34 L. J. Q. B. 5; 5 B. & S. 903.

1. *McCance v. London, etc.*, R. Co., 7 H. & N. 477; 31 L. J. Ex. 65; 10 W. R. 154; 3 H. & C. 343; 34 L. J. Ex. 39; 10 Jur. N. S. 1058; 11 L. T. N. S. 426; 12 W. R. 1086.

2. *Robinson v. London, etc.*, R. Co., 19 C. B. N. S. 51; 34 L. J. C. P. 234; 14 Jur. N. S. 390; 13 W. R. 660.

3. *Hill v. London, etc.*, R. Co., 42 L. T. N. S. 513.

4. *Hodgman v. West Midland R. Co.*, 5 Best & S. 173; 33 L. J. Q. B. 233; 10 Jur. N. S. 673; 10 L. T. N. S. 609; 12 W. R. 1054; s. c., affirmed, 35 L. J. Q. B. 85; 13 W. R. 758.

5. *Black v. Camden & Amboy R. Co.*, 45 Barb. (N. Y.) 40; *Smith v. N. Y. & N. H. R. Co.*, 12 Allen (Mass.), 531; *Sangamon, etc., R. Co. v. Henry*, 14 Ill. 156; *Sturgeon v. St. Louis, etc.*, R. Co., 65 Mo. 569.

In *Texas Pacific R. Co. v. Nicholson*, 61 Tex. 491; s. c., 21 Am. & Eng. R. R.

Cas. 133, it was held that such damages for breach of contract may be allowed as are naturally the result of the breach, or as may fairly be considered as having been within the contemplation of the parties at the time the contract was made.

When it is within the knowledge of a railway company that cattle which it has contracted through its agents to receive at a specified time and to transport to a particular destination are intended for sale on their arrival there, and the company, without fault of the owner of the cattle, violates the contract, and does not receive the cattle until a later period, whereby loss results, the difference between the value of the cattle at the place of destination when they should have arrived there under the contract, and when they did arrive there, is a measure of damage. If there is no other deterioration due to the delay of the carrier, that must also be taken into consideration in estimating damage.

The rule which makes the measure of damages the difference between the value of goods at the place of shipment and their value at the point of destination applies to cases where the goods are never delivered at all at their ultimate destination, and not where there has been loss sustained by the failure to start them on time from the point of shipping. See also *East Tennessee, etc., R. Co. v. Hale* (Tenn.), 27 Am. & Eng. R. R. Cas. 36.

6. *Texas Pacific, etc., R. Co. v. Nicholson*, 61 Tex. 491; s. c., 21 Am. & Eng. R. R. Cas. 133; *Glascok v. Chicago, etc.*, R. Co., 69 Mo. 589.

receive the testimony of witnesses who have derived their information wholly through the newspapers.<sup>1</sup> The value at the place of destination is the criterion.<sup>2</sup> If there is no market value at that point, such value may be ascertained by proof of the market value at other convenient points.<sup>3</sup>

The damages which may be recovered must be proximate, and not remote.<sup>4</sup>

It has been held in an action against the carrier for failure to deliver cattle within the time agreed, that interest from the date of the breach of the contract (if the suit is considered as *ex contractu*)

A parol undertaking was made by a railroad company to furnish cars on a particular day to transport cattle from a point in North Carolina to Richmond, with knowledge of the shipper's purpose to have the cattle delivered at the destination, in time for a particular market day. The company failed to have the necessary cars in readiness, and the shipment was delayed until a later day, when the cattle were sent, and a bill of lading then given, the form of which limited the liability of the company as to detention, measure of damages, etc., in consideration of a reduced rate of freight. *Held*, that the parol undertaking was not merged in the contract arising out of the bill of lading, and that the shipper was therefore entitled to damages consequent upon the detention. *Hamilton v. Western, etc., R. Co. (N. Car.)*, 3 S. Eastern Rep. 164.

1. *Cleveland & Toledo R. Co. v. Perkins*, 17 Mich. 296. If the verdict in such case be excessive, it will be set aside by the court. *Harris v. Panama R. Co.*, 5 Bosw. (N. Y.) 312.

2. *Davis v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 543; *Louisville, etc., R. Co. v. Mason*, 11 Lea (Tenn.), 116; s. c., 16 Am. & Eng. R. R. Cas. 241; *Texas Pacific R. Co. v. Nicholson*, 61 Tex. 491; s. c., 21 Am. & Eng. R. R. Cas. 133; *East Tennessee, etc., R. Co. v. Hale (Tenn.)*, 27 Am. & Eng. R. R. Cas. 36.

3. In *East Tennessee, etc., R. Co. v. Hale (Tenn.)*, 27 Am. & Eng. R. R. Cas. 36, it was held that in an action against a railroad company for failure to deliver a car-load of mules according to a contract under which the company agreed to deliver within a reasonable time at Dalton, Ga., the measure of damages is the difference in the market value of the stock at that point when it should have been, and when it was in fact, delivered there; and if there was no market value

at that point, such value may be ascertained by proof of the market value at other convenient points.

In *Louisville, etc., R. Co. v. Mason*, 11 Lea (Tenn.), 116; s. c., 16 Am. & Eng. R. R. Cas. 241, it was held, in an action against a railroad company, as a common carrier, for damages to horses in transit, the measure of damages would be the value of the horses killed and the depreciation in the value of those injured, at the place of delivery, but direct testimony by the opinion of witnesses of that value or depreciation is not indispensable; it is sufficient if there is proof of these facts in the market of a neighboring State connected with the place by railroad, and a full description of the animals and their qualities, and of the character of the injuries.

4. In *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351; s. c., 7 Am. & Eng. R. R. Cas. 373, it was held that in the absence of evidence to show that a carrier receiving cattle for transportation from a connecting carrier was for any reason bound to continue the transportation in the same cars in which the cattle came to it, or had notice that they were of a kind which it was unlawful to unload within the limits of the State, the receiving carrier will not be compelled to make good to the shipper damages sustained by him by reason of the seizure and sale of the cattle to pay a fine imposed upon him in consequence of its having, against his objection, unloaded the cattle for the purpose of reloading them into its own cars. Such damages are too remote, and cannot be held to have been within the contemplation of the parties.

A recovery cannot be had for the loss of profits anticipated from letting a jack to mares, where the use to which the animal was to be put, and the carrier's knowledge of the same, are not averred and proved. *Chicago, etc., R. Co. v. Hale*, 83 Ill. 360. See also *Sangamon*,

or from the date of the injury (if the action be viewed as one in tort) may be allowed if plaintiff recovers damages.<sup>1</sup>

There is a conflict of opinion as to how far a carrier may, in effect, limit his liability for negligence by a contract which stipulates that he shall be liable only in a certain sum, unless the value of animals worth a greater sum is declared, and an increased charge paid therefor. The United States supreme court has recently affirmed the rule which limits the carrier's liability, even though guilty of negligence, to the valuation fixed by the shipper in the contract.<sup>2</sup> In several of the States, however, it is held that the law preventing a carrier from limiting his liability for negligence by means of any contract is too well settled to permit of its modification even to this extent.<sup>3</sup>

etc., R. Co. v. Henry, 14 Ill. 156; McAlister v. Chicago, etc., R. Co., 74 Mo. 351; s. c., 7 Am. & Eng. R. R. Cas. 373.

1. Illinois, etc., R. Co. v. Haynes (Miss.), 1 South. Rep. 765.

2. Hart v. Pennsylvania R., 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604; s. c., 2 McCrary (C. C.), 333; Harvey v. Terre Haute, etc., R., 74 Mo. 538; Squire v. New York Central, etc., R., 98 Mass. 239; South, etc., R., v. Henlein, 52 Ala. 606.

An agreement between the shipper and the carrier fixing the value of the animal at the time and place of shipment as the basis for damages, is valid. Chicago, etc., R. v. Harmon, 1 Ill. App. 640.

A condition in a bill of lading expressed the value of a cow shipped over defendant's railroad to be of a certain value, and that the carrier assumed no liability for injuries to the animal, except from collision of trains, in which case the carrier was not to be liable for a greater sum than that specified in the agreement. Animals of greater value than that specified were charged at a higher rate. The animal, while in transit, was injured by a fire which caught from sparks from a locomotive, and died in consequence. Held, that the carrier's liability was limited to the valuation expressed in the agreement, and that the plaintiff was bound by the agreement as made in his behalf by his agent. Hill v. Boston, etc., R. (Mass.), 10 N. East. Rep. 836.

See generally, on this subject, CARRIERS OF GOODS, 2 Am. & Eng. Encyc. of Law.

3. Moulton v. St. Paul, etc., R., 31 Minn. 85; s. c., 12 Am. & Eng. R. R. Cas. 13; Kansas City, etc., R. v. Simp-

son, 30 Kan. 645; s. c., 16 Am. & Eng. R. R. Cas. 158.

A horse was shipped by railroad, and the carrier arbitrarily inserted in the bill of lading the words, "Value not to exceed \$100." The horse was injured by the carrier's negligence. Held, that the owner was not limited in the recovery by the above words. Kansas City, etc., R. v. Simpson, 30 Kans. 645; s. c., 46 Am. Rep. 104.

In McCune v. Burlington, etc., R., 52 Iowa, 600, where the carrier attempted to enforce a regulation that no valuable stock should be shipped over his road unless the consignor signed a contract releasing the carrier from liability for anything beyond the value of ordinary stock, it was held that such regulation was void under Iowa Code, sec. 1308, which declares that the carrier cannot exempt himself by any contract, receipt, rule or regulation, from the liability of a common carrier.

In Chicago, etc., R. v. Abels, 60 Miss. 1017; s. c., 21 Am. & Eng. R. R. Cas. 105, it was held that a common carrier cannot avoid payment of full damages to property which he has undertaken to transport, by showing a special contract limiting in advance his liability to an amount less than the real loss sustained by the shipper.

In McFadden v. Missouri Pacific R. (Mo.), 4 So. West. Rep. 689, it was held that whether a stipulation in a bill of lading or contract of shipment, whereby a common carrier limits his liability to a certain fixed sum for each head of stock to be transported, shall limit the shipper to such sum in case the goods are destroyed by the carrier's negligence, depends on the fact whether the shipper has received adequate consideration for

**Definition.**

**CARRY.**

**Definition.**

**CARRY.**—To convey, bear, or transport, by sustaining the thing carried, or causing it to be sustained; generally implying motion from the speaker, and so often followed by the particles *away* and *off*, and opposed to *bring* or *fetch*.<sup>1</sup>

the concession. If obtained from the shipper by a false representation that his goods are to be carried at a special and reduced rate, in consequence thereof, such a stipulation is not binding upon him, in the absence of bad faith on his part towards the carrier.

**Authorities for Carriers of Live Stock.**—Angell on Carriers (5th Ed.); Hutchinson on Carriers; Lawson's Contracts of Carriers; Redman's Law of Railway Carriers (2d Ed.), London, 1880; Article "Transportation of Live Stock" (Henry Austin), 19 Cent. Law Jour. 161; Note to *Clarke v. Rochester*, etc., R., 67 Am. Dec. 205; Notes to Am. & Eng. R. R. Cas., vols. 1 to 27.

**1. Worcester.**

**Carry Arms.**—"Carry," in the sense of the statutes prohibiting the "carrying of arms," means "wear." "When we use the expression 'he carries arms,' we mean 'he goes armed' or 'he wears arms.' This is manifestly the sense in which the word was used by the legislature, and we know of no other single word which could more clearly convey the meaning intended to be conveyed than the word 'carry.' In this sense P. was not only literally carrying a forbidden weapon, but he was 'carrying it,' that is, 'he was going armed,' contrary to the true meaning of the statute. It will be observed that the interpretation which we give to the word 'carry' meets and carries out the manifest purposes of the legislature, which was not only to make criminal the habitual carrying or wearing of [various weapons], but also to make criminal a single act of wearing or carrying one of these weapons, when it is so worn or carried, with the intent of thus going armed. . . . To constitute the carrying criminal, the intent with which it is carried must be that of going armed, or being armed, or wearing it for the purpose of being armed." Page v. State, 3 Heisk. (Tenn.) 198 n.

To have a weapon upon the person is, in contemplation of law, to "carry" it. State v. Carter, 36 Tex. 89.

The word "carries," in an act prohibiting carrying concealed weapons, is used as the synonym of "bears." "Locomo-

tion is not essential to constitute a carrying within the meaning of that section." Owen v. State, 31 Ala. 389.

**Carry Away.**—An indictment against a thief averring that he did "feloniously steal, take, and carry" the goods is insufficient for want of adding "away" after "carry." "The word 'carry' has not the same meaning as the words 'carry away.' The words 'did take and carry away' are a translation of the words *cepit et asportavit*. . . . But no single word in our language expresses the meaning of *asportavit*. Hence, the word 'away' or some other word must be subjoined to the word 'carry' to modify its general signification and give it a special and distinctive meaning." Com. v. Adams, 7 Gray (Mass.), 45. And see Bish. Dir. & Trus. § 582, n. 6.

But in State v. Mann, 25 Ohio St. 668, it was held that in an indictment for larceny the word "steal" implies a carrying away, and therefore an indictment charging that the defendant did "feloniously steal, take, and drive" a sheep, without alleging that he drove or carried it *away*, was sufficient.

The phrase "taking and carrying away a negro" does not imply that it was done "by force or violence," and without those words is insufficient in an indictment. Hamilton v. Com., 3 Pen. & W. (Pa.) 142.

Lifting up a bag from the bottom of a boot of a coach when it is not entirely removed from the space first occupied, but each specific part is removed, is "carrying it away." Rex v. Walsh, 1 Moody, 14.

**Carried into any Port in England** means something different from "imported," and the phrase is applicable to goods where the parties contemplated that they would, or at least might, be carried into and delivered in an English port, and it was provided in the bill of lading and the master in fact put into an English port for orders, in part fulfilment of the contract of carriage. Dapneto v. Wyllie, L. R. 5 P. C. 482, 490-2.

**Carry Off.**—A covenant by a lessee not to "carry off" hay is not broken by his creditors attaching a quantity of hay on



mesne process and carrying it off against his consent. "The words of the covenant, taken strictly, will reach only a voluntary removal of hay, etc., by the defendants." *Smith v. Putnam*, 3 Pick. (Mass.) 222; 4 Wheel. Am. C. L. 34.

A cart going for manure is exempt from toll as a cart "carrying manure." *Harrison v. James*, 2 Chit. 547.

**Carrying on Business.**—"To sell whiskey on a few several occasions" within a period of twelve months could not be just esteemed the being engaged in or carrying on the business of a wholesale dealer in the business of whiskey." *Espy v. State*, 47 Ala. 538.

To "engage in or carry on any business," within the meaning of the revenue law, is to pursue an occupation or employment as a livelihood or a source of profit. "It is not necessary that it should be the sole or exclusive business or occupation. It may be pursued while pursuing another business or in connection with another; and, in either case, the party would be punishable. It is true, the doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business; yet a series of such acts would be so considered. The true inquiry is, and one which a jury will seldom fail correctly to solve, what was the intent of the party? Was it to derive a profit or the means of livelihood from retailing or from any of the other occupations mentioned in the statute? If it was, he is guilty; if it was not, he should not be convicted." *Harris v. State*, 50 Ala. 127; *Weil v. State*, 52 Ala. 19.

A person who, being the owner of a two-story building, offers for rent, for use as a theatre, a room or hall in the upper story, containing a small stage and dressing-room, which might be used for small dramatic exhibitions, but who had never used it as a theatre, cannot be convicted of "engaging in or carrying on the business of a theatre" under the provisions of the revenue law. *Gillman v. State*, 55 Ala. 248.

A company, carrying on business in London, which employs in a country town a general commission agent, who transacts the company's business in such town, in an office for which the company pay him rent, does not "carry on business" in that town within the meaning of the County Court Act, 9 and 10 Vict. c. 95, s. 128. *Corbett v. Gen. Stm. Nav. Co.*, 4 H. & N. 482; *Shiels v. Great Northern R. Co.*, 30 L. J. R. (Q. B.) 331.

A railway company having its principal office in London, where its seal was

kept and the meeting of its directors and shareholders held, and having likewise a large station at Chester, through which ran several branch lines, the entire management of their line there being conducted by a district superintendent, under the general management of the company in London, is not "carrying on business" in Chester. *Brown v. Lond. & N. W. R. Co.*, 4 B. & S. 326.

A company having a station in London, where a considerable portion of their business is transacted, but whose principal station, where the meetings of the directors are held and the general and substantial business of the company conducted, is without the city, does not "carry on business" within the jurisdiction of the mayor's court. *Le Tailleux v. S. E. R. Co.*, 3 C. P. D. 18.

Selling an occasional drink of spirits out of a bottle, not in a bar-room, where no intention of defrauding the national revenues is apparent, is not "carrying on the business of a retail liquor-dealer" without having paid the special tax. *U. S. v. Jackson*, 1 Hughes (U. S.), 531.

The renting of a few rooms by a married woman in the house in which she lived with her husband is not "carrying on business" within the meaning of a statute making her liable for debts incurred on account of such business. "What is meant by the expression is, that the married woman must be pursuing a business as an employment, to the carrying on of which she devotes a considerable portion of her time and skill and means—a business that is continuing in its nature and embraces many transactions." *Holmes v. Holmes*, 40 Conn. 117.

The "carrying on" of the business of a railroad company within the meaning of the Bankruptcy Act of March 2, 1867, 14 U. S. St. at L. 536, must be where the railroad is or is to be constructed, maintained, and operated. "In its broadest sense the term 'business' includes nearly all the affairs in which either an individual or a corporation can be actors. . . . Does, then, the doing of any acts whatever pertaining to the affairs of a railroad company constitute 'carrying on business' in the sense of the act? Has the term 'carrying on business' the same meaning as 'transacting any of its business'? . . . I am constrained not only by considerations already suggested, but by what, upon the words themselves, should be their proper interpretation, to answer these questions in the negative. . . . 'Carrying on business' looks to the scheme and purpose to which such

transactions tend, and not to the incidental transactions themselves. Thus the business of a railroad corporation is, by its charter, the construction and maintenance and operation of a railroad. . . . In aid thereof it may be necessary to employ agents and agencies. . . . But the transactions of such agents are only collateral or incidental. They do not, in a just sense, constitute the business of the railroad company." *In re Ala. & Chat. R. Co.*, 9 Blatch. 390.

Where a wine-merchant contracted not to "set up, embark, or carry on the business of a wine-merchant" within prescribed limits, and afterwards commenced business at a town not within those limits, but from thence in many instances supplied wine to persons within the limits, in pursuance of orders solicited by him, but has no residence, warehouse, or place of business within the limits, it was held a breach of contract. "I am not now to say what the phrase 'carrying on business' may mean in the Excise Act or in other contracts; but to say what in common-sense it means when used by one who sells the business of a wine-merchant for a large sum of money, and promises that he will not directly or indirectly carry on that business within a specified district. It cannot then be supposed to mean that he may, after selling the good-will of that business, do what he will within the district, provided he has no cellars or stores within it." *Turner v. Evans*, 2 El. & Bl. 512.

So where, upon the sale of the good-will of a drapery and hosiery business, the vendor covenanted not to "carry on or assist in carrying on" such business within two miles; it was held that the covenant was broken by his supplying from a place beyond the prescribed limit goods to customers residing within the district, at their solicitation. "It is said that a mere casual sale of goods will not constitute a carrying on of business. But however that may be, here the sales were to a large amount; and I cannot entertain a doubt that the defendant has broken his contract." *Brampton v. Beddoes*, 13 C. B. (N. S.) 538.

The power given to the court, by subsec. 5 of sec. 7 of the Companies Act, 1880, to restore to the register of joint stock companies the name of a company which has been struck off by the registrar, if the court is "satisfied that the company was at the time of the striking off carrying on business or in operation," applies to the case of a company which at the time of the striking off was carrying on business only for the purpose of

winding up voluntarily and releasing its assets. *In re Outlay Assurance Co.*, 34 Ch. D. 479.

But in the case of a covenant not to carry on business so long as a company "carried on business," it was held there had been no breach where the business was being carried on not by the company, but by the liquidator, with a view to its sale as a going concern. "The covenant being in restraint of trade must be construed strictly." *Shorthorn Dairy Co. v. Hall*, 21 Ir. L. T. 343.

A solicitor with a country certificate, whose offices were at Birmingham, and who came up on a retainer and attended the taxation of a bill of costs within ten miles of London, was held not to "practise or carry on his business" within that radius. "Taking the words 'acts or practices' together, and turning to the schedule and finding 'carries on business' used apparently as an equivalent phrase, I think the intention of the legislature was not to strike at one particular transaction within the ten mile radius, but at the general carrying on of business and practising. . . . I think the act means carries on business with a *quasi* permanent *habitat*." *In re Horton*, 8 Q. B. D. 434; s. c., 45 L. T. (N. S.) 543.

A debtor employed as a clerk in a bank, the office of which is within the district of the London bankruptcy court, is "carrying on business" within the district of that court. Cotton, L. J., said: "It is said that a man does not carry on business unless he is a principal, but I do not see that that is necessary. In ordinary language a man is said to carry on business whether he be a principal or not. If I had to decide whether this man's employment was more properly described as a 'business' or an 'occupation,' I might think that the latter would be the more appropriate term. But 'business' is the larger term, and I think it includes his employment." And Lush, L. J., said: "It cannot, I think, be intended that the words 'carries on business' should be confined to persons carrying on business on their own account as principals. That would leave out a large number of persons who are engaged in business in the city of London. I think that a man carries on business where he is to be found during the business hours of the day." *Ex parte Breuil*, 16 Ch. D. 484.

But in *Ex parte Smith*, 2 Pugs. (N. B.) 147, it was held that a clerk in the Provincial Secretary's office in Fredericton, who resides outside the city, was not a person "carrying on business," within

**CART.**—The word “cart,” in its primary and ordinary acceptance, signifies a carriage with two wheels; yet it has a more extended signification, and means a carriage in general.<sup>1</sup>

the meaning of 26 Vic. c. 35, § 20, so as to make him an inhabitant of the city for the purpose of taxation. The court said: “If a public department, such as that of the Secretary of the Province, can be considered ‘carrying on business’ within the legitimate meaning of that expression in the act (which we more than doubt, and which the case of *Hathaway v. Cummings* [Trin. T. 1864] seems to repudiate), surely the business of that department is not ‘carried on’ by the clerks any more than by the messengers. All the employees in the department do as they are directed by the head—the secretary. He it is who ‘carries on’ (if that is a correct expression), who manages, directs, and is responsible for, the business of the department and the manner in which it is transacted, and to whom the employees are all subordinate. So, with respect to private concerns of a mercantile or manufacturing character, can it be said that each and every of the clerks, servants or laborers carry on the business of any mercantile or manufacturing establishment, in which they are employed? Surely the proprietors, the employers, carry on the business of the establishments which belong to themselves. The business is transacted, the work is done at their instigation, by their capital, for their benefit, and at their risk—it is true, necessarily, by the instrumentality of employees, or by machinery, supplied by them. So, in a shipping business, do not the owners of the ships carry on the business—not the lumpers who load, or sailors who navigate them, though without their services the business could not be carried on? This view will be strongly confirmed by reading section 20, in connection with and by the light of section 24, which shows that the term ‘carrying on business in the city’ refers to the principal who owns the business, and who is entitled to and receives the proceeds and profits thereof.”

A covenant not to “carry on or exercise the practice or profession of a surgeon and apothecary” within prescribed limits is not broken by attending several ladies in their confinements, within those limits, with the knowledge and consent of the covenantee, in consequence of a request by him that the covenantor should for a time continue to visit the patients, and

the latter did so for the purpose of assisting the former. *Rawlinson v. Clarke*, 14 M. & W. 187.

A teamster in hauling quartz to a mill performs labor for “carrying on” the mill, and is entitled to a lien against it. *Gould v. Wise*, 3 Pac. Rep. 34.

**Carrying Out** a contract is more than the signing and delivery. Assent to a proposition creates, but does not “carry out,” a contract. “Carrying out” comes after the execution of the contract; it is performance. *Cartmel v. Newton*, 79 Ind. 5.

**Carrying to Sell.**—Where a servant of a licensed tea-dealer was sent by his master round the neighborhood to ask for orders for tea, and was subsequently sent by his master to deliver small parcels of tea in pursuance of those orders—this was held not to be a “carrying to sell,” within the meaning of the *Hawkers and Pedlers Act*, 50 G. III. c. 51, so as to subject the servant to a penalty for trading as a hawk without a license. *Rex v. M'Knight*, 10 B. & C. 734.

1. *Favers v. Glass*, 22 Ala. 621, where it was held that a vehicle with four wheels, drawn by oxen, suited to the ordinary purposes of husbandry, and employed in the same uses to which carts, in the ordinary acceptance of the term, are appropriated, is protected from levy and sale by the statute exempting “one horse or ox cart” from execution. “In order to ascertain whether the legislature used it in its restricted or enlarged sense, we must look to the design and object of the statute. This evidently was, to secure ‘to each poor family’ . . . ‘some vehicle to be used in hauling their crops, and otherwise subserving their wants.’ The number of wheels upon which it moved, we cannot suppose, was a matter of any moment in the enactment of the law. . . . This construction does no violence to the meaning of the word ‘cart,’ but adopts its general rather than its primary as well as ordinary meaning for the purpose of giving effect to the plain object and intention of the legislature, excluding from the class implied by the general designation such vehicles as were not within the legislative contemplation.”

See to the same effect *Webb v. Brandon*, 4 Heisk. (Tenn.) 285, where a large wagon with four wheels was held exempt from levy as an “ox cart,” the court,

**CAS.** (See also ACT OF GOD.)—Used in the Louisiana Code in the phrase *cas fortuits*, and equivalent to irresistible force, inevitable accident, or unforeseen event.<sup>1</sup>

however, saying: "It is true, as contended in the argument, that lexicographers define a 'cart' to be a vehicle with two wheels, and a 'wagon' one with four wheels. The proof makes it clear that the vehicle in question was not a *cart*, but that it was a *wagon*, a large wagon with four wheels, and suitable to be drawn with oxen."

A *coal wagon* is a "cart" within the 19 Geo. II. c. 35, s. 11, requiring tickets to be obtained by the driver or carter of "cart or carts," loaded or driven from any wharf, etc. *Peto v. Hague*, 1 Smith, 417.

**Cart or Truck-wagon.**—A pedler's wagon designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides, and a railing around the top and dasher in front, is not exempt from attachment and execution as "one cart or truck-wagon." *Smith v. Chase*, 71 Me. 164.

**Taxed Cart** is a designation given by 43 Geo. III. c. 161, to a carriage with less than four wheels, constructed wholly of wood and iron, without any covering other than a tilted covering, and without any lining or springs, and with a fixed seat, without slings or braces, and without any ornament whatever other than paint of a dark color for the preservation of the wood or iron only, with the words "a taxed cart," and the name of the owner painted on the back panel, and which was not of more than a given value. *Williams v. Lear*, L. R. 7 Q. B. 286.

**Cartways**, in *Pennsylvania*, were the roads leading to the great provincial roads, laid out by the order of the justices of the county courts, after a return of certain viewers that the same were necessary for the convenience of the public. *McClenahan v. Curwin*, 3 Yeates (Pa.), 371.

1. Thus in the case of *Viterbo v. Friedlander*, 120 U. S. 707, Mr. Justice Gray uses the following language on page 727: "Upon a comparison of the English text with the French of so much of the Louisiana Code as bears upon this case, the greater uniformity and precision of the French text, and its striking resemblance to the Code Napoleon, make it quite clear that the French is the original and the English the translation. More-

over, in the concluding article 3556 (3522) of verbal definitions, the French words in the Code of 1825 are arranged alphabetically, with the English equivalent opposite each one, regardless of its own alphabetical order. In the French column '*cas fortuits*' are defined as '*Evénements occasionés par une force à laquelle on ne peut pas résister*,' or events caused by a force that one cannot resist; opposite to which in the English column is 'Fortuitous event is that which happens by a cause which we cannot resist.' But on turning back to the other articles we find the French '*cas fortuit*' rendered in English in various ways; as 'unforeseen event,' as 'unforeseen accident,' as 'fortuitous event,' as 'fortuitous accident,' as 'accident,' and as 'chance.' In one place *cas fortuit ou force majeure* is rendered 'fortuitous event or irresistible force,' and in another 'accidental and uncontrollable events;' thus treating the two alternative expressions as synonymous. In the concluding article, also, *force* is defined both in French and in English as 'the effect of a power which cannot be resisted;' and '*Force majeure, vis major*, as '*un fait, un accident, que la prudence humaine ne peut ni prévoir ni empêcher*,' or a fact or accident which human prudence can neither foresee nor prevent, with a corresponding definition of the English equivalent, 'superior force.' "*Force majeure*' is also rendered in different places 'unforeseen events,' 'overpowering force,' and 'force' only; '*événement de force majeure*' as 'accident;' and '*accidens de force majeure*' as 'inevitable accident.' It cannot be doubted, therefore, that the words 'unforeseen event' and 'accident,' as used in the articles now under consideration, have the meaning of 'fortuitous event' or 'irresistible force.' The Louisiana Code, following the French law and the Code Napoleon, recognizes two kinds or degrees of what, under various but equivalent names, has been called *vis major*, '*cas fortuit*,' irresistible force, inevitable accident, or unforeseen event; the one, ordinary, which might have been foreseen by any man of common prudence as not unlikely to happen at some time; the other, extraordinary, which could not have been foreseen, or expected to occur at any time." S. c., 7 Sup. Ct. Rep. 962, 973.

**CASE.** (See also CONSTITUTIONAL LAW.)—A contested question in a court of justice.<sup>1</sup> In this sense it is used in various

1. A *case* is defined to be a question contested before a court of justice; an action or suit in law or equity. *Ex parte* Towles, 48 Tex. 413, 433.

The *Iowa* code provides that actions "for relief on the grounds of fraud in cases heretofore solely cognizable in a court of chancery" are barred in five years (Code, § 2529, p. 4). and that "in actions for relief on the ground of fraud . . . the cause of action shall not be deemed to have accrued until the fraud . . . complained of shall have been discovered by the party aggrieved." Code, § 2530. In holding that this latter section will not suspend the operation of the statute of limitations until the discovery of the fraud in the case of a sale absolutely void, since a deed thereunder would be no defence to recovery in an action at law, the court, Beck, J., said: "The second provision is applicable to actions contemplated in the first, which are such as are prosecuted 'for relief on the grounds of fraud in cases heretofore solely cognizable in a court of chancery.' It is not applicable to all actions for relief against fraud, but to actions in such cases as were before solely cognizable in chancery. The word 'case' here means a contested question in a court of justice. Bouvier's Dict. It does not refer to the action, or the form thereof, or the character it may assume on account of the form in which it is prosecuted, but to the questions and rights involved. Now to bring this action within the operation of section 2530, the *case*, the questions and rights involved, must have been 'heretofore solely cognizable in a court of chancery.' But this condition does not exist in this cause. As we have seen, the sale was absolutely void, and defendants claiming under it could not maintain an action to recover the property. Of course the sale and deed executed thereon amount to no sufficient defence to the recovery of the property in an action at law by plaintiffs. Plaintiffs' case, their rights, and the questions involved therein, are and were not solely cognizable in a court of chancery. The provision found in section 2530 is not applicable to this action, and the fact that the alleged fraud, the failure of the trustee to comply with the conditions of the trust deed, was not discovered, does not arrest the operation of the limitation." *Gebhard v. Sattler*, 4 Iowa, 152.

**Cases in Law and Equity.**—This expres-

sion, as used in the Constitution of the United States, art. 3, § 2, has been frequently the subject of exposition. The following brief extracts from the opinions of the various judges will serve to illustrate its meaning:

"A *case* in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." By Marshall, C. J., *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 379.

So it has been held by Hughes, J., that the Federal courts have jurisdiction by reason of the character of the cause, irrespective of the citizenship of the parties; and where the question involved is the appointment of a receiver of realty, situate within the United States territory of Fortress Monroe, the jurisdiction is complete. *Woodfin v. Phœbus*, 30 Fed. Rep. 289.

This has been extended by Drummond, J., to the case of marshals' bonds, on the ground that suits thereon are *cases* under the laws of the United States within the meaning of the constitution. *United States ex rel. v. Davidson*, 1 Biss. (U. S.) 433.

"This clause" (viz., U. S. Const. art. 3), said Marshall, C. J., "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a *case*, and the constitution declares that the judicial power shall extend to all *cases* arising under the constitution, laws, and treaties of the United States." *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 319, 738.

For a discussion of this clause of the constitution in the State courts, see *In the Matter of Booth*, 11 Wis. 498; dissenting opinion of Bartley, C. J., *Piqua Bank v. Knoup*, 6 Ohio St. 342; *State v. Davis*, 12 S. Car. 528.

**A Case arising under a Treaty.**—These words, in the same section of the constitution, were held by Marshall, C. J., not to apply to an action of ejectment between two citizens of the same State for a tract of land where the defendant set

up an outstanding title in a British subject, which he contended was protected by the treaty, but the highest State court in Maryland decided against the title. *Owings v. Norwood's Lessee*, 5 Cranch (U. S. Sup. Ct.), 344.

**All Cases affecting Ambassadors, etc.**—The original jurisdiction reserved to the supreme court of the United States in these *cases* does not extend to a criminal assault upon the person of a foreign minister. *United States v. Ortega*, 11 Wheat. (U. S.) 467.

**Cases of Admiralty and Maritime Jurisdiction**—The clause of the constitution restricting the jurisdiction over such subjects to those courts which are established in pursuance of article 3 is not applicable to the Territories. *Am. Ins. Co. v. Canter*, 1 Pet. (U. S.) 511.

For a discussion of the application of this phrase in a State court, see *Home Ins. Co. v. Northwestern Packet Co.*, 32 Iowa, 223.

**Case arising in the Naval Forces.**—In construing these words as used in an act of Congress providing for the trial and punishment of offences committed in the naval service by courts-martial, without indictment or the intervention of a jury, in connection with the fifth amendment to the constitution of the United States, the court, Sawyer, Circ. J., said: "If the acts of Congress conferring jurisdiction upon naval and military courts-martial to try offences committed in the naval and military service are held to be constitutional, it is further insisted, on behalf of the petitioner, that the offence must not only be committed, but that the jurisdiction must also be exercised, or, at least, must attach by an arrest and commencement of the prosecution before the connection of the offender with the service is legally severed by the expiration of his term of service, or by resignation, dismissal, or other discharge; that Congress has no power to authorize a trial after the connection is so severed, and after the accused has become a private citizen. To support this view a criticism is made upon the word 'case,' and it is argued that, although the offence has been committed while in the naval service, yet a *case* does not arise until a charge is actually made; and if the charge is not actually framed and presented till after the offender ceases to be in the service, it is not a 'case arising in the land and naval forces' within the meaning of the fifth amendment to the constitution. This is certainly a very finely-drawn distinction. It is not merely a *case* that the court is to try, but a 'case arising in the

land or naval force.' A *case*, in ordinary parlance, is that which falls, comes, or happens; an event. Also a state of facts involving a question for discussion. Webster's Dict. But the event—that which happens—the state of facts presenting the question for discussion—must have arisen—must have had an origin. . . . A *case* arising in the land or naval forces appears to us to be a case proceeding, issuing, or springing from acts in violation of the naval laws and regulations, committed while in the naval forces or service. A *case* originating in the naval forces or service, or, in other words, 'offences' against the laws regulating the navy, committed by a party while in the naval forces.' *In re Bogart*, 2 Sawy. (U. S.) 396, 404. See *Dynes v. Hoover*, 20 How. (U. S.) 65. *Ex parte Milligan*, 4 Wall. (U. S.) 2.

**"Case Affecting" contrasted with "Cause Affecting."**—For the same reason that, in *United States v. Ortega*, 11 Wheat. (U. S.) 467, it was held that the clause in the constitution as to "cases affecting ambassadors," etc., did not apply except where the ambassador was a party, so in construing the civil rights bill, which gives jurisdiction to the circuit court of all *causes*, civil and criminal, *affecting* persons who are denied, etc., the court held that it did not apply where negroes were witnesses only. Strong, J., saying: "An attempt has, however, been made to discriminate between the words 'case affecting,' as found in the constitutional provision, and the words 'cause affecting,' contained in the act of Congress. We are unable to perceive any substantial ground for a distinction. The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action. Surely no court can have jurisdiction of either a *case* or a *cause* until it is presented in the form of an action. We regard, therefore, the *United States v. Ortega* as an authority directly in point, to the effect that witnesses in a criminal prosecution are not persons affected by the cause. It necessarily results from this that jurisdiction of the offence for which these defendants were indicted was not conferred upon the circuit court by the act of Congress." *Blyew v. United States*, 13 Wall. (U. S.) 581, 595.

**Case in which the Law of the United States Authorizes an Oath to be Administered.**—Where, on a complaint made before a United States commissioner for an offence against the United States, one S. was committed to stand his trial, and be-



phrases, for examples of which see the notes.<sup>1</sup> One of the forms

fore warrant issued V. went before the commissioner to justify as bail for S. and made in his deposition statements of material matter which he did not believe to be true, on an indictment and conviction of V. for perjury the court held that the deposition was made in a *case* in which a law of the United States authorizes an oath to be administered (Rev. Stat § 5392), Benedict, J., saying: "I am of the opinion that it must be held to have been so made. Plainly, the word 'case,' as used in the statute, is not to be confined to suits or proceedings strictly in court. There are many instances where the laws of the United States authorize an oath to be administered where no suit or criminal proceeding has been commenced." *United States v. Volz*, 14 Blatch. (U. S.) 15.

1. **Special Cases.—Action for Assault and Battery.**—In construing article 6, § 14, of the New York constitution, which provides as follows: "The county court shall have such jurisdiction in cases arising in justices' courts, and in *special cases* as the legislature may prescribe, but shall have no original civil jurisdiction except in such *special cases*," the courts have held that *special cases* are those distinguished from *cases at common law*. Thus Gardiner, C. J., says: "The primary meaning of the word 'case,' according to lexicographers, is *cause*. When applied to legal proceedings, it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. In this, its generic sense, the word includes all *cases*, special or otherwise. At the forming of the constitution, independently of the general division of cases into those cognizable in equity and those at law, the latter were by the common law grouped into different species, each of which, as a general rule, was designated by the leading fact or incident, which was the cause or ground of the action of the court in that particular species of 'case,' as debt, *assumpsit*, trespass, etc. But because each case belonged to a species, this, it is hardly necessary to say, did not make it a 'special case;' for in that sense not only all 'cases' but all things are special. The primary signification of the word 'special' is 'designating a species or sort.' Whether we adopt this meaning or that of 'particular,' 'peculiar,' 'noting something more than ordinary,' or 'appropriate, designed for a particular purpose,' or 'extraordinary and uncommon,' in all which senses the

word is used, is perhaps not very material. The constitution, as we have seen, does not by the term '*special cases*' refer to every species of case, for this construction would annul the limitation on the power of the legislature altogether; but it designates, or was designed to designate, a particular 'sort' possessing certain characteristics which distinguish them from those ordinary 'cases' which the common law had arranged and classified; 'cases,' which are extraordinary in this sense, and 'peculiar,' and which in general are authorized by the law to 'subserve a particular purpose.' The court, in this case, therefore held that an action for assault and battery was not a *special case* within the meaning of art. 6, § 14, of the constitution; and that the statute purporting to confer jurisdiction therein upon the county court was unconstitutional and void." *Kundolf v. Thalheimer*, 12 N. Y. 593, 596.

**Actions to Foreclose Mortgages.**—Such actions have been held not to be *special cases* within the meaning of the constitution. Thus Emott, J., says: "There are two methods of interpreting the words *special cases*, which is the limiting phrase used in the constitution in reference to the jurisdiction which may be conferred on the county courts, limiting their original civil jurisdiction and 'jurisdiction in equity cases.' One method is that which I have already indicated, and which would consider the word 'special' as used with reference to the future action of the legislature perhaps as rather directory than otherwise, making it necessary for the legislature to select and specify particular if not peculiar cases which the court might entertain, but allowing every action to be or become a 'special case' within this jurisdiction which the legislature saw fit to legislate into that category. The other construction would refer the meaning of the word 'special' altogether to the past action of the same legislative department of the government, and restrict it not to what the legislature might thereafter see fit to make, but to what they had already made, 'special cases.' In other words, according to this view, the 'special cases' which the county court might entertain were such as were already, at the adoption of the constitution, known in the legislation of the State as distinct from the ordinary suits and actions possessing characteristics by legislation, which were extraordinary, peculiar, and authorized by law, to serve a particular purpose.

This latter view is that which is taken by the Court of Appeals (*Kundolf v. Thalheimer*, 12 N. Y. 593); and there is no authority under the constitution, as they have interpreted it, to confer jurisdiction upon the county court, except in those particular cases which were to be found in the statute-book, when the constitution was adopted, possessing all these characteristics, and thus clearly distinguishable from all ordinary suits and actions. For examples of such cases the court refer to summary proceedings to recover land, proceedings to drain swamps, and proceedings in insolvency—examples which indicate clearly the scope which the court intended should be given to the provision in question. It is true the decision reported in 12 N. Y. was made in reference to one of a class of actions which were formerly known as actions at law; but the jurisdiction of the courts was as well established, and their proceedings as well settled, in suits in equity as in the ordinary common-law actions of *assumpsit*, case, covenant, and the rest. And, therefore, it is as easy to determine what were special proceedings in equity as at law, according to the statutes and the jurisdiction and practice of the courts in 1846." *Hall v. Nelson*, 23 Barb. (N. Y.) 88, 94.

A contrary opinion was, however, expressed in *Benson v. Cromwell*, 26 Barb. (N. Y.) 218, by Mitchell, P. J., where he says: "It is proper briefly to state our views as to the constitution. The case in the court of appeals arose in an action for an assault and battery. Judges Gardiner and Hand each delivered written opinions, in which Judge Gardiner confines his understanding of the *special cases* in which county courts may have criminal jurisdiction to special *proceedings* existing in 1846 and similar special proceedings. Judge Hand's views are nearly the same, but he cautiously remarks: 'Perhaps it may be different in equity; for the legislature is authorized to confer upon the county judge equity jurisdiction in special cases (art. 6, § 14, subd. 4)'. This prevented him and the court of appeals from being committed to extend that decision to equity cases. Judges Denio, Johnson, Crippen, and Dean avoided the appearance to the views of Judges Gardiner and Hand by stating the grounds of their concurrence to be 'that the statute conferring jurisdiction on county courts in *actions of assault and battery* was unconstitutional.' Judges Ruggles and Marvin took no part in the decision. In the case in the sec-

ond district, Justice Emott felt controlled by the decision in the court of appeals, although he does not hesitate to express his dissent from it, and shows strongly the danger of such a decision, when the law had met the approbation of the profession, and many titles depended on its being sustained. Justice Brown dissented from his associates. The reasoning in the court of appeals admits that *cases* primarily means or includes *causes*. The section of the constitution referred to uses it in that sense. It says: 'The county court shall have such jurisdiction in cases arising in *justices' courts* and in *special cases* as the legislature may prescribe; but shall have no original civil jurisdiction except in such 'special cases.' The 'cases' arising in justices' courts are causes—mostly common law causes—and unless *cases* includes such causes and not merely *special proceedings*, the legislature can give no appellate jurisdiction to the county courts over the justices' courts. And if the opinions in the case in the court of appeals are to be extended, that court must also pronounce any act giving an appeal to the county court from decisions of the justices' courts unconstitutional, except in what were known as special proceedings, in 1846. Section 10 of this article in like manner uses the word 'cases.' 'The testimony in equity *cases* shall be taken in like manner as in *cases* at law.' The reasoning in that case also depends on the adoption of a meaning of the word 'special' allowable only where precision of language is not required, namely, 'extraordinary.' Special is contradistinguished from 'general' as 'species' is from *genus*. This very article of the constitution makes this precise distinction, as applicable to this subject. Section 3 says: 'There shall be a supreme court having general jurisdiction in law and equity.' This court was to possess a power in law and equity as general as law and equity themselves are. There was to be no need of any specification of its powers by the legislature, and it may be that it was intended that the legislature should have no right to limit its powers. Having thus provided for a court with *general* jurisdiction, it was proper to provide for others with special jurisdiction, or jurisdiction in *special cases*, using the term *special* as contradistinguished from *general*. *Cases* was a more appropriate word than *causes*, for it includes not only *causes*, but special proceedings, and is more commonly used as including equity as well as common-law actions, than the word 'causes' is. *Cases in equity* is a



more familiar phrase than *causes in equity*. This would require the legislature to specify the cases in which the county courts should have jurisdiction; and it may be that the four judges who concurred in the decision in the court of appeals 'on the ground that the statute conferring jurisdiction on county courts in *actions of assault and battery* was unconstitutional,' so held because the legislature did not 'specify the cases' in which the county court was to have original civil jurisdiction, but gave it in general terms; terms almost as general, as to personal actions, as those in which the constitution confers the powers on the supreme court, except by limiting the actions to the amount demanded and the residence of the defendants . . . But the legislature does distinctly *specify* the power to foreclose a mortgage and sell the mortgaged premises, if they are situated within that county. . . . So where it is said in section 14 that the legislature may confer equity jurisdiction in 'special cases' upon the county judge, is it not plain that *cases* here means *causes in equity* as plainly as *equity cases* does in § 10, and then that *special* must mean such as are *specified* by the legislature, not thrown in mass in general terms upon the court?" Page 220. S. c., 6 Abb. Pr. (N. Y.) 83.

This reasoning has finally prevailed, and it has been held that the statute conferring upon the county court jurisdiction of actions for the foreclosure of a mortgage and the sale of mortgaged premises, situated within the county, is constitutional, such a proceeding being a *special case* within art. 6, § 14, of the constitution. *Arnold v. Rees*, 18 N. Y. 57.

**Actions of Assumpsit.**—A similar view has been expressed by Willard, J., in holding that the action of the legislature in giving to the county courts jurisdiction over *actions of assumpsit* is constitutional. *Beecher v. Allen*, 5 Barb (N. Y.) 169.

**Proceedings to obtain Partition of Lands** has been held to be a "special case" within the meaning of the constitution. *Doubleday v. Heath*, 16 N. Y. 80.

**Taking the Recognizance of Bail** is a "special case" within article 6, § 15, of the constitution, and the power may be conferred by the legislature upon a local officer appointed to discharge the duties of county judge. *People v. Main*, 20 N. Y. 434.

**Special Cases not Cases at Law.**—In holding that, by the California constitution, no case, except cases arising in the probate court, and criminal cases amounting to felony, is subject to review by the

supreme court, in the exercise of its appellate power, unless it be a case in equity or a "case at law" of a definite character; and that "special cases" are special proceedings characteristically differing from ordinary suits at the common law, and are not "cases at law" within the appellate jurisdiction of the supreme court as defined by the constitution, such as, for example, proceedings under an act to modify the grades of certain streets; the court, by Wallace, J., said: "It will be seen upon examination of the constitution that the cases to which the appellate power extends are carefully defined. . . . It is argued by the appellant that the case is a 'case at law,' one involving the legality of an assessment, and therefore within the jurisdiction of this court to hear and determine. But even if it can be said to involve the legality of an assessment, I think it clear that it is not a case at law within the intent of the constitution. It is said that it is a legal controversy, prosecuted according to the forms of law, and that therefore it is a case at law; but though it be such controversy, and so prosecuted, it does not follow that it is a 'case at law' in the sense of not being a 'special case.' A special case may be said to be a legal controversy, prosecuted according to the forms of law; and yet the constitution itself has distinctly provided that the jurisdiction in 'special cases' shall be in the county court, unless otherwise provided for. A special case can no more be said to be a case at law in a constitutional sense, merely because it is a legal controversy prosecuted according to the forms of law, than it could be said to be a case in equity, because its solution might involve a consideration of the principles of equity, or the judicial proceedings provided for its determination were similar in form to those usually observed in courts of equity. But the case at bar does not belong to either one of the two grand divisions of civil cases mentioned in the constitution as subject to be reviewed here in the exercise of appellate power, but does unmistakably belong to another and well-defined class of cases which are accustomed to be principally designated and distinguished from the others by the fact that they are 'not cases for which the courts of general jurisdiction had always supplied a remedy.' *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43. 'Special cases' are special proceedings characteristically differing from ordinary suits at the common law. *Jackson v. Day*, 15 Cal. 91. Special proceedings do not proceed according to the course of the

common law. They give new rights and afford new remedies (*Saunders v. Haynes*, 13 Cal. 145), etc. This distinction between 'cases at law' and 'special cases' was already established and enforced by this court when, in 1862, the constitution was amended, and 'cases at law' and 'special cases' again provided for; 'the county courts shall have original jurisdiction . . . of all such special cases and proceedings as are not otherwise provided for' (art. 6, sec. 8), is the language of the constitutional amendment of 1862. I can attribute to this expression no other meaning than that which, as we have already seen, had been theretofore fixed to the term 'special cases' in this court before the amendment of 1862 was adopted; and it results that 'special cases,' that is, cases which grow out of special proceedings authorized by statute creating rights not theretofore existing, and providing remedies not accustomed to be administered by courts of law or equity as such, are not cases at law within the appellate jurisdiction of this court as defined by the constitution, even though they may involve questions or values which, if involved in a case of law, would constitute it one to be reviewed here on appeal or writ of error. The case at bar not being a case in equity nor a case at law, within the constitutional designation, is not within the appellate jurisdiction of this court as defined by the constitution." *Houghton's Appeal*, 42 Cal. 35, 60.

The term 'special cases,' in the constitution, does not include any class of cases for which the courts of general jurisdiction have always supplied a remedy. The 'special cases' must be confined to such new cases as are the creation of statutes and the proceedings under which are unknown to the general framework of courts of common law and equity. *Parson v. Tuolumne County Water Co.*, 5 Cal. 43.

Writs of mandate are not 'special cases' within the meaning of article 6, section 8, of the constitution; and therefore the act which attempts to confer power on the county courts to issue writs of mandate is unconstitutional; "for," said the court, "the familiar definition of a special case is that it is a case unknown to the general framework of courts of law or equity. Writs of *mandamus* certainly cannot be held to be 'special cases' within this definition." *People ex rel. Jackson v. Supervisors of Kern County*, 45 Cal. 679. See *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70.

**Cases at Law.**—The words "'cases at

law,' . . . which involve . . . the legality of any task, impost, assessment, toll, or municipal fine," in section 4 of article 6 of the constitution, refer to 'civil cases' as distinguished from criminal cases; and as the supreme court has no jurisdiction on appeal in a criminal action where the offence charged is less than a felony, there can be no appeal from the judgment of the county court imposing a fine on a conviction of unlawfully demanding and receiving toll. *People v. Johnson*, 30 Cal. 98.

The proceedings for the appointment of a guardian for an insane person is not a "case at law" within the meaning of the fifth section of article 1 of the constitution of Wisconsin, which provides as follows: "The right of trial by jury shall remain inviolate, and shall extend to all 'cases at law' without regard to the amount in controversy," etc. "We think," said *Whiton, C. J.*, "that 'cases at law,' as these words are used in the constitution, are not cases of this description. 'Cases at law' are properly controversies between parties, and not the appointment of guardians for minors or insane persons." *Gaston v. Babcock*, 6 Wis. 503.

**Civil Cases.**—In *Indiana* the act organizing the court of common pleas gave it "original concurrent jurisdiction with the circuit courts in the State in all civil cases both at law and in equity." Acts 1848, p. 32. In construing this act the court, *Worden, J.*, said: "This language is broad enough, in our opinion, to include cases for divorce, which have always been regarded as civil proceedings in this State, inasmuch as no ecclesiastical tribunals have ever been established here." *Ellis v. Hatfield*, 20 Ind. 101; *Herron v. Herron*, 16 Ind. 129. But see the opinion of *Gregory, J.*, in *Ewing v. Ewing*, 24 Ind. 468.

On the question as to the action of the circuit court in setting aside the report of damages, made by the appraisers, for a right of way, and ordering them to be assessed by a jury, the court, *Perkins, J.*, said: "It is contended on the one hand that that clause in the constitution which declares that 'in all *civil cases* the right of trial by jury shall remain inviolate,' forbids an assessment of damages except by jury, unless the same be waived; while on the other it is insisted that that clause has no application to the case at bar, because it is not a 'civil case.' . . . The above provision in our own constitution applies in terms but to 'civil cases.' What then, within its meaning, is a 'civil case'? Not every case which is not a

criminal is a civil one. 'Civil case' had a definition, a meaning at common law, when the early constitutions of this country were formed; and it has been held that the term was used in those constitutions in the common-law sense. See *Willyard v. Hamilton*, 7 Ohio, 112; *Livingston v. The Mayor, etc.*, 8 Wend. (N. Y.) 85; *Beekman v. Saratoga, etc.*, R. Co., 3 Paige (N. Y.), 45; *Gold v. Vermont Central, etc.*, R. Co., 19 Vt. 478; *Wells v. Caldwell*, 1 A. K. Marsh (Ky.), 441; *Harris v. Wood*, 6 T. B. Mon. (Ky.) 641; and the cases cited in *French v. Lighty*, 9 Ind. 475; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374. It may be fairly argued that the term should be construed in our constitution to embrace such as were treated as 'civil cases' in this State when the constitution was adopted; and such has been the rule acted upon in some of the States. See Sedgw. on Stat. 542. But this rule would not extend the meaning of the term so as to embrace legal proceedings in all cases except criminal. It has not been the practice in this State to try chancery causes, nor to assess damages, in the laying out of highways, by jury (see *Kemp v. Smith*, 7 Ind. 471); nor to try contested elections by that tribunal. Other examples might be named. Chancery causes, it should be observed, are, in the system of practice provided for by the new constitution, expressly merged in the class of civil actions. What has been the practice in the assessment of damages to real estate taken for public works? On appeals in such cases to the circuit court, the trial seems uniformly to have been by jury. It was so in *Rubottom v. McClure*, 4 Blackf. (Ind.) 505. That was the first case, and was tried as early as 1837 or 1838. It was followed by *McIntire v. State*, 5 Blackf. (Ind.) 384; *State v. Digby*, 5 Blackf. (Ind.) 543; *Vanblaricum v. State*, 7 Blackf. (Ind.) 209; *State v. Beackmo*, 8 Blackf. (Ind.) 246; and other cases, all of which seem to have been thus tried on appeal in the circuit court. See *New Albany, etc., Co. v. Connelly*, 7 Ind. 32. Such being the fact, it follows that this class of cases may legitimately be ranked as *civil*, and hence held to be within the constitutional provision above quoted." See Sedgw. on Stat., *supra*; *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558; *Norristown & Turnpike Co. v. Burket*, 26 Ind. 53.

The Georgia legislature having passed an act declaring in one of its sections "that neither of the aforesaid courts shall issue out any civil process, or try any 'civil case,' except for the trial of the

right of property, real and personal." Motion was made to bring on the trial of a certain cause on the ground that this act, which was entitled "An act to alleviate the condition of debtors, and afford them a temporary relief," did not prevent the trial of equity cases, the statutes having created a distinction between equity and "civil cases"; but the motion was overruled, the court, Charlton, J., saying: "The second ground of the motion now demands investigation; and the question it involves is, whether, under our system of laws, an *equity case* can be denominated a 'civil case.' There can be but this division of cases: 1, criminal; 2, civil. Criminal cases are those which involve a wrong or injury done to the Republic, for the punishment of which the offender is prosecuted in the name of the whole people. 'Civil cases' are those which involve disputes or contests between man and man, and which only terminate in the adjustment of the rights of plaintiffs and defendants. It is said, however, that a critical examination and collation of our statutes establish another class of cases, to wit, equity cases as contradistinguished to civil and criminal cases. I have taken infinite pains to trace, in our laws, the lines of distinction between an equity and a civil case; but without adopting implicitly the inferences of the gentlemen who contend for this distinction, I can see nothing in the plain letter of the law which creates it. The argument, I think, stands fairly thus: The constitution gives to the superior court exclusive and final jurisdiction in all criminal cases, and in cases respecting the titles to land. Art. 3, sec. 1. Here, then, is one distinction between criminal cases and that class of 'civil cases' relating to real property. The inferior courts shall have cognizance 'of all other *civil cases*.' Art. 3, sec. 1. Here, then, is another distinction between criminal cases and 'all other civil cases,' cognizable in the inferior courts; and, *ex concessu* of counsel, there is nothing in the constitution which excludes the inferior courts from sustaining a jurisdiction over equity suits, under the sweeping clause of 'all other civil cases.' But the third section of the judicial act of 1799 is, I think, conclusive as to the scope and latitude which should be allowed the terms 'civil cases.' It declares that the said superior and inferior courts shall have full power and authority to hear and determine all causes, both *civil and criminal*, of which they shall severally have jurisdiction. Now the term 'civil' must evidently mean all cases (whatever technical appellation

they may assume, in the shape of an action or chancery bill) which cannot legally be denominated criminal cases. The 53d section of the judicial act of 1799 confers a chancery jurisdiction upon the superior courts. Therefore equity proceedings must be denominated 'civil cases,' agreeably to the mode of classification adopted in the 3d section of the judicial act; and I may add, that the terms 'all other civil cases,' used in the 1st section of the 3d article of the constitution, appear to authorize a similar conclusion, for the constitution speaks of only two classes of cases—criminal and civil; and it will not, I presume, be contended that the judicial department can take cognizance of cases which do not fall under the one or the other of these classes; the conclusion is thus irresistible, that if an equity case is not a 'civil case,' the court has no authority to try it. This is the dilemma we are reduced to by establishing, or rather attempting to establish, a distinction between an equity and a civil case. Upon the second ground of the motion, I am, therefore, of opinion that an equity case is a 'civil case,' and that this bill cannot be tried under the prohibitory provisions of the act of assembly, it not being a case relating to the right of personal property." *Grimball v. Ross*, Charlton's Rep. (Ga.) 175, 181.

In *Ohio* it has been held that the mayor of the city of Cincinnati can *not* take acknowledgments under the act (13 O. L. 67) authorizing him to exercise, within the limits of that corporation, in all "civil and criminal cases," the same powers as are, or may be, delegated to justices of the peace by the laws of the State; the court, Wright, J., saying: "When the general assembly speak of 'civil and criminal cases,' we understand them to employ legal terms in their legal sense, and to describe *suits at law*. A *civil case* is a suit at law to redress the violation of some contract, or to repair some injury to property or to the person or personal rights of individuals; a *criminal case* is a public prosecution for a crime or misdemeanor. In *such cases* the mayor of Cincinnati was authorized to exercise the same powers as justices of the peace. The authority does not embrace *any other case, act, or duty* of a justice." *Shultz's Lessee v. Moore*, Wright's Ch. Rep. (Ohio) 280.

**Criminal Cases.**—The term "criminal cases," as used in the first section, third article of the constitution, has reference to such acts or omissions as are in violation of the public laws of the State, and

not to the violation of the local by-laws or police regulation; for, said Warner, J.: "The common-law definition of a *crime*, as given by Blackstone, is an act committed, or omitted, in violation of a public law. 4 Black. Com. 3. And it is in this sense that we consider the term 'criminal cases' in the constitution was intended to have been understood;" therefore violations of local by-laws of a municipal corporation, not involving the elements of offences known to the penal laws, are within the jurisdiction of such local authorities as the legislature may authorize, notwithstanding that the constitution provides that the superior courts shall have exclusive jurisdiction in all "criminal cases," except in the cases which are therein specified. *Williams v. City Council of Augusta*, 4 Ga. 509; *Floyd v. Commissioners of Eatonton*, 14 Ga. 354.

**Capital Cases.**—An indictment for a capital offence cannot, in Indiana, be found in a circuit court in the absence of the president, because the third section of the fifth article of the constitution provides: "that the president alone, in the absence of the associate judges, or the president and one of the associate judges, in the absence of the other, shall be competent to hold a court, as also the two associate judges, in the absence of the president shall be competent to hold a court, except in capital cases," etc. In this case it was contended that the constitution has delegated to the circuit court, when held by the two associate judges, general jurisdiction in all criminal cases, by empowering them to hold a court, and that the restriction on their power contained in the exception as to "capital cases," does not reach to that portion of their jurisdiction under which the grand jury is impanelled, sworn, and charged, and under which the indictment is returned into court; but that it only restrains them from proceeding further with the cause after the indictment is returned; but, said the court, Dewey, J.: "This interpretation is founded upon the meaning which those who hold to it give to the word 'cases,' as used in the exception in respect to proceedings for a capital offence. It is contended that case as there employed is synonymous with prosecution (which, according to the definition of Blackstone, is the commencement of a criminal suit by the indictment), and that it does not include the proceeding prior to the indictment. We cannot bring ourselves to concur in this construction. The same word 'cases' is used as well in that part of the constitution which

confers jurisdiction generally upon the circuit courts, as in that which restricts it when exercised by the associate judges only; and we cannot suppose that the framers of the constitution designed to use it in the same paragraph, and in relation to the same general subject, in different senses. The circuit courts, whether held by all the judges, by the president alone, by the president and one associate judge, or by the two associates, have unlimited criminal jurisdiction 'in all such cases, and in such manner, as may be prescribed by law,' except that the associate judges shall not hold a court in 'capital cases.' If this word, as used in the first instance, was designed to embrace (as undoubtedly it was) all the stages of criminal proceedings from the impelling of the grand jury to the execution of the final sentence, we know of no rule of criticism by which it must not embrace the same proceeding, when designating the crimes over which a court held by the associate judges shall not have jurisdiction. In our opinion, the circuit court, so held, has no more power to impanel, swear, and charge a grand jury, and receive an indictment for a capital crime, than it has to try the cause and pronounce sentence." *Cook v. State*, 7 Blackf. (Ind.) 165. See *Com. v. Hardy*, 2 Mass. 303.

**Case Stated.**—By Sergeant, J.: "According to the English practice, a special case is used instead of a special verdict. It is a species of special verdict. The jury find generally for either party, but subject to the opinion of the court, on a special case (stated by the counsel on both sides, or dictated by the judge), with regard to a matter of law. Leave is sometimes given to turn it into a special verdict. But in a special case, as in a special verdict, the facts proved at the trial ought to be stated, and not merely the evidence of facts. In arguing a special case, the counsel are not permitted to go out of it, and the court must judge upon it as stated. If it be so defective, that the court are not able to give judgment, they will grant a new trial, in order to have it restated. 1 Tidd's Prac. 930; 1 Arch. Prac. 192. Under the Pennsylvania practice, a special case, or as it is usually termed a 'case stated,' has been more extensively used. The parties where a real contest exists may enter an action by amicable agreement, and in that action or in one brought by process issued may agree to state certain facts for the opinion of the court; and if they desire to have the benefit of a writ of error, may insert in their agreement that

it shall be in nature of a special verdict. *Fuller v. Trevor*, 8 S. & R. (Pa.) 529. The rule, however, as to the duty of stating the facts only, and not the evidence of facts, and of submitting to the court only questions of law, is the same here as in the English practice." *Diehl v. Ihrie*, 3 Wharton (Pa.), 143, 148.

By Gibson, C. J.: "A case stated is a substitute for a verdict, resorted to for convenience and to save the expense of a trial, its purpose being not to make evidence for a jury, but to supersede the action of a jury altogether, by imparting to facts ascertained by consent the judicial certainty requisite to enable the court to pass upon the law, and give judgment on the whole; and its existence is consequently inconsistent with an issue to draw the facts again into contest." *McInghan v. Bovard*, 4 Watts (Pa.), 308, 312.

By Rogers, J.: "A case stated is a substitute for a special verdict, adopted for convenience to save the labor and expense of finding the same facts by the jury in the form of a special verdict." *Whitesides v. Russell*, 8 W. & S. (Pa.) 44.

**In Each Case.**—In a policy of insurance it was stipulated that the underwriters shall not be liable "for any partial loss on other goods, or on the vessel and freight, unless it amount to five per cent, exclusive in each case of all charges and expenses incurred, for the purpose of ascertaining and proving the loss;" and it was held that the words "in each case" in the foregoing clause do not mean "at each time of loss," but that they refer to the three several subjects insured, goods, freight, and vessel, and require a damage of five per cent to justify a claim in each case, and so successive losses on the cargo, in the course of the voyage, each less than five per cent, but in the aggregate amounting to more than five per cent are not within the exception, and are to be borne by the underwriters. *Donnell v. The Columbian Ins. Co.*, 2 Sumner (U. S.), 366.

**Facts of his Case.**—An affidavit of merits, under the New York rules of court, that the party "has fully and fairly stated the facts of his case," etc., is insufficient; it should be that he "has fully and fairly stated the case." *Fitzhugh v. Truax*, 1 Hill (N. Y.), 644.

The affidavit may be that the party has stated "this case" or "his case," but not that he has stated "his defence;" for, said Bronzon, J.: "An affidavit that the party has fully and fairly stated *this case* or *his case* to counsel fairly implies that he has stated the *whole case*, and is a sufficient compliance, in that particular,

of action, including *assumpsit* and *trover*.<sup>1</sup> Used in the phrase "in case of" to denote the contingency of an event.<sup>2</sup> Something that holds or covers anything else.<sup>3</sup>

with the 61st Rule. But an affidavit that he has stated his *defence* to counsel only implies that he has stated *one side* of the case, and is therefore insufficient." *Brownell v. Marsh*, 22 Wend. (N. Y.) 636.

Nor will it do to qualify the phraseology by adding "so far as the facts have come to his knowledge, or in any other manner, unless a sufficient excuse therefor be expressly shown." *Brown v. Toosey*, 19 Wend. (N. Y.) 616.

For the text of this 61st Rule, adopted May Term, 1840, see 22 Wend. (N. Y.) 644.

An affidavit of merits (to change the place of trial) which states that the party has fully and fairly stated "the facts of this case" to his counsel was held sufficient, and equivalent to the statement that he has fully and fairly stated "the case" to his counsel, as required by Rule 39. *Jordan v. Garrison*, 6 How. Prac. (N. Y.) 6.

But an affidavit of merits is defective which states that the defendant has stated "his case in this cause" to his counsel, instead of "the case," as required by Rule 39. Such a statement is not equivalent to the statement that "he has stated his case" generally. *Ellis v. Jones*, 6 How. Prac. (N. Y.) 296.

See generally on this subject, *Cary v. Livermore*, 2 How. Prac. (N. Y.) 170; *Bleecker v. Storms*, 2 How. Prac. (N. Y.) 161; *Richmond v. Cowles*, 2 Hill (N. Y.), 359; *Rickards v. Swetzer*, 3 How. Prac. (N. Y.) 413; *McMurray v. Gifford*, 5 How. Prac. (N. Y.) 14; *Britain v. Peabody*, 4 Hill (N. Y.), 61, and reporter's note at page 64.

**Sit in any Case.**—The Texas constitution provides that no judge "shall sit in any case" wherein he has been of counsel. This disqualification disables a district judge from sitting at the trial of a case in which he has been counsel, but not from receiving an indictment from a grand jury, nor, it seems, from making orders preliminary to the trial of such a case. "What is meant," said Winkler, J., "by the phrase 'sit in any case' is, we are of the opinion, explained by the provisions of the constitution as to what may be done when the judge is so disqualified. For instance, the parties may, by consent, appoint a proper person to try the case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is

pending. Art. 5, sec. 11. Taking these several passages in connection, it would seem that when it is said the judge "shall not sit in any case," it is intended that he shall not do what the person chosen or appointed may do—that is, "try the case." So that whilst a judge who has been counsel for either party could not sit in the trial of the case, or make any ruling which would properly arise on the trial, he would not be incompetent to preside in taking incidental orders, as, for instance, an order granting a change of venue, or entering an order appointing the person agreed upon or appointed to try the case. The disqualification of the judge to try the case would not prevent him from receiving the report of the grand jury for the term, although there be embraced in their report the return of an indictment in which he would not be qualified to sit on the trial. We find no error in overruling the defendant's motion in arrest of judgment. *Cock v. State*, 8 Tex. App. 659, 666.

1. See TRESPASS ON THE CASE.

2. **In Case of the Death.**—In wills, this and kindred phrases, when applied to a first legatee, and followed by a second legacy of the same property, have been interpreted by the courts not to mean death at any time in the future, but death within a certain period, and when no other period is indicated, within the lifetime of the testator. *Lowfield v. Stoneham*, 2 Strange, 1261; *Hinckley v. Simmons*, 4 Ves. 160; *Turner v. Moore*, 6 Ves. 567; *Cambridge v. Rous*, 8 Ves. 12; *Galland v. Leonard*, 1 Swanst. Ch. 161; *King v. Taylor*, 5 Ves. 806; *Home v. Pillans*, 2 Myl. & K., 20; *Schenk v. Agnew*, 4 Kay & Johns. 406; *Briggs v. Shaw*, 9 Allen (Mass.), 516. But see *Douglas v. Chalmer*, 2 Ves. Jr. 501; also *In re Potter's Trust*, L. R. 8 Eq. Cas. 52.

3. By the Metalliferous Mines Act, 1872 (35 and 36 Vict. c. 77, s. 23, subs. 2.): "Gunpowder or other explosive or inflammable substance shall not be taken into the mine, except in a case or canister containing not more than four pounds;" and it was held that the word "case" as used in the section must be taken to mean something solid and substantial in the nature of a canister, and that a bag of linen or calico was not such a "case." By Lord Coleridge, C. J.: "I should say that here the words 'case or canister'

**CASH.**—Ready money.<sup>1</sup>

explain one another, that the word 'case,' which is used in this place and in connection with 'canister,' must mean a 'case' in the nature of a 'canister,' not strictly speaking a canister, but a solid and substantial thing of wood or metal, or some other such solid substance, which can be covered over so as to prevent ignition from a spark. That seems a proper view of this section, because in so construing the act we give effect to the act according to its purposes. . . . I do not think the respondents gained much by referring to the subsequent act (the Explosives Act, 1875, 38 Vict. c. 17, s. 22, which enacts that the gunpowder shall be in a substantial 'case, bag, canister, or other receptacle'), for that is directed to a totally different subject, viz., the conveyance of gunpowder in the open air, and not below ground, where there is no escape. . . . It was admitted that a net, if sufficiently fine, would be a 'case' within the meaning of the act; and we are familiar with the fact that some most powerful gunpowder is made in such large grains that it could be carried in a net which need not be particularly fine to hold it. But a net would be no protection whatever in a mine. I am clearly of opinion that this bag is not a 'case' within the meaning of the act, and the justices must proceed to convict." And by Grove, J.: "I am entirely of the same opinion. . . . When I first read sec. 23 it never occurred to me that 'case' meant 'bag,' nor indeed should I have expected, until a definition was found including bag—which may be sometimes the same as a 'case'—that 'case' could include 'bag.' For 'case,' *prima facie*, to my mind means something solid—not confined perhaps to box, canister, or tin case, but something of a solid character. The counsel for the respondents, in answer to a question put to him as to 'net,' defined 'case' to mean anything which would include another thing. So perhaps a handkerchief or net might be a 'case.' . . . Can any one, except a person seeking a way out of the act, interpret the word 'case' used in s. 23 otherwise than as meaning something solid? But it is said the word 'case,' according to the dictionary, may include a bag. There are few words that cannot be used in more senses than one, and are not capable of some exceptional interpretation different from the ordinary meaning if taken from their context. I have as an author tried in vain to find words not capable of being applied

differently to my intention. Language does not admit of mathematical accuracy, and it is impossible to use words which, with all their various senses, may not be used in a different sense to that in which the author used them. Nobody reading this act by ordinary common-sense would say that in an act providing against accidents from explosion of gunpowder the provision that 'It shall not be taken into the mine except in a case or canister,' means that it may be taken in a thin calico bag or even in a net, because a net would include some kinds of gunpowder. Every one would understand the word 'case' there to mean something solid, something permanent, which would save the gunpowder from being exploded. . . . Bag is not, however, the ordinary meaning of the word 'case,' and I have not the least doubt that it is not the meaning intended by this act. I am of opinion that case in sec. 23 means—as 'canister' means—something solid and capable of reasonably protecting gunpowder taken into a mine, one of the very sources of danger against which the act is directed. Gunpowder is not to be conveyed into a mine except in something that will protect it. A 'case' or 'canister' would protect it from a spark or hot cinder which would be almost certain to explode it if only in a thin bag, and still more so in a net." Foster v. Diphwys Casson Slate Co., L. R. 18 Q. B. Div. 428; s. c., 56 L. J. Rep. Magistrates' Cases, 23.

1. "A sale for *cash* is a sale for the money in hand: at least such is the general meaning of the term." By Elmer, J., Steward v. Scudder, 24 N. J. Law, 96, 101.

"In all sales for *cash*, the money must be paid when the property is delivered. It is wholly inconsistent to claim that a sale for cash means a sale on a credit for a week or ten days. If the commission merchants in New York have adopted such a custom as was contended for and testified to, it must be for their own accommodation, and cannot be recognized as obligatory on those who intrust to them property to be sold for *cash*." By Williams, C. J., Bliss v. Arnold, 8 Vt. 252.

But in a Missouri case the court said, Gantt, P. J.: "A sale for *cash*, or a sale which is called a *cash* transaction, the term being interpreted in the sense in which the merchants of St. Louis use it, is something different from a sale of goods to be paid for on delivery. Of



course a sale of goods to be paid for on delivery may in one sense be termed a sale for *cash*; but the interpretation put on the phrase 'a *cash* transaction,' or 'a *cash* sale,' by the course of dealings in St. Louis, demonstrates that often what is thus characterized repudiates the idea of payment at the time when the goods come to the possession of the purchaser. It is distinctly shown that it is quite consistent with the definition practically given to this phrase by the well-understood custom of the merchants of St. Louis, that an interval of thirty days may elapse between delivery and payment, and yet that the transaction may be called and recognized by every one as a '*cash* transaction.' It follows that a 'sale for *cash*,' a '*cash* sale,' or a '*cash* transaction' is something, as known to the merchants of St. Louis, not to be confounded for a moment with a sale by the terms of which the goods sold are to be paid for on delivery. The two expressions are not convertible; and every instruction which in terms treats them as convertible, or which assumes their convertibility, is liable to mislead a jury—indeed, can hardly fail to have that effect. Now, there was no evidence before the jury that the goods in this case were to be paid for on delivery. There was evidence that the sale was for *cash*, or that the transaction was what is called a '*cash* transaction.' And what this phrase meant we have already seen." St. Louis Type Fdry. v. Union Printing Co., 3 Mo. App. 142, 149.

Where a plaintiff in execution, desiring to purchase the defendant's land at a low price, ordered the sheriff to sell for specie, the order was indorsed on the execution, but no such condition was stated in the advertisement. On the day of sale a junior creditor offered \$3000 for the land in bank bills. His offer was refused, and the land was sold to a third person for \$1000. It was held that the sale was void as against the junior creditor, and at his instance it was set aside, the court, O'Neal, J., saying: "To enable persons to buy they ought to be apprised of the terms on which the property is to be sold. The usual terms of a sheriff's sale are *cash*. The term *cash* has two meanings—one a payment in current bills, the other in specie. The first is the popular, the latter the legal meaning. The former has, in common parlance, entirely supplanted the latter. An advertisement that the sale was to be for *cash* would be understood by every one to be for current bills. A sale made for specie, under such a notice, was anything else than

fair. It was, in fact, a sale without being advertised, for one of the most important conditions of the sale was not disclosed in the advertisement. In this respect the sale was void for want of authority on the part of the sheriff to sell." Farr v. Sims, Rich. Eq. Cas. (S. Car.) 122, 131.

But where property is advertised by the commissioner to be sold for cash, it was held no variance for him to announce at the sale that payment would be received in United States treasury notes, the court, Carroll, Ch., saying: "The mortgaged property was advertised to be sold for *cash*, and immediately before the sale it was announced that payment would be received in United States treasury notes. It is objected that *cash* means coin, and that the premises were therefore sold upon other terms than those specified in the advertisement of sale. It would be difficult to show that the term *cash* in the notice of sale was intended to mean or actually imported anything else than ready money, in contradistinction to credit. That it does not mean coin when employed in an advertisement of sale is shown by the very case cited to sustain the objection (Farr v. Sims, Rich. Eq. Cas. 131)." Meng v. Honter, 13 Rich. Eq. (S. Car.) 210.

When the terms of a sale by auction require a "cash payment," the auctioneer has no authority to receive as payment a check upon a bank in which the drawer has at the time no funds; and the vendor is not bound by the act of the auctioneer, though he omits to notify the vendee that he repudiates it. Broughton v. Silloway, 114 Mass. 71. See Sykes v. Giles, 5 M. & W. 645; Williams v. Evans, L. R. 1 Q. B. 352.

Where the statement of a mechanic's lien contained the following clause: "That the terms, time given, and conditions of said contract are and were *cash*," it was held not to be a compliance with the Code Civ. Proc. § 1187, requiring a statement of the terms, time given, and conditions of the contract, the court, Sharpstein, J., saying: "On behalf of appellant it is insisted that the requirement as to 'terms, time given, and conditions of his contract' is not fulfilled by the statement that they 'were and are *cash*.' . . . The only question which we can determine is, whether there has been a substantial compliance with them. Whether the word *cash* sufficiently shows what the terms and conditions of the contract were, and what time was given, is the question which we have to decide. In respondent's brief it is said that, 'in modern times there is no word in the



English language so pregnant with meaning as the little word *cash*, used in the proper relation; and it is further said in the same connection, that 'it contains a world of significance.' On turning, however, to the standard dictionaries of the English language we find that its primary meaning is 'a box,' and that its common meaning is 'money,' and that it sometimes means 'ready money.' Accepting these definitions as probably correct, it does not seem to us that the word *cash*, when used in the connection in which it is in this case, signifies anything. Assuming that the contract in this case was of the most simple character, consisting of an agreement that one of the parties should furnish certain materials to be used in the construction of the buildings which were being erected upon the defendant's premises, and that the other should pay a stipulated price for said materials upon the delivery of them upon said premises or elsewhere, would the word *cash* indicate to a reasonable certainty that these were 'the terms, time given, and conditions' of the contract? If a witness were asked to state before a court and jury 'the terms, time given, and conditions' of such a contract, would the answer *cash* be considered satisfactory? It is conceded that, if time had been given, *cash* would not be the appropriate word to express the 'terms, time given, and conditions' of the contract. In that case the word 'credit' would throw just as much light upon the terms, etc., of the contract as the word *cash* does in this case. To hold that the statement in this case, in respect of 'the terms, time given, and conditions of his contract' is a compliance with the law, would be in effect to hold that a compliance with it in this respect is unnecessary. This we are not prepared to do." *Hooper v. Flood*, 54 Cal. 218.

"*Cash* is money at command; ready money. Worcester. *Cash* (commerce) is money on hand, which a merchant, trader, or other person has to do business with. Bouv. Law Dict. 240. To receive a cheque, therefore, "as *cash*" is to receive it as money—*ready money*, and imports a payment of the debt for which it was given." By Barks, J., *Blair v. Wilson*, 28 Gratt. (Va.) 165, 175.

"In striving to reach the true meaning of the word *cash*, C. C. 14 directs us to take its 'most usual signification.' This word may be employed at all times as the synonym of money in general; but Webster declares that, *primarily*, it means 'ready money, money in chest or on hand, etc.;' and in view of the definition

of the Code, art. 2439, declaring a sale to be the giving of a thing 'for a price *in current money*,' the use of this word *sale*, in conjunction with the word *cash*, so modifies the latter as to exclude the idea of its use as expressive of *money* as a consideration, in contradistinction to goods, property, etc., as in barter. This results, for if anything but *money* be taken the contract is not under our law a *sale*, but an 'exchange,' lease, etc., according to its circumstances. The only sense, therefore, permissible in this connection for the term *cash sale* is the primary one of a sale for ready money as distinguished from one upon credit. Having concluded that where a person, by expression or implication, stipulates for *cash*, what he reserves is the right to collect his money at will, I do not feel justified in going to the extent of intimating that where parties have actually settled upon a definite period, however short, during which payment may be withheld, the sale is nevertheless for *cash*. Such a state of facts comes too clearly within Webster's definition of *credit*, No. 11: 'time given for payment for lands or goods sold on trust, as a long or short credit.'" By McGloin, J., *Delaume v. Agar*, McGloin Rep. (La.) 97, 104.

But in a Maryland case the court held that where a sale of goods is made for *cash*, an offer by the vendee to pay in the vendor's own overdue notes was a compliance with the condition, Mason, J., saying: "A *cash* payment, in ordinary parlance, is understood in contradistinction to a *credit payment*; and there is no more reason for supposing that the *first* is to be made in *money* than that a deferred or credit payment is when due. Each payment must be made in the same way. The only difference, as before remarked, is that one must be made at the time of sale or delivery, the other when the credit has expired. What discharges the one will also discharge the other." *Foley v. Mason*, 6 Md. 37, 51.

*Cash*, in the sense used in the statute (authorizing the sale of decedent's lands: Rev. Code, §§ 2228, 2079, 2080, 2090), and in the order of the court authorizing this sale, means money; that is, such a currency as was good as a legal tender in payment of debts under the constitution and laws of the United States, or such a currency as was convertible into such a legal-tender currency without loss to the estate to which it was paid. It does not mean the "war currency" of the so-called Confederate States. Index to Rev. Code, p. 891, §

2134. This was not *cash*, and a payment in it was not a compliance with the terms of this sale. Const. U. S., art. I, § 10." *Kitchell v. Jackson*, 44 Ala. 302.

Gold dust is not *cash* within the meaning of a contract calling for the payment of *cash*; for, said the court, Bennett, J.: "By the contract the lumber was to be paid for in *cash*, and gold dust is not *cash*. The defendants, however, could receive it at such price as they chose in lieu of *cash*, the same as they might accept any other article of merchandise instead of *cash*. They did receive it at \$15.50 per ounce—the plaintiff paid it at that valuation; and though he paid it, as he says, under protest, his protest was a nullity. If gold dust was in truth, at \$16 the ounce, equivalent to *cash*, why did he not exchange it at that rate for *cash*, and make his payment in that about which there could be no question? Gold dust is constantly fluctuating in its market value; it is an article of traffic like merchandise, and a payment in it is a payment for just so much as the parties agree, and no more". *Gunter v. Sanchez*, 1 Cal. 45, 49.

Bank notes, being ready money, pass as *cash* by a devise of "all that should be in testator's house at his death;" otherwise of bonds and other securities, they not being *cash*, but only evidence of so much money due. *Popham v. Lady Aylesbury*, 1 Ambler, 68. See *Southcot v. Watson*, 3 Atk. 226, 232; *Miller v. Race*, 1 Burr. 452; *U. S. Bank v. Bank of Georgia*, 10 Wheat. (U. S.) 333, 347; *Mann v. Exrs. of Mann*, 1 Johns. Chanc. (N. Y.) 231, 238. *Contra*, Bank notes are not *cash*, nor can they be brought into court and tendered as such. *Coxe v. State Bank at Trenton*, 3 Halst. (N. J.) 172.

Treasury notes are not money or *cash*. In this case the court, Hosmer, C. J., said: "I am aware of the decision made in a sister State (*Keith v. Jones*, 9 Johns. N. Y. 120), in which it is said that bank-paper, in conformity with common usage and understanding, is regarded as *cash*, and that the same observation has been made in other cases. *Miller v. Race*, 1 Burr. 452; *Grant v. Vaughan*, 3 Burr. 1516). Notwithstanding the truth of the remark, evinced by constant experience, that bank bills are voluntarily received as *cash*, I cannot admit that he who assumes to pay gold and silver coin can *compel* his creditor to receive in satisfaction bank bills of any or either of the numerous banks in our country. The creditor may always say, and this should be an impenetrable shield, *Non hac in*

*fadera veni*. Let the law be as it may with respect to bank bills, which by usage are treated as *cash*, and are the common currency of our country, there is no analogy between them and treasury notes. The latter are neither *cash* nor currency; and there is no usage to sanction or even give plausibility to their being considered as such." *Foquet v. Hoadley*, 3 Conn. 534.

**Full Cash Value.**—In the Code of California, sec. 3627, providing that "all property must be assessed at its full cash value," the term "full cash value" means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor. *Huntington v. C. P. R. Co.*, 2 Sawy. (U. S.) 503, 510.

**Estimated Cash Value.**—Where a fire-insurance policy contained this clause: "It is agreed that the aggregate amount insured in this and other companies on the above-mentioned property shall not exceed two thirds of the 'estimated cash value,'" it was held that the "estimated value" was that at the time of insurance, as placed upon the policy, for otherwise the contract would be reformed by substituting "actual" for estimated. *Elliott v. Lycoming County Mut. Ins. Co.*, 66 Pa. St. 22; s. c., 5 Am. Rep. 323.

**Actual Cash Payment and Value.**—See ACTUAL, note.

**Terms Cash.**—The words "terms cash" upon an unreceipted bill of goods sent by a wholesale to a retail dealer cannot be held, as a matter of law, to imply that the goods were paid for before they were shipped. *Wellauer v. Fellows*, 48 Wis. 105.

The words "terms cash" on the bill do not necessarily and conclusively import that the goods are not delivered until the money is paid. They may mean that the money is to be paid in a month, or in a longer or shorter time. They necessarily import nothing more than that the articles purchased are to be paid for in money, and are not to be exchanged for other articles. It is not inconsistent with any inference we can make from them to admit evidence to prove that they were sold on credit, but *prima facie* they import that there was no credit; and still it may be shown what meaning the parties attached to them. By Gilchrist, C. J., *George v. Joy*, 19 N. H. 544.

**Cash Notes.**—A promissory note made payable in foreign bills is not a "cash note," and therefore is not negotiable. *Jones v. Fales*, 4 Mass. 245. *Contra* in New York, where the note was made payable in York State bills or specie, which

**CAST.**—To throw.<sup>1</sup> Used metaphorically in the sense of to turn the balance ; cause to preponderate.<sup>2</sup>

the court held was the same thing as being made payable in lawful current money of the State. *Keith v. Jones*, 9 Johns. (N. Y.) 120.

So a promissory note payable "in bank notes current in the city of New York" is a negotiable note within the statute. *Judah v. Harris*, 19 Johns. (N. Y.) 144. See *Morris v. Edwards*, 1 Ohio, 189.

**Credit in Cash.**—An instrument in the following form: "Port of London Sea, Fire, and Life Assurance Co. To the Cashier—Fifty-three days after date, credit Messrs. P. & Co. or order with the sum of £500, claimed *per* Cleopatra, in cash, on account of this corporation. A. C., Managing Director,"—was held to be a bill of exchange, and properly declared on as such, *Creswell, J.*, saying: "*Credit in cash* clearly means 'pay over the money,'" and *Williams, J.*: "I am of the same opinion. 'Credit in cash' is equivalent to 'pay.'" *Ellison v. Collingridge*, 9 C. B. 570.

**Copper Cash.**—Chinese coin, known in China as "copper cash," composed of copper and lead and copper and nickel, and used in China as money by count, is not entitled to be imported into this country free of duty, under Schedule I of the Tariff Act of July 30, 1846 (9 U. S. Stat. at Large, 49), as "coins, gold, silver, and copper," unless it is imported to be used as a part of the currency of this country, or is at the time of its importation a part of such currency. Otherwise it is chargeable with a duty of five per cent under Schedule H of said act, as "copper, when old and fit only to be re-manufactured." *Crocker v. Redfield*, 4 Blatch. (U. S.) 378.

**In Cash.**—Proposals for a contract requiring as security the certificate of a bank that it holds a deposit of \$4000 "in cash," are satisfied by a certificate of the deposit of \$4000 without further specification. *People v. The Contracting Board*, 27 N. Y. 378.

**For Cash.**—The terms of a deed of trust required that the real estate therein mentioned should be sold "for cash." Subsequent to the execution of the deed and prior to the sale, the property became encumbered with various liens. At the sale the purchaser paid for the property only a portion of the sum named as the purchase-money, but gave his notes to the holders of the liens for the balances due them over and above the amounts realized by them at the sale, and in consideration of these notes the lien-holders

yielded up their claims against the maker of the deed of trust. *Held*, that the notes so given were equivalent to "cash" placed in the hands of the trustee. *Mead v. McLaughlin*, 42 Miss. 198.

1. **Cast Away.**—In charging the jury in an indictment for "casting away" and destroying a vessel, of which the defendant was owner, on the high seas, with intent to prejudice the underwriters, *Washington, J.*, said: "Before the prisoner can be found guilty, you must be satisfied of the following facts: 1st. That Johns was the owner of *The Enterprise*: this is acknowledged. 2d. That she was insured: this is proved. 3d. That she was 'cast away' or otherwise destroyed. This is a mixed question of law and fact. The question of law is new; and in giving a legal definition of those words we have very few sources of information to resort to. But after the fullest consideration which we have been able to give the question, we are of opinion that to 'destroy a vessel' is to unfit her for service beyond the hopes of recovery by ordinary means. This, as to the extent of the injury, is synonymous with 'cast away'; it is the general term. 'Casting away' is, like burning, a species of destruction. Both of them mean such an act as causes the vessel to perish, to be lost, to be irrecoverable by ordinary means. Whether upon the evidence, and agreeable to this definition, *The Enterprise* was 'cast away' or destroyed is a matter of fact for your decision." *U. S. v. Johns*, 1 Wash. C. C. (U. S.) 363, 371; s. c., 4 Dall. (Pa.) 412; *U. S. v. Vanranst*, 3 Wash. C. C. (U. S.) 146.

2. **Casting Vote.**—Where a statute relating to religious corporations provided that no board of trustees should be competent to transact any business "unless the rector, if there be one, and at least one of the church-wardens, and a majority of the vestrymen be present; and such rector, if there be one, and if not, then the church-warden present, or if both the church-wardens be present, then the church-warden who shall be called to the chair . . . shall preside at every such meeting or board, and have the 'casting vote,' the court *held* that this did not mean that the chairman should have the 'casting vote' only in case of a tie arising upon the votes of the other members, but that the term 'casting vote,' as used in that section, is to be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring,

**CASUAL.**—Happening without design and without being foreseen or expected; coming by chance; accidental.<sup>1</sup>

to give a second vote; the court, Gilbert, J., saying: "The question, then, is, What is the legal signification and effect of the phrase, 'and have the casting vote'?" Does the calling a church-warden to the chair annul for the time being his right as a constituent member of the corporate body or absolve him from the execution of any trust or duty devolved upon him as such member? No authority for such a proposition was cited, except the learned treatise of Mr. Curtis on Parliamentary Practice. This author does, indeed, in his commentary on the practice of legislative assemblies, in the absence of express regulations, sustain the position of the relator's counsel. But he shows at the same time that the reasons for such practice are peculiar to that kind of assembly. In the English House of Commons the Speaker never votes but when there is an equality without his 'casting vote,' which in that case creates a majority; but the Speaker of the House of Lords has no 'casting vote,' and in case of an equality the noncontents, or negative voices, have the same effect and operation as if in fact they were a majority. 1 Bl. Com. 181 n. The practice in the Congress of the United States and in the legislature of this State is different. Neither the Vice-president of the United States nor the Lieutenant-governor of this State, as presiding officer of the Senate, has any vote unless the votes be equally divided. The Speaker of the House of Representatives of the United States and of the Assembly of this State each have a vote. The rule of the common law applicable to corporations, however, is uniform and well settled, and it is applicable to religious societies incorporated under our law. They do not belong to the class of ecclesiastical corporations in the sense of the English law, but are civil corporations governed by the ordinary rules of the common law. *Robertson v. Bullions*, 1 Kern. (N. Y.) 243. In corporations consisting of an indefinite number, a major part of those who are existing at the time are competent to do the act. But when the body is definite, as it is in this case, there must be a major part of the whole number, for it is a special appointment. *Rex v. Varlo*, Cowp. 250; *Rex v. Bellinger*, Com. 203. This rule of the common law has been expressly declared by the statute. 2 R. S. 555, § 27; *Horton v. Garrison*, 23 Barb. (N. Y.) 176. As a majority of the vestry did not vote

in favor of calling the relator, he was not, therefore, called or elected, unless the statute giving the chairman a 'casting vote' is to be construed as meaning a vote only in case of a tie arising upon the votes of the other members. The plain reading of the statute does not admit of such construction. It first vests the power of election in a body of which the chairman is a constituent member. This is a grant to every such member of a right to vote. It then contains another grant of power to the presiding officer, *virtute officii*, in the words 'he shall have the casting vote.' What is the legal effect of the latter grant? By the common law a 'casting vote' sometimes signifies the single vote of a person who never votes but in the case of an equality; sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. 1 Bl. Com. 181 n.; Jac. Law Dic., Parliament, 7. I think that in the statute under consideration the term 'casting vote' is used in the latter sense. 1 Bl. Com. 478 n.; Cowp. 377. It is true that a double vote is not allowed in corporate meetings, except by express statute (*Anon.*, Loft's Rep. 315; 15 Vin. 214), but that it ought to be allowed where the statute is clear cannot be doubted. In *Rex v. Giniver*, 6 T. R. 732, a charter had been granted creating a corporation, and giving the bailiffs and aldermen, or a major part of them, power to choose a senior bailiff. A by-law was passed giving to the senior bailiff the 'casting voice,' in cases where, in the election of bailiffs, aldermen, or other officers, the voices should happen to be equal. The court held the by-law to be void, because it was contrary to the constitution of the charter; but it was tacitly conceded that if the provision of the by-law had been incorporated in the charter the senior bailiff would have had, in case of an equality of votes, a double vote. Lord Kenyon, C. J., and Lawrence, J., expressly asserted that such would have been the effect of the by-law if it had been valid." See also *State v. Adams*, 2 Stew. (Ala.) 231; *Rex v. Bumpstead*, 2 B. & Ad. 699; *People v. Rector*, etc., *Church of the Atonement*, 48 Barb. (N. Y.) 603.

1. Webster.

**Casual poor** are such poor persons as are suddenly taken sick or meet with some accident when from home, and are thus providentially thrown upon the charities.

## CASUALTY—CATALOGUE—CATCHING BARGAIN.

**CASUALTY.**—Accident; that which comes by chance or without design, or without being foreseen.<sup>1</sup>

**CATALOGUE.**—A list or enumeration of the names of men or things, disposed in a certain order.<sup>2</sup>

**CATCHING BARGAIN.** (See also EQUITY; FRAUD; POST-OBIT.)

*Definition, 37.*

*Equitable Doctrine, 38.*

*Who are Expectant Heirs, 40.*

*Adequacy and Valuation, 40.*

*Exceptions, 41.*

*Confirmation and Acquiescence, 42.*

*Statutory Enactments, 42.*

**1. Definition.**—An agreement made with an expectant heir for the purchase of his expectancy at an inadequate price.<sup>3</sup> Any contract for an inadequate consideration, made with an expectant heir, to be performed on his part when his expectancy shall come into possession.<sup>4</sup>

of those among whom they happen to be; and when in such case the parish officers afford relief they have no remedy over for the money expended—not even against the parish where the person relieved was regularly chargeable. *Force v. Haines*, 2 Harr. (N. J.) 405.

1. Webster.

An unjust condemnation or sentence is not such a casualty as a marine insurer must answer for. *Vanderheuvcl v. United Ins. Co.*, 2 Johns. Ca. (N. Y.) 127, 160.

Casualties in the title to a portion of a statute was held to mean casualties resulting in death in *Nothard v. Pepper*, 17 C. B. (N. S.) 51.

In an insurance policy it was provided that if the premises "be damaged or destroyed by the bursting of a boiler or by explosion from any cause, this policy shall be null and void the instant the casualty by explosion occurs." *Held*, the word "casualty" referred to the damage or destruction of the premises mentioned in the condition, and not to a fire caused by the explosion. *Waldeck v. Insurance Co.*, 56 Wis. 98.

**Casualties of War.**—The shooting and killing, by ununiformed men bent on robbery, of one engaged on the construction of a bridge under the direction of the military authorities during a war, but holding no office of a military character, is not within the meaning of this phrase as used in an insurance policy. *Wells v. Conn. Mut. L. I. Co.*, 48 N. Y. 34.

**Casualty or Necessity.**—Leaving a homestead because unable to make a living on it is not a case of "casualty or necessity." "The word 'casualty' evidently refers to some sad accident—as fire or flood or some social or family disaster or misfortune—which causes a temporary absence.

... The two words may fairly imply various other events impossible to enumerate; but no proper construction can make them cover an abandonment for years induced by the fact that the owner has found elsewhere a location deemed more advantageous." *Thompson v. Tillotson*, 56 Miss. 36.

**Inevitable Casualties** in a lease means only such casualties as are inevitable by the lessee, and not such as might not be avoided by the united efforts of the whole society. Destruction by fire arising from a cause unknown is such an inevitable casualty. *Hodgson v. Dexter*, 1 Cr. C. C. 109.

**Unavoidable Casualties** in a lease upon injury or destruction from which there is to be an abatement of rent means "events or accidents which human foresight, prudence, and sagacity cannot prevent," and does not include an injury from the failure of the landlord to repair the adjoining tenements. *Welles v. Castles*, 3 Gray, 323.

2. Webster.

An expired lease offered in evidence in an action for not farming the land in accordance with the covenants contained therein, is not a schedule, catalogue, or inventory within the meaning of an act inquiring such writings to be stamped. *Strutt v. Robinson*, 3 B. & Ad. 395.

3. Bouv. L. D.

4. The form of the transaction is of no moment: it may be a sale, loan, mortgage, annuity, or *post-obit* bond. *Beynon v. Cook*, L. R. 10 Ch. Ap. 389; *Peacock v. Evans*, 16 Ves. 512; *Emmet v. Tottenham*, 10 Jur. N. S. 1090; *Bromley v. Smith*, 26 Beav. 644; *Curling v. Townsend*, 19 Ves. 628; *Beynon v. Fitch*, 29 Beav. 570; *Butler v. Duncan*, 47 Mich. 94; s. c., 41 Am. Rep. 711.

**2. The Equitable Doctrine.**—Such agreements are held to be infected with fraud, for which equity affords relief. The fraud is always presumed or inferred from the circumstances or conditions of the parties contracting. The transaction is a fraud upon the ancestor or person from whom the expectancy is derived.<sup>1</sup> But there is also an equity more strictly and directly personal to the heir; a necessitating distress on his part or an inequality between the parties always presumed to exist.<sup>2</sup> The *onus* is therefore cast upon the person dealing with an expectant heir to show that the transaction was reasonable and fair, and the consideration adequate.<sup>3</sup> If this

It is not even necessary that the contingency of coming into possession be stated, so long as the creditor knows that the fund for payment of his debt depends upon his debtor's surviving his ancestor. *Chesterfield v. Janssen*, 2 Ves. 125; 1 L. C. Eq. 541.

1. "The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of their fathers, etc., against which relief always extended. These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain. . . . In most of these cases have occurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances and resorting to them for advice, which might have tended to his relief; this misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand." Lord Hardwicke in *Earl of Chesterfield v. Janssen*, 2 Ves. 125; s. c., 1 L. C. Eq. 541; *Earl of Aylesford v. Morris*, L. R. 8 Ch. Ap. 492; *Earl of Aldborough v. Trye*, 7 C. & F. 436; *Boyton v. Hubbard*, 7 Mass. 112.

2. *Earl of Aylesford v. Morris*, L. R. 8 Ch. Ap. 492.

"The whole doctrine with respect to an expectant heir assumes that the one party is defenceless and exposed, unprotected to the demands of the others, under the pressure of necessity." *King v. Hamlet*, 2 M. & K. 456; s. c., 3 C. & F. 208.

"Fraud does not here mean deceit or circumvention: it means an unconscientious use of the power arising out of the circumstances and conditions of the parties." *Aylesford v. Morris*, *supra*; but see remarks of Sir G. Jessel, M. R., in *Beynon v. Cook*, L. R. 10 Ch. Ap. 389.

"The doctrine has nothing to do with fraud." *Bowes v. Heaps*, 3 V. & B. 117.

"It has been laid down in case after case that the court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and if it is what it calls a hard bargain, sets it aside." In *Cribbens v. Markwood*, 13 Grat. (Va.) 495, on the other hand, the court, in the absence of evidence of fraud, refused to inquire into the adequacy of the consideration.

3. *Wiseman v. Beake*, 2 Vern. 121; *Cole v. Gibbons*, 2 P. Wms. 290; *Kendall v. Beckett*, 2 R. & M. 88; *Bawtree v. Watson*, 2 M. & K. 330; *Davies v. Cooper*, 5. M. & C. 270; *Edwards v. Brown*, 4 Coll. 100; *Gowland & De Faria*, 17 Ves. 20; *Peacock v. Evans*, 16 Ves. 512; *Woodroffe v. Allen*, 1 H. & J. 73; *Sewell v. Walker*, 12 Jur. 1041; *Addis v. Campbell*, 4 Beav. 401; *Bromley v. Smith*, 20 Beav. 644; *Salter v. Bradshaw*, 20 Beav. 161; s. c., 28 L. J. Ch. 426; *St. Albyn v. Harding*, 27 Beav. 11; *Foster v. Roberts*, 29 Beav. 47; *Jones v. Ricketts*, 31 Beav. 130; *Sharpless v. Leach*, 31 Beav. 491; *Dally v. Wonham*, 33 Beav. 154; *Benyon v. Fitch*, 35 Beav. 570; *Edwards v. Burt*, 2 De G., M. & G. 55; *Croft v. Graham*, 2 De G., J. & S. 155; *Hiucksman v. Smith*, 3 Russ. 433; *Talbot v. Staniford*, 1 J. & H. 484; *Earl of Aldborough v. Trye*, 7 C. & F. 436; *In re Salter's Trusts*, L. R. 11 Ch. D. 227; *Earl of Aylesford v. Morris*, L. R. 8 Ch. Ap. 492; *Beynon v. Cook*, L. R. 10 Ch. Ap. 389; *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 11 Eq. 275; *Shelly v. Nash*, 3 Madd. 235; *Smith v. Kay*, 7 H. L. C. 750; *Bacon v. Bonham*, 33 N. J. Eq. 614; *Butler v. Duncan*, 47 Mich. 94; s. c., 41 Am. Rep. 711; *Davidson v. Little*, 22 Pa. St. 245; *Nim-*



is not shown, the transaction will be set aside upon payment by the expectant of the amount actually advanced or paid with interest.<sup>1</sup> Inadequacy of consideration is sufficient ground upon which to have the agreement set aside, although there is no actual fraud or imposition, and the transaction is *bona fide*.<sup>2</sup> And the rule is equally

mo v. Davis, 7 Tex. 26. But see Larrabee v. Larrabee, 34 Me. 477.

"Dealing with younger heirs and for reversionary interests is also watched with the utmost jealousy, and constitutes a particular class of cases forming an exception to the general rule that, for mere inadequacy of price, a contract is not to be set aside." Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1; Juzan v. Toulmin, 9 Ala. 663; Gowland v. De Faria, 17 Ves. 20.

Such bargains, if made for inadequate consideration, are held to be contrary to the policy of the law, and as such void both at law and in equity. Boyton v. Hubbard, 7 Mass. 112. And see Poor v. Hazleton, 15 N. H. 564. In Kentucky, sales of literal expectancies are absolutely void. Alves v. Schlesinger, 81 Ky. 290.

If the purchaser shows that the transaction was reasonable and fair, and the consideration adequate, the court will not set it aside in the absence of fraud. Batty v. Lloyd, 1 Vern. 141; Wharton v. May, 5 Ves. 27; Curling v. Townsend, 19 Ves. 634; Aldborough v. Trye, 7 C. & F. 436; Bacon v. Bonham, 33 N. J. Eq. 614; Fitch v. Fitch, 8 Pick. (Mass.) 480; Fitzgerald v. Vestal, 4 Sneed (Tenn.), 258. And see Power's Ap., 63 Pa. St. 448; Miller's Ap., 31 Pa. St. 337.

Where, too, the vendor in his proposal stated the value of the *corpus* of the property, which valuation was acted upon, the burden is on him to show that he understated it. Perfect v. Lane, 3 De G., F. & J. 369.

Relief can be had against a sub-purchaser, with full notice of the original fraud. Addis v. Campbell, 4 Beav. 401; King v. Savery, 5 H. L. C. 627.

1. This is on the ground that "he who seeks equity must do equity." Earl of Aylesford v. Morris, L. R. 8 Ch. Ap. 484; Tyler v. Yates, L. R. 11 Eq. 265; s. c., 6 Ch. Ap. 665; Miller v. Cook, L. R. 10 Eq. 641. Compound interest is never allowed. Gowland v. De Faria, 17 Ves. 20.

The defendant is also entitled to compensation for expenditures made by him in lasting and valuable improvements, and generally to costs. Salter v. Beavshaw, 26 Beav. 161; Wharton v. May, 5 Ves. 27; Bowes v. Heaps, 3 V. & B. 117;

Fox v. Wright, 6 Madd. 111; Miller v. Cook, *supra*. But not to the cost of an unsuccessful reference as to value. Boothby v. Boothby, 15 Beav. 214; Edwards v. Burt, 2 De G., M. & G. 55; Jones v. Ricketts, 31 Beav. 130.

In default of payment in accordance with the decree, the action is dismissed, and costs put upon the plaintiff. Aylesford v. Morris, L. R. 8 Ch. Ap. 498.

But where there has been misconduct or fraud on the part of the defendant, or he has refused proper terms, he will be charged with costs. Beynon v. Cook, L. R. 10 Ch. Ap. 389; Emmet v. Tottenham, 10 Jur. 1090. Each party bore his own costs in Tyler v. Yates, L. R. 11 Eq. 265.

In a suit by the purchaser for specific performance, if he does not show the adequacy of the consideration, the bill will be dismissed with costs and no decree made for the repayment of a deposit. Kendall v. Beckett, 2 M. & R. 88.

2. Peacock v. Evans, 16 Ves. 512; Foster v. Roberts, 29 Beav. 467. where Sir John Romilly, M. R., said: "The burden of proof lies on the defendant to prove that the transaction was a *bona-fide* one in this sense—that a full and sufficient price was given for the reversion." "I consider the present state of the law on this subject practically to amount to this: that unless a person gives much more than the value, it is impossible to purchase a reversionary interest with safety, except under a sale by auction." It is of no moment that the defendant used no endeavor to prevail on the plaintiff to enter into the contract. "It is not every bargain which necessity may induce one man to offer, which another is bound to accept." Bowes v. Heaps, 3 V. & B. 117; Miller v. Cook, L. R. 10 Eq. 641.

"To that class of persons (expectant heirs) this court seems to have extended a degree of protection approaching nearly to an incapacity to bind themselves by any contract." Peacock v. Evans, 16 Ves. 512.

It is not necessary, therefore, for the plaintiff to show that he was in pecuniary distress at the time of the transaction. Bromley v. Smith, 26 Beav. 644; Salter v. Bradshaw, 26 Beav. 161.

In some of the American States it has

applicable, although the expectant is of mature age and perfectly understands the nature and extent of the transaction.<sup>1</sup>

**3. Who are Expectant Heirs.**—This phrase includes not only those who are literally expectant heirs and persons having expectancies, but all remaindermen and reversioners.<sup>2</sup>

**4. Adequacy and Valuation.**—There is no rule by which it is determined what is inadequacy of price. This is for the court to decide. Its measure is the difference between the price paid and the market price, which is to be ascertained by expert testimony. Small differences have been held inadequacies sufficient to warrant the setting aside of the bargain.<sup>3</sup>

been held necessary that there should be fraud and imposition in order to render the transaction void. *Varick v. Edwards*, 1 Hoff. Ch. (N. Y.) 382; *Mastin v. Marlow*, 65 N. C. 695; *Cribbins v. Markewood*, 13 Grat. (Va.) 495. And see opinions of Lords Blackburn and Gordon in *O'Rorke v. Bolingbroke*, L. R. 2 Ap. Ca. 814.

The fact that the expectant had a professional adviser is of some importance with regard to the *bona-fides* of the transaction. *Lynte v. Hodge*, 2 H. & M. 287; *Miller v. Cook*, L. R. 10 Eq. 641.

1. *Davis v. Duke of Marlborough*, 2 Swanst. 147; *Earl of Portmore v. Taylor*, 4 Sim. 182; *Bromley v. Smith*, 26 Beav. 644; *Tynte v. Hodge*, 2 H. & M., where the expectant was forty-seven years old; *Wiseman v. Blake*, 2 Vern. 121, where he was forty, a proctor and a man of experience.

2. "The phrase is used not in its literal meaning, but as including one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has a hope of succession to the property of an ancestor, either by reason of his being heir apparent or presumptive, or by reason merely of the expectation of a devise or legacy on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham v. Emmet*, 14 W. R. 3, and *Aylesford v. Morris*, 8 L. R. Ch. Ap. 484." *Beynon v. Cook*, L. R. 10 Ch. Ap. 391.

"In more modern times it has been considered not only that those who were dealing for expectancies, but those who were dealing for vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs and reversioners

the *onus* of proving that they had paid a fair price, or otherwise to undo the bargains, and compel a reconveyance of the property purchased." *Shelly v. Nash*, 3 Madd. 235; *Freeman v. Bishop*, 2 Atk. 39; *Nott v. Hill*, 1 Vern. 167; *Edwards v. Burt*, 2 De G., M. & G. 57; *Wiseman v. Blake*, 2 Vern. 121; note to *Davis v. Marlborough*, 2 Swanst. 147; *Bowes v. Heaps*, 3 V. & B. 117; *Kendall v. Beckett*, 2 R. & M. 88; *Davies v. Cooper*, 5 M. & C. 270; *Edwards v. Browne*, 2 Coll. 100; *Gowland v. De Faria*, 17 Ves. 20. *Contra*, *Boyton v. Hubbard*, 7 Mass. 112; *Cribbins v. Markewood*, 13 Grat. (Va.) 495.

One who has an estate in possession in a part of which another has a life estate is not an expectant heir. *Davidson v. Little*, 22 Pa. St. 245. But if the bulk of the property sold is reversionary, the mere fact that a small part is in possession will not prevent the application of the rule with reference to the sale of interests in reversion. *Davis v. Marlborough*, 2 Swanst. 147; *Portmore v. Taylor*, 4 Sim. 182. Otherwise where the interest is substantially an estate in possession. *Wardle v. Carter*, 7 Sim. 490.

One entitled to the income of property, subject to an annuity to another, is not an expectant heir. *Webster v. Cook*, L. R. 2 Ch. Ap. 542.

A legatee whose legacy is not to be paid for several years is not an expectant. *Parmelee v. Cameron*, 41 N. Y. 392. One expecting a legacy from a person still living is. *Bacon v. Bonham*, 33 N. J. Eq. 614.

In *Nevill v. Snelling*, L. R. 15 Ch. Div. 679, a bargain with a younger son was relieved against, though he had no expectancy; the bargain having been entered into in the hope of extorting money from the father.

3 "The material consideration is the undervalue." "Anything which can be substantially considered as inadequacy, is a ground for setting aside the contract." *Peacock v. Evans*, 16 Ves. 512; *Earl of*



**5. Exceptions to the Doctrine.**—If the agreement is entered into with the knowledge and assent of the ancestor, or person from whom the expectancy is derived or owner of the estate in possession,<sup>1</sup> or if he joins in the bargain,<sup>2</sup> it ceases to be a fraud on him, and will not be set aside. The first part of this proposition, how-

Portmore *v.* Taylor, 4 Sim. 182. In Edwards *v.* Browne, 2 Coll. 100, where the market price was £1900, and the price paid £1700, relief was granted. In Jones *v.* Ricketts, 31 Beav. 130, these prices were respectively £238 and £200. See also Edwards *v.* Burt, 2 De G., M. & G. 62; Foster *v.* Roberts, 29 Beav. 471.

The burden is upon the defendant of proving that the price paid is the fair market value, which is done by expert testimony. Edwards *v.* Burt. *supra*. In valuing the property the court is to be guided by the market value and not by actuaries' tables. Tynte *v.* Hodge, 2 H. & M. 287; Wardle *v.* Carter, 7 Sim. 490; Potts *v.* Curtis, 1 Younge, 543; Edwards *v.* Browne, 2 Coll. 100; Aldborough *v.* Trye, 7 C. & F. 436. And see Perfect *v.* Lane, 3 De G., F. & J. 369. The value is to be calculated with reference to the time of the contract, not to its result. Gowland *v.* De Faria, 17 Ves. 20. "The apparent amount of the property is not all that is to be considered; but also its nature, position, and other particulars affecting it." Edwards *v.* Browne, 2 Coll. 100.

The fact that a reversion depended on contingencies that could not be valued by actuaries, will not relieve a purchaser from the burden of proving that the full value was given. Talbot *v.* Staniford, 1 J. & H. 484; Boothby *v.* Boothby, 1 Mac. & G. 604.

1. "The extraordinary protection given in general must be withdrawn if it shall appear that the transaction was known to the father or other person standing *in loco parentis*,—the person, for instance, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession—even though such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. . . . Still more fatal to his claim of relief will it be if the father or person *in loco parentis* shall be found to have concurred in the adoption of the repudiated contract." King *v.* Hamlet, 2 M. & K. 456; s. c., 3 C. & F. 216. The soundness of this proposition is questioned.

"The son is entitled to be relieved although the father may witness his ruin

with indifference." Sugden on V. & P. (11th Ed.) 316.

It is now considered as established that the mere fact that the dealings with regard to the expectancy are known to his family and friends is not of itself sufficient to prevent relief being given. Notes to Chesterfield *v.* Janssen. 1 L. C. Eq. (6th Ed.) 682; Bispham's Eq. 220; Talbot *v.* Staniford, 1 J. & H. 484; Earl of Aylesford *v.* Morris, L. R. 8 Ch. Ap. 491.

Where the tenant for life, who was an uncle of the remainderman, hearing of the bargain which he had made respecting his interest, filed a bill to compel him to repay the money obtained with interest or be foreclosed of any relief from the bargain, and the latter elected to stand to the bargain, declaring it to be fair, he was subsequently, after coming into possession, granted relief, on the ground that he was, at the time his uncle filed the bill, laboring under the same necessity as when he entered into the bargain. Wiseman *v.* Blake, 2 Vern. 121.

The rule was held to apply where the sale was to the ancestor who took advantage of the expectant heir. Needles *v.* Needles, 7 Ohio St. 432; Talbot *v.* Staniford, 1 J. & H. 484. But see Jenkins *v.* Pye, 12 Pet. (U. S.) 241; Power's Ap., 53 Pa. St. 443.

In America it seems that the knowledge and approval of the ancestor generally renders the bargain valid. Fitch *v.* Fitch, 8 Pick. (Mass.) 480; Trull *v.* Eastman, 3 Metc. (Mass.) 121; Jenkins *v.* Stetson, 9 Allen (Mass.), 128; McBee *v.* Myers, 4 Bush (Ky.), 356; Fitzgerald, 4 Sneed (Tenn.), 258; though in these cases the consideration was deemed accurate.

On the other hand, it has been held that a sale of an expectancy, in a literal sense, even with the knowledge of the ancestor, is absolutely void, unless the latter joins in for the purpose of divesting himself of the right to make any other disposition of his property. Alves *v.* Schlesinger, 81 Ky. 290.

2. Wood *v.* Aubrey, 3 Madd. 422; Wardle *v.* Carter, 7 Sim. 490; Alves *v.* Schlesinger, 81 Ky. 290.

But in such a sale other circumstances may exist to throw the *onus* of proving an adequate consideration on the purchaser, as where undue parental influ-

ever, has been questioned, and the weight of authority is against it.

The principal rule is also inapplicable when the transaction is a family arrangement, and there is no misrepresentation or suppression, even though some parental influence is exercised, provided it be not undue.<sup>1</sup>

Nor is the rule applicable where the sale is made by auction, the presumption then being that the price is fair and adequate.<sup>2</sup> This is also the case where the price is by agreement fixed by persons of competent skill to do so.<sup>3</sup>

**6. Confirmation and Acquiescence.**—Catching bargains may be rendered valid by acts of ratification by the expectant after he comes into possession of his expectancy, remainder, or reversion, and is cognizant of his rights.<sup>4</sup> They may also become valid by acquiescence for a great length of time, after he has been relieved from his distress.<sup>5</sup>

**7. Statutory Enactments.**—It has been enacted in England that no purchase, made *bona-fide* and without fraud or unfair dealing, of any reversionary estate shall be opened or set aside merely on the ground of undervalue. This has, however, been construed not to repeal the doctrine which protects expectants in the hands of

ence has been used. *King v. Savery*, 5 H. L. C. 627.

1. *Tweddell v. Tweddell*, T. & R. 13; *Jenner v. Jenner*, 2 De G., F. & J. 359; *Hartopp v. Hartopp*, 2 Jur. N. S. 794; s. c., 21 Beav. 259; *Wakefield v. Gibbon*, 1 Giff. 401; *Williams v. Williams*, L. R. 2 Ch. Ap. 294.

There must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement which are within the knowledge of the several parties, whether such information be asked for or not. *Greenward v. Greenward*, 2 De G., J. & S. 28.

A settlement by an heir in favor of his wife and child will not be relieved against. *Shafto v. Adams*, 4 Giff. 492.

A purchase by an uncle, tenant for life of a nephew's reversionary interest in the family estate, is not a family arrangement. *Talbot v. Staniford*, 1 J. & H. 484.

2. *Shelly v. Nash*, 3 Madd. 232.

Otherwise if the sale take place under such circumstances as to affect the purchaser with notice that he is dealing with a person in distress. *Fox v. Wright*, 6 Madd. 111.

3. It is not sufficient to take the opinion of an actuary. *Edwards v. Burt*, 2 De G., M. & G. 55.

So where a fair test of the market value can be obtained from a knowledge of the highest bid at a previous attempt to sell the expectancy at auction (*Lord v. Jeffkins*, 35 Beav. 7), or where it has at

the same price been offered to and declined by many (*Moth v. Atwood*, 5 Ves. 845; *Perfect v. Lane*, 2 De G., F. & J. 369), the price may be presumed to be adequate. But see *Roche v. O'Brien*, 1 Ball & B. 330.

4. *Chesterfield v. Janssen*, 2 Ves. 125; *Cole v. Gibbons*, 5 P. Wms. 289; *Stump v. Gaby*, 2 De G., M. & G. 62; *Negley v. Lindsay*, 67 Pa. St. 228. See note 5.

5. *Sibbering v. Earl of Balcarras*, 3 De G. & S. 735; *Lyddon v. Moss*, 4 De G. & J. 104; *Lord v. Jeffkins*, 35 Beav. 7; *Turner v. Collins*, L. R. 7 Ch. Ap. 329.

Time does not begin to run against a reversioner or expectant until the reversion or expectancy has fallen into possession. "There is, I believe, no case in which, during the continuance of the same situation in which the party entered into the contract, acquiescence has ever gone for anything. It has always been presumed that the same distress which pressed him to enter into the contract prevented him from coming to set it aside; that it is only when he is relieved from that distress that he can be expected to resist the performance of the contract." Sir Wm. Grant in *Gowland v. De Faria*, 17 Ves. 20; *Salter v. Bradshaw*, 26 Beav. 161; *Beynon v. Cook*, L. R. 10 Ch. Ap. 393; *Portmore v. Taylor*, 4 Sim. 182.

The same holds good as to confirmation. *Savery v. King*, 5 H. L. C. 627.

persons ready to take advantage of their necessities, such dealings being unfair.<sup>1</sup>

**CATCHINGS.**—"Things caught and in the possession, custody, power, and dominion of a party, with a present capacity to use them for his own purposes."<sup>2</sup>

**CATTLE.**—"Domestic quadrupeds collectively, especially those of the bovine genus, sometimes also including sheep, goats, horses, mules, asses, and swine."<sup>3</sup>

1. 31 & 32 Vic. c. 4; Bispham's Eq. 221; Miller v. Cook, L. R. 10 Eq. 641; Tyler v. Yates, L. R. 6 Ch. Ap. 665; Earl of Aylesford v. Morris, L. R. 8 Ch. Ap. 484.

**Authorities for Catching Bargain.**—Story's Eq. Jur. (13th Ed.) §§ 334-348; Bispham's Eq. § 220; Sugden on Vendors and Purchasers, 277 sq.; notes to Earl of Chesterfield v. Janssen, 1 L. C. Eq. 541; note to Davis v. Duke of Marlborough, 2 Swanst. 147.

2. The term used in an insurance policy covers blubber and pieces of flesh cut from a whale and on the deck of the ship insured. Roger v. Mechanics' Ins. Co., 1 Story (C. C.), 603.

3. Webster; U. S. v. Mattock, 2 Sawy. (C. C.) 148.

Worcester's definition is practically identical, and is adopted in Bank v. Bank, 21 Wall. (U. S.) 294, and People v. Barnes, 2 Pac. R. (Cal.) 493.

It is commonly in America confined to beasts of the bovine genus. Webster. "The word originally had a more extensive and comprehensive meaning than it now has in the American States. It has still a more extended signification in English parlance; and to give the term the restricted meaning which it only possesses in general American phraseology, the Englishman still uses some qualifying adjective, such as *black* or *neat* cattle." Hubotter v. State, 32 Tex. 479.

The following have been held to be cattle within acts making it a criminal offence to maliciously kill, wound, or maim cattle: Asses. Rex v. Whitney, 1 Moody, 3. Horses. The King v. Paty, 2 Wm. Bl. 721; s. c., 2 East P. C. 1074. Mares. State v. Hambleton, 22 Mo. 452; State v. Sutton, 24 Mo. 376. Geldings. Clark's Case, 1 Lewin, 229; Mott's Case, 2 East P. C. 1075. Pigs. Russ. & Ry. 77.

A buffalo, though tamed, is not. State v. Crenshaw, 22 Mo. 457.

Under these statutes and under larceny acts and stray laws it is sufficient to describe the animal or animals in the indictment as "steer" (State v. Lange, 22 Tex. 591; State v. Abbott, 20 Vt. 537),

"beef steer" (Robertson v. State, 1 Tex. Ap. 311), "beeves" (Hubotter v. State, 32 Tex. 479), "oxen" (State v. Moreland, 27 Tex. 726; Henry v. State, 45 Tex. 84), without the use of the generic term "cattle." Or the specific term may be used in conjunction with the generic, as "a certain calf of the neat-cattle kind." Grant v. State, 3 Tex. Ap. 1.

A description in an indictment as "two cattle" is sufficient under a statute making it larceny to steal "a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog." The term covers at least a part of these. People v. Barnes 2 Pac. R. (Cal.) 493.

Under statutes requiring railroad companies to fence their lines, making them liable for neglect to do so, "cattle" has been decided to include horses. McAlpine v. Grand Trunk Ry. Co., 38 U. C. Q. B. 446. Asses. O. & M. R. Co. v. Brubaker, 47 Ill. 462. Pigs. Child v. Hearn, L. R. 9 Ex. 176. But see 7 Kan. 497 n. Mules. Railway Co. v. Cole, 50 Ill. 184. Contra, Brown v. Bailey, 4 Ala. 413.

Horses and mares are cattle within an act making owners of dogs liable for injury done by them to cattle. Wright v. Pearson, L. R. 4 Q. B. 582.

So are sheep within an act prohibiting the depasturing of Indian lands with horses, mules, or cattle. United States v. Mattock, 2 Sawy. (C. C.) 148.

A letter of credit guaranteeing drafts on shipments of cattle includes drafts on shipments of hogs. Bank v. Bank, 21 Wall. (U. S.) 294.

**Cattle-Guards**, in a statute requiring their erection by a railroad, means such appliances as will prevent animals from going on land adjoining the right of way. It will not do to limit their construction to the track or roadbed. Mo. Pac. Ry. v. Mason, 31 Kan. 337; s. c., 13 Am. & Eng. R. R. Cas. 540.

**Cattle turned Loose.**—Cattle turned into the highway to graze, under the care of a servant, are not. Sherborn v. Wells, 3 B. & S. 784.

**Driving or Conducting Cattle through** the streets on Sundays, as used in a mu-

**CAUSA.** See **CAUSE.**

**CAUSE.**—That which supplies a motive, decides action, or constitutes the reason why anything is done; hence it sometimes means the consideration for a contract.<sup>1</sup>

The origin or foundation of a thing, as of a suit or action; a ground of action.<sup>2</sup>

municipal ordinance forbidding it, does not cover the conveyance of calves in a van drawn by horses. *Triggs v. Lester*, L. R. 1 Q. B. 259.

**Fodder for Cattle.**—Barley on the way to a mill to be ground for food for hogs is fodder for cattle within an act exempting such from toll. *Clements v. Smith*, 3 El. & Bl. 238.

**Working Cattle.**—Under a statute exempting from attachment "one pair of working cattle," a bull used for work, the owner having no other cattle, is exempt. *Bowzey v. Newbegin*, 48 Me. 410.

1. *Abbott's L. D.* The cause, in the civil law, was that which rendered a contract valid; it was "the inducement which constituted a basis for the obligation." *Hare on Contracts*, 187. The following account of it is given by Pollock (*Principles of the Law of Contracts*): "Informal agreements (*pacta*) did not give any right of action without the presence of something more than the mere fact of the agreement. This something more was called the *causa*. Practically the term covers a somewhat wider ground than our 'consideration executed'; but it has no general notion corresponding to it—at least none coextensive with the notion of contract; it is simply the mark, whatever it may be in the particular case, which distinguishes any particular class of agreements from the common herd of *pacta*, and makes them actionable." P. 122. See *Thomas v. Thomas*, 2 Q. B. 851. The term has passed into modern French jurisprudence, where it has a more extended meaning, but never coinciding with the English consideration. Pollock on *Contracts*, 152. *Contra*, *Monton v. Noble*, 1 La. Ann. 192. Cause is used as synonymous with consideration in L. C. Civ. Code, §§ 984, 989.

2. *Burrill's L. D.*; *U. S. v. Rhodes*, 1 Abb. (C. C.) 28.

**Cause of Complaint.**—Where directors of the poor were authorized to adjust rates, and any person was given the right of appeal within four months after the cause of complaint had arisen, it was held that the cause of complaint was the making of an order by the directors. *The King v. Justices of Salop*, 2 B. & Ad. 145;

*Reg. v. Justices of Derbyshire*, 7 Q. B. 198.

**Cause of Removal**, in a statute, means "some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character or his fitness for the office." It is not sufficient that the duties of the office can be more efficiently performed by another. *People ex rel. Mundy v. Commissioners*, 72 N. Y. 445.

**Any Other Cause.**—Under a statute giving certain rights of a *feme sole* to any married woman whose husband, "from drunkenness, profligacy, or any other cause," shall refuse or neglect to provide for her support, "any other cause" means cause *ejusdem generis*, and does not include "mere poverty, sickness, intellectual inferiority, or physical inability of the husband, without being caused by vice." *Edson v. Hayden*, 20 Wis. 682.

A statute which permits a tenant to quit rented premises without liability for rent where they have been destroyed by the elements or any other cause, without fault of his, applies only to cases where the buildings become untenable by reason of some sudden and unexpected calamity. *Hatch v. Stamper*, 42 Conn. 28.

**Due Cause—Due Cause Shown.**—"Where a power to remove [from office] for due cause is given, the words 'due cause' operate as a limitation on the power. . . . What is 'due cause' for the removal of an officer is a question of law to be determined by the judicial department, and in the absence of any statutory provision as to what shall constitute such cause, should be determined with reference to the nature and character of the office and the qualifications requisite to fill it." *State ex rel. Gill v. Com. Council*, 9 Wis. 261. The removal in such a case is not a mere matter of judicial discretion; some unfitness must be shown. *In re Moore Mining Co.*, L. R. 12 Ch. Div. 325.

**For Cause.**—"The power to remove a person from office 'for cause' means that a reason must exist which is personal to the individual sought to be removed,

which the law and a sound public opinion will recognize as a good cause for his no longer occupying the place." *People v. The Mayor*, 19 Hun (N. Y.), 441. The cause must be a just cause; and the power can only be exerted after an opportunity given for a defence. *Haight v. Love*, 39 N. J. Law, 14.

**Good Cause—Good Cause Shown.**—A contract stipulating that it may be cancelled by either party for good cause, may be revoked for any cause assigned in good faith, the phrase being radically uncertain. *Cummer v. Butts*, 40 Mich. 332; s. c., 29 Am. Rep. 530.

"Good cause" in the phrase in a statute, "unless he is absent from the United States, or prevented by some other good cause from testifying," means a sufficient cause other than mere absence from the State. *In re Jackson*, 7 Biss. (C. C.) 280.

Under a statute providing that the report of persons appointed to appraise compensation for land taken for railroad purposes should stand unless upon good cause shown for setting it aside, the cause must be something clear and indubitable, pointing intentional or unintentional error in law or fact, or both. *V. & T. R. Co. v. Henry*, 8 Nev. 165.

A power to allow costs for good cause shown is equivalent to a power to allow such costs as they deem just and reasonable. *Whitcher v. Benton*, 50 N. H. 25.

**Irresistible Superhuman Cause** means act of God which "is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident." *Clay Co. v. Simonsen*, 1 Dakota, 453.

**Justifiable Cause** in an indictment for maliciously and without justifiable cause forcing a seaman on shore, in a foreign land, does not mean such a cause as in the maritime law would authorize a discharge; but a case of moral necessity, required for the safety of the ship and crew, the due performance of the voyage and the regular enforcement of discipline. *U. S. v. Coffin*, 1 Sumn. (C. C.) 394.

**Legal Cause.**—Relationship within the fourth degree of affinity or consanguinity is such a legal cause as to render a judge incompetent to sit on a criminal trial. *Gill v. State*, 62 Ala. 169.

**Nature and Cause.**—An indictment which charges that larceny was committed in the county to which the stolen property was brought, sufficiently notifies the accused of the nature and cause of the offence, within an act giving him a right to such notification. *Norris v. State*, 33 Miss. 373.

**Other Cause.**—Where a power is given to remove "for incompetency, improper conduct, or other cause satisfactory to the board," "other cause" means other *like* cause, i. e., one affecting the officer's fitness for the office. *State v. McGarry*, 21 Wis. 498.

**Probable Cause.** (See also MALICIOUS PROSECUTION; FALSE IMPRISONMENT.)—Where in a collection law it was provided, that where a seizure shall be made pursuant to this act the *onus probandi* shall be on the claimant where probable cause is shown for such prosecution, it is held that probable cause means not "*prima facie* evidence, or such evidence as in the absence of exculpatory proof would justify condemnation," but "less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion." *Locke v. U. S.*, 7 Cr. (U. S.) 339. It means "reasonable ground of presumption that the charge is or may be well founded." *Wood v. U. S.*, 13 Pet. (U. S.) 342; *Buckley v. U. S.*, 4 How. (U. S.) 242; *Stacey v. Emery*, 97 U. S. 642.

The same meaning is given to the term in matters of prize. *The Thompson*, 3 Wall. 155; *The George*, 1 Mason, 24.

Probable cause, in the fourth amendment to the constitution of the United States, means a probability that the crime has been committed by the person charged, of which probability the court or magistrate issuing the warrant must be satisfied by facts supported by oath or affirmation. *U. S. v. Bollman & Swartout*, 1 Cr. C. C. 373; and see *In re Coleman*, 15 Blatchford (C. C.), 406.

**Proximate Cause** of anything is "the cause which naturally leads to and which might have been expected to be directly instrumental in producing the result." *State v. R. Co.*, 52 N. H. 528. See also NEGLIGENCE; CASE, ACTION ON THE.

**Reasonable Cause**, in a statute authorizing a municipality to remove a court clerk, means just cause. *Osgood v. Nelson*, L. R. 5 H. L. 636.

Men must be considered to have had reasonable cause to believe that they were insolvent under a bankrupt law "when such a state of facts is brought to their notice in respect to the affairs of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business." *Toof v. Martin*, 13 Wall. (U. S.) 40.

The mere apprehension of future mischief is not a reasonable cause for the dissolution of a corporation on the pe-

A judicial proceeding; an action or suit, including all its steps.<sup>1</sup>  
(See also CASE.)

tition of a majority of its members. *In re Franklin Tel. Co.*, 119 Mass. 447.

Where "absence from the habitation of the other, without reasonable cause," is ground for a divorce, the reasonable cause is no other than that which would entitle the party so separating himself or herself to a divorce. *Butler v. Butler*, 4 Pa. L. J. 284; *Cattison v. Cattison*, 22 Pa. St. 275; *May v. May*, 62 Pa. 206.

The certificate of a magistrate authorizing the arrest of a poor debtor, reciting that "satisfactory cause" had been shown for the arrest, is not a compliance with an act requiring that such certificate set forth that "he is satisfied that there is reasonable cause to believe" that the charge contained in the affidavit on which the arrest is asked for is true. *Smith v. Bean*, 130 Mass. 208.

**Same Cause.**—Where a statute relieves one convicted of an assault on a woman from "all further or other proceeding, civil or criminal, for the same cause," he is exempt from suit by her husband, cause here meaning assault. *Maspar v. Brown*, L. R. 1 C. P. D. 97.

1. *Abbott's L. D.*

Cause was held to relate to civil actions only, and not to embrace *quo warranto* in *The Queen v. Seale*, 5 E. & B. 1. See *Logan v. Small*, 43 Mo. 254. But it included criminal cases in another connection in *The Queen v. Pembridge*, 3 Q. B. 901.

A garnishee order under court rules is not a decision in an "action" or "cause." *Mason v. Wirral Highway Board*, L. R. 4 Q. B. D. 459.

The term was held to mean the particular suit pending, and not the cause of action, in a statute providing that a cause should be considered as abandoned unless an appeal was taken within a certain time. *Koon v. Nichols*, 85 Ill. 155.

**Cause of Action** is "a right to bring an action which implies that there is some person in existence who can assert, and also a person who can lawfully be sued." *Bouv. L. D.* *Douglas v. Beasley*, 40 Ala. 148; *Parker v. Enslow*, 102 Ill. 272. It is the right which a party has to institute and carry through an action. *Meyer v. Van Collem*, 28 Barb. (N. Y.) 330. The right to prosecute an action with effect. *Douglas v. Forrest*, 4 Bing. 704. It is "synonymous with right of action—right of recovery, and a complaint which does not show a right of recovery fails to show a cause of action." *Graham v. Scripture*, 26 How. Pr. (N. Y.) 507. It

is composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant. These combined, it is sufficiently accurate to say, constitute the cause of action. *Veeder v. Baker*, 83 N. Y. 160.

"Cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse." Hence, where a cause of action, in order to be within the jurisdiction of a court, must have arisen within its territorial jurisdiction, the phrase means whole cause of action. Where bills were drawn and indorsed in America and dishonored in England, the cause of action did not arise in England. *Cook v. Gill*, L. R. 8 C. P. 107; *Borthwick v. Walton*, 15 C. B. 501.

Where a promise of marriage was made in Germany, and the plaintiff subsequently came to England, where he received a letter from the defendant in Germany, the cause of action was held not to have arisen in England. *Cherry v. Thompson*, L. R. 7 Q. B. 573.

The contrary has, however, been maintained. It is not the whole cause of action, but "that which in popular meaning—for many purposes in legal meaning—is the cause of action, viz., the act on the part of the defendant, which gives the plaintiff his cause of complaint." *Jackson v. Spittall*, L. R. 5 C. P. 542.

Where a promise of marriage was made outside of England, and the breach took place in England, the cause of action arose in England. *Durham v. Spence*, 8 L. R. 6 Ex. 46.

"Whatever be the form of action, the breach of duty is substantially the cause of action." *Hornell v. Young*, 5 B. & C. 259; *Bank of Commerce v. R. Co.*, 10 How. Pr. (N. Y.) 1. Hence in an action to enforce an equitable lien, the indebtedness is the cause of action. *Borst v. Corey*, 15 N. Y. 505. And the cause of action arises in the place where the debt is contracted or originates. *Steele v. Commissioners of Rutherford*, 70 N. C. 157. "Cause of action," however, is not synonymous with "chase in action." *Bank v. R. Co.*, 10 How. Pr. (N. Y.) 1.

There is not a complete cause of action until there is some one who can sue. *Parker v. Enslow*, 102 Ill. 272. Hence the cause of action does not accrue until there is such a person. *McKerras v. Gardiner*, 3 Jus. (N. Y.) 137.

To effect by agency, power, or influence; to be the occasion of.<sup>1</sup>

In an action by an administrator on a bill of exchange, payable to the decedent, but accepted after his death, the statute of limitations begins to run, not from the time the bill became due, but from the granting of the letters, at which time there was first a person to sue and the action accrued. *Murray v. East India Co.*, 5 B. & Ald. 204. There must likewise be some one who can be sued. *Douglas v. Forrest*, 4 Bing. 704.

The action accrues "whenever the defendant's liability becomes perfect and complete, whenever the defendant has done an act which makes him liable in damages, and there is a person *in esse* to whom damages ought to be paid, and who may sue for and recover the same." In an action for damages for injury resulting in death, brought by the widow, the statute of limitations begins to run at the death. *Kennedy v. Burrier*, 36 Mo. 128. But when the action must be brought by the personal representative, the statute does not begin to run until his appointment. *Andrews v. R. Co.*, 34 Conn. 57.

A running account is "one cause of action" within a statute forbidding the splitting of such a cause. *Bonsey v. Wordsworth*, 18 C. B. 325. But where one has a claim against another for money loaned, and also for goods sold and work and labor done, these are not one cause of action. *Kimpton v. Willey*, 9 C. B. 719.

In an act giving a court jurisdiction of suits when the cause of action shall have arisen or the subject of action shall be situated within a certain city, cause of action refers to personal actions only. *Bennett v. Erving*, 4 Robt. (N. Y.) 671.

**Cause Affecting Persons Who, etc.**—The incompetency of witnesses on account of color by the law of a State does not make a criminal action a cause "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by" an act protecting their civil rights and furnishing the means of their vindication. The act refers only to parties to a suit. *Blyew v. U. S.*, 13 Wall. (U. S.) 581, overruling *U. S. v. Rhodes*, 1 Abb. (U. S.) 28.

**Causes and Suits held** not to include injunctions, they having been provided for in another part of the same act. *Cocke v. Pollock*, 1 H. & M. (Va.) 515.

**Cause or Matter.**—A proceeding for contempt is a cause or matter within a

removal statute. *Lamonte v. Ward*, 36 Wis. 559.

**Causes Remaining Untried.**—An award of referees upon which no judgment has been rendered is a "cause remaining untied." "A cause is not completely tried within the meaning of the act until judgment is pronounced." *Preston v. Englebert*, 5 Binn. (Pa.) 390.

**Any Party to a Cause** includes a beneficial plaintiff. *Darling v. Sherwood*, 2 U. C. L. J. N. S. 130.

**Civil Cause.**—The right of an individual to a penalty incurred under a statute in a civil cause, within the section of a bill of rights which prohibits the passage of retrospective laws for the decision of civil causes. *Dow v. Norris*, 4 N. H. 16.

Proceedings for the violation of a city ordinance is neither a civil cause nor a criminal prosecution. *Withers v. State*, 36 Ala. 252.

A prosecution for bastardy, the object of which is to procure an order of filiation upon the putative father, and thus compel him to aid the mother in supporting the child, is not a civil cause. *Sweet v. Sherman*, 21 Vt. 23.

A *mandamus* is not a "civil cause in law or equity." *Williamsport v. Commonwealth*, 90 Pa. 498.

**Final Disposition of the Cause** in a bankrupt act means the final disposition of the administration of the estate, and the discharge of the assignee. *In re Brightman & Lossee*, 14 Blatchf. (C. C.) 130.

**Good Cause of Action** can mean no more than cause of action. A cause of action, not good, is no cause of action. *Parker v. Enslow*, 102 Ill. 272.

**Suit, Controversy, Matter, or Cause Depending.**—An indictment with issue joined on a plea of not guilty is within the meaning of this phrase. *U. S. v. Reese*, 4 Sawy. 634.

**This Cause.**—A stipulation that certain testimony taken on a former trial "may be read in evidence on the trial of this cause," applies to any subsequent trial, and not merely to the first. *Hincley v. Beckwith*, 23 Wis. 328.

#### 4 Webster.

Under an act making a city liable for the destruction of property by mobs, unless the destruction was caused by the owner's illegal or improper conduct, the destruction is so caused if, without such conduct on his part, it would not have occurred. *Palmer v. City of Concord*, 48 N. H. 211.

**Cause to be Taken.**—If A delivers poison to B, both intending B to take it

**CAVEAT—CEASE—CEDE—CEDULE—CELEBRATE.**

**CAVEAT.** (See also **PATENTS**; **PROBATE**; **EXECUTORS**; **WILLS**.) (Lat., "Let him beware.")—A notice not to do an act, given to some officer, ministerial or judicial, by a party having an interest in the matter.<sup>1</sup> Especially a caution entered in the court of probate to stop probates, administrations, and such like from being granted without the knowledge of the party that enters.<sup>2</sup>

In patent law, a notice filed in a government office to prevent a patent's being issued on a particular device until the caveator shall have an opportunity to establish his priority of invention.<sup>3</sup>

**CEASE.** See note 4.

**CEDE.**—To yield up.<sup>5</sup>

**CEDULE.**—Technical name of an act under private signature in French jurisprudence.<sup>6</sup>

**CELEBRATE.** See note 7.

to cause an abortion, and B afterwards, in the absence of A, takes it, this is a causing to be taken by A within a statute punishing the same. *Reg. v. Wilson*, 7 Cox (C. C.), 190.

**Administer, or Cause and Procure to be Administered**, when used, in a statute, of poison, constitute one offence, and not separate ones. *Le Beau v. People*, 34 N. Y. 223.

1. *Bouv. L. D.*

2. *Williams on Executors*, 581. It is a mere cautionary act by a stranger to prevent the court from doing any wrong.

3. *Bouv. L. D.* See *Walker on Patents*, 143; *Bump on Patents*, 208.

In the United States it is used for the purpose of protecting persons who have made a new invention or discovery, and desire further time for maturing the same. *Rev. Stats.* 4902.

A *caveat* is also used to prevent the issuing of a land patent. *Wilcox v. Calloway*, 1 Wash. (Va.) 50; *Currie v. Martin*, 3 Call (Va.), 28; *Harper v. Baugh*, 9 Grat. (Va.) 508; *Caruthers v. Eldridge*, 12 Grat. 670; *Hanna v. Munn*, 3 Md. 230; *Hughes v. Stevens*, 7 Wr. (Pa.) 197.

4. **Cease to be Operated.**—Where a policy of insurance becomes void if the premises insured, being a manufacturing establishment, shall "cease to be operated" without agreement, etc., a permanent cessation is meant, not a temporary one, caused by the prevalence of an epidemic of yellow-fever. *Poss v. Ins. Co.*, 7 Lea (Tenn.), 704.

**Cease to Reside.**—A temporary removal is not such removal as to vacate an office which is declared vacant by the charter creating it when the occupant "ceases to reside" in the ward. *State v. Camden*, 39 N. J. L. 57.

**Cease to Inhabit.**—A pauper having

purchased a leasehold interest, occupies the premises for more than forty days, but finally quits and ceases to reside within ten miles. *Held*, he had gained a settlement in the parish, which was lost by his removal. *Reg. v. St. Giles*, 2 Q. B. 448.

**Ceased to be Thereon.**—A statutory provision that a school-house lot shall revert to an owner when a school-house has ceased to be thereon for two years, does not apply where such house has not been built nor begun, though two years have elapsed since the choosing of the location. *Jordan v. Haskell*, 63 Me. 189.

**Ceasing to Reside.**—A justice of the peace is not disqualified from conducting his office because an act of legislature has placed him in a new township, though the State constitution provides that his commission shall become vacant upon his ceasing to reside in the township in which he is elected. *State v. Dilloway*, 2 Vroom (N. J.), 42.

5. **Will.**—The language in a will, "I will unto my son, J. S., and to his heirs by his present wife, A., all the farm, etc. reserving the full use and benefit of the above lands unto my wife during her widowhood, for and at her death, the lands to cede to my said son J., his heirs and assigns, to all intents and purposes," was construed to mean that J. took an estate in fee tail and not a trust estate for the widow; that cede was synonymous with to be yielded up, and the words to all intents and purposes meant the purposes before expressed. *Somers v. Pierson*, 16 N. J. L. 181.

6. *Campbell v. Nicholson et al.*

7. **Celebrating a Rite.**—*Held*, that the collecting an offertory is not, according to the rubric, the celebration of a rite; and persons being churchwardens, who at-



**CELLAR.** See note 1.

**CEMETERIES.** (See also DEAD BODY; EXECUTORS AND ADMINISTRATORS; NUISANCE; TAXES.)

*Definition, 49.*

*Title of Lot-owners, 49.*

*Right to Improve with Monuments, etc., 51.*

*Right of Burial of the Dead, 51.*

*Right to Remove Corpse, 52.*

*Who are Trespassers, 53.*

*Who can Maintain Action Against, 54.*

*When Equity will Protect from Desecration, 54.*

*When They are Nuisances, 55.*

*Mortgages on Them are Void, 55.*

*Exemption from Taxation, 56.*

*Exemption from Execution, 58.*

1. **Definition.**—A cemetery is a place where the dead bodies of human beings are buried.<sup>2</sup>

2. **Title of Lot-owners.**—Rights of burial in churchyards, although acquired by deed of the particular lot, are only easements in land belonging to the religious society which owns the church and churchyard.<sup>3</sup>

tempted to make such a collection, were not guilty of unlawfully molesting the clergyman. *Cope v. Barber*, L. R. 7 C. P. 393.

**Celebrate a Marriage.**—A justice of the peace may celebrate a marriage out of the county for which he is commissioned as justice. *Pearson v. Howey*, 6 Halst. (N. J.) 13.

1. The vestry of each parish have control by statute of all pavements. All vaults, arches, and cellars must by statute be repaired and kept in order by the owners. But a cellar the top of which consists of the flags or stones which form the pavement is not a cellar within the meaning of the act, and the vestry are bound to repair the flags as part of the pavement. *Hamilton v. Vestry of St. George*, L. R. 9 Q. B. 42.

2. Webster's Dict.

"Cemetery, literally a sleeping place, was the name applied by early Christians to the places set apart for the burial of their dead. These were generally extra-mural and unconnected with the churches, the practice of interment in churches or churchyards being unknown in the first centuries of the Christian era. The term cemetery has, therefore, been appropriately applied in modern times to the burial-grounds, generally extra-mural, which have been substituted for the overcrowded churchyards of populous parishes both urban and rural." *Ency. Brit. tit. Cemetery.*

"Cemetery properly means sleeping places. The Jews used to speak of death as *sleep*. The Persians call their cemeteries 'the cities of the Silent.' The Greeks thought it unlucky to pronounce the name of death." *Brewer's Dict., Phrase and Fable.*

3. Washburn on Easements, etc. (2d Ed.) 604.

In *Richards v. Northwest Protestant Dutch Church*, 32 Barb. (N. Y.) 42, an injunction was applied for by the representatives of the original grantees of a lot in the churchyard to restrain the officers of the church from removing remains and destroying vault. In denying the complainants' right to relief the court said: "The right of burial, it seems to me, when confined to a churchyard as distinguished from a separate and independent cemetery, although conveyed with the common formalities of 'heirs and assigns forever' must stand upon the same footing as the right of public worship in a particular pew of the consecrated edifice. *It is an easement in and not a title to the freehold*, and must be understood as granted and taken subject (with compensation, of course) to such changes as the altered circumstances of the congregation or neighborhood may render necessary. . . . Like the sale of a church pew, which gives the mere right to worship in the place while the church stands and is occupied for religious purposes, the sale of a church vault gives, it would seem, the mere right of interment in the particular plat of ground, so long as that and the contiguous ground continues to be used and occupied as a churchyard. The owner of the easement may be, in the case of a disturbance, and no doubt is, entitled to a reasonable compensation or equivalent; but he cannot interpose a veto to the disposition of the soil, should the court, as was actually the case in this instance, on the application of the legitimate church officers, deem such disposition proper and order it, accordingly." *Sohier v.*

A person making an interment in a cemetery in the absence of a deed, properly executed, etc., does so under a mere license, and his exclusive right to make such interments in a particular lot would be limited to the time during which the ground continued to be used for burial purposes.<sup>1</sup> And upon the ground ceasing to be used for burial purposes all he could claim would be that he should have due notice and an opportunity to remove the bodies and monuments to some other place of his own selection, if he desired to remove them himself, and, in default of his so doing, that said remains should be decently removed by others.<sup>2</sup>

But where the right to burial is acquired by deed, properly executed, etc., the owner cannot be deprived of such right without compensation.<sup>3</sup>

Where the proprietor of grounds laid out for use as a public cemetery makes a conveyance of a burial lot, no interest in the

Trinity Church, 109 Mass. 21; Buffalo Cemetery v. City of Buffalo, 46 N. Y. 593; Price *et al.* v. M. E. Church *et al.*, 4 Ohio, 515. Compare Brick Presbyterian Church, 3 Edw. 155.

In this case the petition was filed for sale of the church and churchyard, to which a number of pew-holders and vault-owners, the latter claiming under deeds, objected. The petition was dismissed, the vice-chancellor observing: "The intention obviously was to sell and dispose of the land, and not to grant a mere temporary use and privilege to construct vaults in the land with a reserve of the title in the church. It was a grant of the land itself, such as passed the title to the purchasers or lessees, and hence the form of conveyance describing each lot by metes and bounds, with all the apt words generally used to pass the title to land." Wint v. Ger. Ref. Ch., 4 Sandf. Ch. 471.

C. received from the superintendent of a cemetery a receipt for \$75, being the amount of the purchase money of "a plot of ground eight feet by eight feet in Calvary Cemetery, . . . Section 7, Range 35, Plot D, 4 Graves, 5, 6, 7, 8." It was held that this operated as a certificate of his right to use the lot for burial purposes only, conformably with the established by-laws of the corporation. The instrument was not a conveyance or grant vesting title. People v. St. Patrick's Cathedral Trustees, 21 Hun (N. Y.), 184.

1. Partridge *et al.* v. First Independent Church, 39 Ind. 631, where after reciting the facts, and stating that the certificate was neither under the seal of the corporation, nor acknowledged nor recorded, the court says: "We think it clear that it conferred no title or estate

in the soil, nor could it operate as a grant of an easement, because it was not under seal nor was it acknowledged and recorded, so as to be effective to convey such an interest. The right to an easement must be founded upon a grant by deed, or upon prescription, for it is a permanent interest in another's land, with a right of enjoyment; whereas a mere license is but an authority to do a particular act or series of acts upon another's land, without possessing any estate therein. At most, then, the certificate, such as we have here, conferred only a privilege or license to make interments in the lot described, exclusively of others, as long as the ground remained a burying-ground or cemetery." Meagher v. Driscoll, 99 Mass. 381; Kincaid's Appeal, 66 Penn. St. 411; McCrea v. Marsh, 12 Gray (Mass.), 211; Burton v. Scherf, 1 Allen (Mass.), 133; Bryan v. Whistler, 8 B. & C. 288; Wood v. Leadbiter, 13 M. & W. 841. Compare Moreland v. Richardson, 22 Beav. 596; Page v. Symonds, 68 N. H. 17 (1883); s. c., 56 Am. R. 481, 19 Am. Law Reg. 65.

2. Partridge v. First Church, 39 Ind. 631; Craig v. First Presbyterian Church, 88 Penn. St.; s. c., 32 Am. R. 417. In the latter case it was held that "One who is merely a pew-holder or has relatives buried in the yard, and has no contract relation with the church, cannot maintain the objection that an act of the legislature authorizing the removal of the dead from such churchyard impairs the obligation of a contract." See dissenting opinion of C. J. Agnew. Rayner v. Nugent and Brown, 1 Am. & Eng. Corp. Cases, 267 and note.

3. Richards v. Northwest Protestant Church, 32 Barb. (N. Y.) 42.

alleys which separate it from other lots, except a right of way, passes to the purchaser, unless particularly expressed in the deed.<sup>1</sup>

The doctrine as to burial rights does not apply to cases where the grave is in a separate independent cemetery not associated or connected with any other society or body politic.<sup>2</sup>

No adverse right by prescription can be established in a public burying-ground by proof of fencing it, pasturing upon it, cutting trees therefrom, and cultivating a part of the land.<sup>3</sup>

A grant of a lot in a cemetery is said to be analogous to a grant of a pew in a meeting-house, and the right of burial in a public burying-ground in some respects resembles the right of pew tenancy.<sup>4</sup>

The continuous and notorious use of land for twenty years as a public burial-place, with the acquiescence of the owner, affords presumptive evidence of its dedication for that purpose, and the owner is estopped from denying it, and will be enjoined from interfering with such use.<sup>5</sup>

Where a lot in a cemetery is sold, with reference to a certain plan, on which plan appears a certain avenue, leading up to, or close beside, the lot, affording a convenient highway to and from it, that avenue becomes a servitude in favor of the lot and cannot be legally obstructed.<sup>6</sup>

**3. Right to Improve with Monuments, etc.**—The owner of the lot has a right to enter on the same at all times to improve and erect suitable monuments and vaults. And all monuments so erected are regarded as the personal property of the lot-owner, and he would have the right to remove the same upon the lot ceasing to be used for the purpose of burial.<sup>7</sup> Property in monuments and vaults, etc., to the heir-at-law.<sup>8</sup>

**4. Right of Burial of the Dead.**—A dead body is not property, but there are rights attached to a dead body—rights to care for it, watch over it, and bury it—which the law will protect.<sup>9</sup> Gen.

1. *Seymour v. Page*, 33 Conn. 64.

2. *Richards v. Dutch Church*, 32 Barb. (N. Y.) 42; *Gay v. Baker*, 17 Mass. 435; *Daniel v. Wood*, 1 Pick. (Mass.) 102; *Bryan v. Whistler*, 8 B. & C. 288; *Downey v. Dee*, Cro. Jac. 605.

3. *Commonwealth v. Viall*, 2 Allen (Mass.), 172.

4. *Jones v. Towne*, 58 N. H. 462; s. c., 42 Am. R. 602; *Sohier v. Trinity Church*, 109 Mass. 121; *Kincaid's Appeal*, 66 Penn. St. 411; s. c., 5 Am. R. 337.

5. *Boyce v. Kalbough*, 47 Ind. 334 (1877); s. c., 27 Am. R. 464. See *Edwards v. Stonington Cem.*, 20 Conn. 477.

6. *Buck v. Wall*, 29 La. Ann. 38; s. c., 29 Am. R. 318.

7. *Partridge v. First Church, etc.*, 39 End. 631.

8. 2 Black Com., 429; *Savin v. Harkness*, 4 N. H. 415.

A widow can, with the consent of the heirs, erect a monument at the grave of her deceased husband, and give the contractor a license to enter the burial-lot for the purpose of removing it if it is not satisfactory, or is not paid for according to the terms of the contract. *Fletcher et al. v. Evans* (Mass. 1885), 2 N. E. Rep. 837.

The indisputable and paramount right as well as duty of a husband to dispose of the body of his deceased wife by a decent sepulture, in a suitable place, carries with it the right of placing over the spot of burial a proper monument. *Durell v. Hayward*, 9 Gray (Mass.), 248.

9. 2 Black Com. 429; 4 Black Com. 235; *Pierce v. Swan Point Cem.*, 10 R. I. 227; *Guthrie v. Weaver*, 1 Mo. App. 136; *Reg. v. Sharpe*, 7 Cox C. C. 214.

In *Indiana* it is held that the bodies of

erally, where there is no expressed wish of the testator as to the disposition of his remains, the wishes of the surviving husband or widow shall control, as against the next of kin.<sup>1</sup>

A husband is bound to bury his deceased wife, and a wife must bury her deceased husband.<sup>2</sup> A parent is bound to provide a Christian burial for the body of a deceased child.<sup>3</sup>

It is the general right of every one, recognized as such by the common law, to have his body carried, decently covered, from the place where it lies to the cemetery, or other proper inclosure, and there put under the ground.<sup>4</sup>

The expressed wish of the deceased will control the right to the burial of his body.<sup>5</sup>

Replevin will not lie for a coffin and its contents, when those contents are a corpse.<sup>6</sup>

**5. Right to Remove Corpse.**—A husband has the right to remove the corpse of his wife where it had been buried in the lot of another without his consent.<sup>7</sup>

the dead belong to the surviving relatives, in the order of inheritance, as property to be disposed of as they shall deem fit, but subject to such burial regulations as are reasonable and proper for the public health and advantage. *Bogert v. Indianapolis*, 13 Ind. 134.

In *New York* it was held that, in the absence of testamentary disposition, the right to bury the corpse belongs exclusively to the next of kin. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and reintering their remains. *In re Widening Beekman Street*, 4 Bradf. 502.

In *Pennsylvania*, that at common law it is the duty of the executor to bury the deceased, and in a manner suitable to the estate he leaves behind him. *Wynkoop v. Wynkoop*, 42 Pa. St. 293; 10 Cent. Law Jour. §§ 303, 325, 478.

1. *Durell v. Hayward*, 9 Gray (Mass.), 248; *Wynkoop v. Wynkoop*, 42 Pa. St. 293; *Secor v. Secor*, 31 Leg. Int. 268.

2. *Ambrose v. Kerrison*, 10 C. B. 776; *Chapple v. Cooper*, 13 Mees. & W. 259; *Weld v. Waker*, 1 Am. Law Rev. 57; *Jenkins v. Tucker*, 1 H. Bl. 90.

3. *Regina v. Vann*, 2 Den. C. C. 325.

4. *Regina v. Stewart*, 12 Ad. & El. 773; *Pierce v. Swan Point Cem.*, 10 R. 1. 227.

Under the common law, it was held in England that the duty of seeing to the providing for the funeral, and of carrying to the grave the dead body, rests upon the person under whose roof the death takes place. He cannot keep the body

unburied, nor he cannot cast it out, or expose the body to violation, or to offend the feelings or endanger the health of the living, nor can he do anything which prevents a Christian burial. *Regina v. Stewart*, 4 Eng. C. L. 773.

5. In *Scott v. Riley*, 40 Leg. Int. (Pa.) 382, Phil. Com. Pleas (1883), it was held that a court of equity will not interfere to give the right of burial to the next of kin against the expressed wish of the deceased. Deceased, a female aged 23, had been living with the defendants, for whom she worked seven years previous to her death. She had been entirely neglected by her parents during that time. Just before her death she expressed fears that her father would claim her body and not give her the burial she desired, and requested the defendants to bury her in their lot. The court stated that there was no law which compels the next of kin to perform the duties of burial. See *In re Widening Beekman Street*, 4 Bradf. 503.

6. When a coffin, with the consent of all persons having a pecuniary interest in it, has been deposited in the earth for the purposes of interment, with a corpse enclosed within it, it is no longer an article of merchandise. There is no property in a corpse: the relatives have, in regard to it, the right of interment, and this having once been exercised by the father of the married woman, though against the consent of the husband, or by the husband, though against the consent of the father, no right to the corpse remains, except to protect it from insult. *Guthrie v. Weaver*, 1 Mo. App. 136. See Eng. Rep., Moak's notes, 427; 16 Am. Law Reg. (N. S.) 156.

7. *Weld v. Walker*, 130 Mass. 422.

A widow has no such control over the body of her dead husband as to give her power to remove it from the cemetery where it was buried by his relatives to one of her own selection.<sup>1</sup>

A son cannot remove the corpse of his mother from the family burial-place;<sup>2</sup> nor that of his father.<sup>3</sup>

When a body has once been buried no one has a right to remove it without the consent of the owner of the grave or leave of the proper ecclesiastical, municipal, or judicial authority.<sup>4</sup>

The legislature has the right to authorize a municipality to remove the remains of the dead from the cemeteries.<sup>5</sup>

**6. Who are Trespassers.**—An interment made in a lot by a stranger is a trespass for which such stranger is liable to the owner.<sup>6</sup>

One who takes up tombstones in a churchyard, or defaces the inscriptions, is a trespasser.<sup>7</sup>

The unlawful disinterment of a dead body consists, not merely in the removal of the dead body, but in its removal without the consent of the deceased, given in his lifetime, or of his near relatives, given since his death.<sup>8</sup>

The erection of a structure on land of the builder to exclude surface water which would otherwise flow from an adjoining burial-ground is not a trespass.<sup>9</sup>

One has the right to enter a burial-lot and remove a tablet sold and placed there conditionally, on breach of the condition of payment, without the assent of the owners of the tomb.<sup>10</sup>

In *Fox v. Gordon*, 40 Leg. Int. 374, Phil. Com. Pleas, the court held that when the husband has once exercised the right of burial, and consented to the burial of his wife in a certain place, he cannot, after the lapse of years, remove the remains to another place. The wife and child, who had died some weeks previous, were interred, with the consent of the husband, in the burial-lot of the father-in-law, by whom the expenses in the last sickness and funerals of both were paid. The husband acquiesced three years in the place of burial of his child and wife.

1. *Ehlen v. Ehlen*, Circuit Ct., Baltimore, 18 C. L. N. 208; *Wynkoop v. Wynkoop*, 42 Pa. St. 293. Compare 5 Wk. L. Bul. 786.

2. *Reg. v. Sharpe*, 7 Cox C. C. 214.

Erle, J., in delivering the opinion, said: "Our law does not recognize the right of any one child to the corpse of its parent. . . . And there is no authority for saying that relationship can justify the taking of a corpse from the ground where it has been laid." *Reg. v. Sharpe*, Dears. & B. 160.

3. *Secor's Case*, 31 Leg. Int. 268.

A proper respect for the dead, a regard for the tender sensibilities of the living,

and the due preservation of the public health, require that a corpse should not be disinterred or transported from place to place, except under extreme circumstances of exigency.

4. *Regina v. Sharpe*, 7 Cox C. C. 216; *Wynkoop v. Wynkoop*, 42 Pa. St. 293; *Weld v. Walker*, 130 Mass. 422; s. c., 39 Am. R. 467.

5. *Craig v. First Pres. Church*, 88 Pa. St. 42; s. c., 32 Am. R. 417.

"The right of the legislature to authorize the removal of the dead from cemeteries is well settled. So it may delegate such power to municipalities. It is a police power necessary to the public health and comfort." *Coats v. N. Y. City*, 7 Cow. (N. Y.) 585; *Charlestown v. Wentworth*, etc., 4 Strob. Law Rep. (S. Car.) 306. See note to *Rayner v. Nugent*, 1 Am. & Eng. Corp. Cases, 271.

6. *Smith v. Thompson*, 55 Ind. 5; s. c., 39 Am. R. 409.

7. *Francis v. Ley*, Cro. Jac. 367. *Spooner v. Brewster*, 3 Bing. 136; 1 Addison on Torts (Wood's Ed.), 16.

8. *Tate v. State*, 6 Blackf. (Ind.) 110; *State v. McClure*, 4 Blackf. (Ind.) 328.

9. *Bates v. Smith*, 100 Mass. 181.

10. *Fletcher v. Evans*, S. J. C. Mass. (1885); 3 Daily Law Rec. No. 22.

**7. Who can Maintain Action against.**—The person who has the freehold of the soil may bring an action of trespass against such as dig and disturb it.<sup>1</sup>

One who erects tombstones in a churchyard can maintain an action for defacing or removing them,<sup>2</sup> and if he is dead the right of action belongs to his heirs.<sup>3</sup> Any person in actual possession may maintain an action against a wrong-doer.<sup>4</sup>

The gist of the action is the breaking and entering the close, yet the circumstances which accompany and give character to the trespass may always be shown either in aggravation or mitigation of damage.<sup>5</sup>

**8. When Equity will Protect from Desecration, etc.**—Equity will restrain invasion and quiet the possession of grounds appropriated by a church organization to purposes of a cemetery; and will, in a proper case, enjoin town authorities who have assumed, by virtue of an alleged plot and dedication, to open a highway through such lands.<sup>6</sup>

A court of equity will interfere to prevent a mere trespass.<sup>7</sup>

A purchaser of land upon which is located a burial-ground may be enjoined from removing the bodies therefrom, if he attempts to do so against the wishes of those interested.<sup>8</sup>

Mortgagees will also be enjoined from destroying or defacing graves, or from doing any act which may prevent future interments.<sup>9</sup>

1. *King v. Lynn*, 2 T. R. 733; *Haynes' Case*, 12 Co. 113; *Corven's Case*, 12 Co. 105.

"But though the heir has a property in the monuments and escutcheons of his ancestor, yet he has none in his body or ashes, nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it." 2 Black Com. 429.

2. *Francis v. Ley*, Cro. Jac. 367; *Spooner v. Brewster*, 3 Bing. 136.

3. *Sabin v. Harkness*, 4 N. H. 415.

4. *Barnstable v. Thatcher*, 3 Metc. 243.

A grantee who has buried the remains of his child in a lot in a cemetery, of which he holds possession under a deed from the proprietor, which sets forth that such grantee is entitled to the lot, *habendum* to him and his heirs and assigns, to his and their use as a place for the burial of the dead, may maintain an action of tort in the nature of *quare clausum fregit* against the superintendent for disintering and removing the remains therefrom. *Meagher v. Driscoll*, 99 Mass. 381.

5. *Brewer v. Dew*, 11 Mees. & W. 625; *Guerin v. Harvey*, 5 Taunt. 442.

But after one has dedicated land for

a burying-ground, he and his grantees have no greater control over it than a lot-holder, and the latter may maintain an action against the grantee of the person who dedicated the ground for trespass upon plaintiff's lot and removing stone post placed there by him. *Pierce v. Spofford*, 53 Vt. 39.

6. *Trustees v. Walsh*, 57 Ill. 363.

7. The property dedicated to public and pious uses, threatened with desecration—the sepulchres of the dead with violation—the sentiment of natural affection of the surviving kindred and friends of the deceased to be wounded—the memorials erected by piety and love removed, so as to leave no traces of the last home of their ancestors to those visiting the spot in future generations, were acts that could not be redressed by the ordinary process of law. The remedy must be sought in the protecting power of a court of equity, operating by injunction to preserve the asylum of the dead and quiet the just and natural sensibilities of the living. *Beatty v. Kurtz*, 2 Pet. 566; *Boyce v. Kalbaugh*, 47 End. 334; s. c., 28 Am. R. 464.

8. *First Pres. Church v. Second Pres. Church*, 2 Brewst. (Penn.) 372.

9. *Mooreland v. Richardson*, 24 Beav.

One who has dedicated land to the public for burial purposes, the dedication having been accepted, will be prohibited from defacing or meddling with the graves thereon, at the suit of any one having relatives or friends buried there.<sup>1</sup>

**9. When They are Nuisances.**—A burial-ground near dwellings is not necessarily a nuisance, and its use can only be enjoined on clear proof of probable injury.<sup>2</sup>

If, however, it can be clearly proven that a place of sepulture is so situated that the burial of the dead there will endanger either life or health by corrupting the surrounding atmosphere or the waters of wells or springs, a court will grant injunction relief.<sup>3</sup>

Mere proximity will not constitute a cemetery a nuisance.<sup>4</sup>

**10. Mortgages on Cemetery Lots are Void.**—A mortgage made upon a cemetery lot where an interment has been made is void, as against public policy;<sup>5</sup> but where no interment has been made,

1. Davidson v. Reed, 111 Ill. 167; s. c., 53 Am. R. 613; Beatty v. Kurtz, 2 Pet. 585.

2. Musgrove v. St. Louis Church, 10 La. Ann. 431; New Orleans v. Wardens, 11 La. Ann. 244; Ellison v. Commissioners, 5 Jones Eq. (N. Car.) 57; Lake View v. Lutz, 44 Ill. 81; Begein v. City of Anderson, 28 Ind. 79.

"Burial-places for the dead are indispensable. They may be the property of the public, devoted to the uses of the public, or the owner of a freehold may devote a part of his premises to the burial of his family or friends. It is but a just exercise of his dominion over his own property. Neither adjoining proprietors nor the public can complain, unless it is shown that, from the manner of the burial, or some other cause, irreparable injury will result to them. It is quite an error to suppose that of itself a burying-ground is a nuisance to those living in the vicinity. Much depends upon the mode of interment, whether it can be justly asserted that in any event injury will result from it. The particular locality and its surroundings must also be considered. Low, damp grounds, percolated by water, will hasten decomposition and the soil will be saturated with its products. Dry, high, well-ventilated localities retard rather than hasten decomposition, and if in a brief space of time there were numerous burials, there might be great peril of the products of decomposition escaping into and polluting the atmosphere." Kingsbury v. Flowers, 65 Ala. 479; s. c., 39 Am. R. 14; Ellison v. Comrs. of Washington 5 Jones Eq. (N. Car.) 57; Dunning v. Aurora, 40 Ill. 481; Barnes v. Hathorn, 54 Me. 124.

3. Clark v. Laurence, 6 Jones Eq. (N. Car.) 83; Barnes v. Hathorn, 54 Me. 124.

4. Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff, and the consequent depreciation of the market value of his property. For a repository of the dead is yet indispensable, and wherever located, it must *ex necessitate* be in the vicinity of the private property of some one who might prove its market value injuriously affected thereby. Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or excited fancy or imagination they become unpleasant, and induce mental disquietude from association, exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both when merely fanciful. The human contents of these graves cannot, as they lie buried there, offend the senses, in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them. If this burial-ground is, under the circumstances, a private nuisance, then it is also a public nuisance to every traveller who passes on the road, as well as every soldier's monument in the country. Monk v. Packard, 71 Me. 309; s. c., 36 Am. R. 315; Cooley on Torts, 600; First Baptist Church v. Railroad, 5 Barb. (N. Y.) 79; New Orleans v. Wardens, etc., 11 La. Ann. 244; Barnes v. Hathorn, 54 Me. 124.

5. Plaintiff conveyed to H. by deed, absolute in form, a lot in a cemetery in which plaintiff had buried his children.

and there is no statutory provision forbidding it, it is valid.<sup>1</sup>

**11. Exemption from Taxation.**—Most of the States contain either a constitutional or a statutory provision exempting burial-grounds from taxation. In *Ohio* the constitution provides that "laws shall be passed taxing by a uniform rule . . . all real and personal property, according to its true value in money, but burying-grounds . . . may be exempted from taxation,"<sup>2</sup> and by statute it is provided that they shall be exempted from taxation.<sup>3</sup>

But this does not relieve the association from paying an assessment for a street improvement.<sup>4</sup> But its lands cannot be sold to pay such assessment.<sup>5</sup>

This exemption from taxation includes all lands dedicated for cemetery purposes and the necessary improvements therein,<sup>6</sup> even

This deed was intended as a mortgage, security for a loan of money. H. conveyed the lot to F., who conveyed it to C. for a valuable consideration. C. knowing that interments had been made in the lots. It was held that the deeds were void, and equity would restrain a removal of the bodies interred. "But that it is an offence against good morals to mortgage a small, isolated plot of ground in a cemetery dedicated exclusively, under the sanction of the law, as a sanctuary for the dead of one's family, and already consecrated by the ashes of one's kindred, I am sure, cannot be well questioned. Such a transaction is clearly a breach of the policy of the statute, is contrary to its equity, and is within the evils it was designed to cure, and our moral nature protests against it. As a consequence of such a transaction, we have here a stranger calling upon a father to disinter his three children, who have been buried for a period of ten years in a cemetery lot, with a threat that, if the parent will not, he himself will do it. And suppose he carries his threat into execution, what then? Sepulture must, in the end, be had, and that, it is believed, the statute was intended to secure permanently." *Thompson v. Hickey*, 59 How. Pr. (N. Y.) 434; *Lautz v. Buckingham*, 11 Abb. N. S. (N. Y.) 64.

1. *Lautz v. Buckingham*, 4 Lans. (N. Y.) 484.

2. Const. Ohio, art. 12, § 2.

3. Rev. Statutes, Ohio, §§ 2732, 3571, 3578.

4. **Assessment.**—*Lima v. Cemetery Assn.*, 42 Ohio St. 128; s. c., 5 Am. & Eng. Cor. Cases, 547. See *Buffalo City Cem. v. Buffalo*, 46 N. Y. 506; *Alexander v. Baltimore*, 5 Gill (Md.) 396; *Baltimore v. Greenmount Cem.*, 7 Md. 517; *Boston, etc., Society v. Boston*, 116 Mass. 181;

s. c., 17 Am. R. 153; *Paterson v. Society, etc.*, 24 N. J. L. 385; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Crawford v. Burrell Tp.*, 53 Pa. St. 219, 280; *Orange & A. R. Co. v. Alexander*, 17 Gratt. (Va.) 176; *Second Univ. Soc. v. Providence*, 6 R. I. 235; *Beals v. Rubber Co.*, 11 R. I. 381; *Reclamation Dist. v. Goldman*, 61 Cal. 205; *Emery v. Gas Co.*, 28 Cal. 345; *Palmer v. Stump*, 29 Ind. 329; *Marks v. Trustees*, 37 Ind. 155; *Illinois In. Canal v. Chicago*, 12 Ill. 403; *People v. Graceland Cem.*, 86 Ill. 336; *Sioux City v. School Dist.*, 55 Iowa, 150; *Leefevre v. Detroit*, 2 Mich. 586; *Broadway Bapt. Church v. McEtee*, 8 Bush (Ky.), 508; *Louisville v. Nevin*, 10 Bush (Ky.), 549; *Paine v. Spratley*, 5 Kan. 525; *Bridgeport v. Railroad*, 36 Conn. 255; *Yeatman v. Crandall*, 11 La. Ann. 220; *Rooney v. Brown*, 21 La. Ann. 51; *Lockwood v. St. Louis*, 24 Mo. 20; *Sheehan v. Good Samaritan Hos.*, 50 Mo. 155. Compare *Dalrymple v. Milwaukee*, 53 Wis. 178; *Hale v. Kenosha*, 29 Wis. 599; 18 English Rep., Moak's notes, 427.

5. *Lima v. Cem. Assn.*, 42 Ohio St. 128; s. c., 5 Am. & Eng. Cor. Cases, 547.

While the cemetery lands . . . cannot be sold on any legal process, we think the city may nevertheless be able to collect the assessment, if indeed occasion should arise for resorting to further proceedings in the case, and payment, if not voluntarily made, could doubtless be secured by the appointment of a receiver, by sequestration, or by such other appropriate remedy as equity may afford—2 *Dillon, Mun. Cor.* § 822—without in any way disturbing the resting-place of those reposing in the city of the dead.

6. **Taxation.**—The exemption was of "the land of the company dedicated to the purposes of a cemetery," and it was argued that this exemption does not



though the land may be idle.<sup>1</sup> But this can only be applied to a reasonable quantity of land which will at some time be needed for cemetery purposes.<sup>2</sup>

Where a statute provides that cemetery associations are exempt from "all public taxes and assessments," the exemptions extend to assessments for local improvements, as, for example, a sidewalk built in front of the property.<sup>3</sup>

extend to or include the improvements on the land, because by the tax-law the assessors were required, in valuing real estate, to estimate the value of the land per acre, and "separately" to value the improvements thereon. But the court held the point not well taken. "But this requirement," said Bartol, C. J., "was not designed to convert the improvements into personalty, or to separate them from the realty, nor can it be construed to have that effect: it was intended only to point out the mode in which the assessment should be made, and the whole aggregate value of the land, with the improvements, ascertained. The whole context shows that the permanent improvements are treated as realty, as the law regards them; and in our judgment the exemption of the permanent improvements thereon used for the purposes of a public cemetery, and which are essential to the use and enjoyment of the land for the purposes contemplated in the charter." *Appeal, Tax, etc. v. Baltimore Cem. Co.*, 50 Ind. 433; Note 9 Am. & Eng. Cor. Cases, 436. Compare *Woodlawn Cem. v. Inhabitants of Everett*, 354.

1. Where there was about five acres of land in the cemetery property that was not used for burial purposes, but was cultivated by the superintendent of the cemetery, who resided in a house on the five acres, this house and five acres were assessed, but the court held it exempt, under a law providing that the cemetery and all the burial lots therein should be free from taxation. Replying to the contention that the exemption extended only to land actually used for burial purposes, the court said: "Such construction of the general act is too narrow. The space required for burial purposes constantly increases, and a reasonable quantity of land for future occupancy should be provided. Land acquired for such purposes is not taxable. Seventeen acres is not an unreasonable quantity of land for a cemetery in the vicinity of Hoboken." *Hoboken v. North Bergen*, 43 N. J. L. 148.

2. In *People v. Cemetery Co.*, 86 Ill. 337, the exemption was of property held

by the company "subservient to burial uses." The company had 153 acres in two tracts near Chicago, besides the land which they had in actual use for burial purposes, and upon this 153 acres were built certain stables, etc., occupied by men and teams employed in the cemetery. The court held the property not within the exemption. "Here are two large tracts of land," said the court, "not used, or likely to be used for years to come, for cemetery purposes. While we may concede the right of the company to purchase and hold the land to be appropriated some time in the distant future for burial purposes, yet we cannot hold, under a fair and reasonable construction of its charter, that the land can be held free from taxation."

3. "The statute relating to cemetery association (Gen. St. 1878, c. 34, § 259) provides that cemetery lands and property formed pursuant to this title are exempt from all public taxes and assessment. The question here is whether this exemption includes assessments levied for local improvements, which in this case was a sidewalk. The cost was, in accordance with the charter of the city of St. Paul, assessed upon the property fronting upon the improvement, in accordance with the number of lineal feet of real estate. In our judgment, the manifest intention of the legislature was to exempt the property of cemetery associations from all public charges and burdens imposed in the exercise of the taxing power, whether of a general or local character. This construction is in harmony with the object of the exemption, which is not merely to aid cemetery associations in dollars and cents, to the amount of the tax or assessment which would otherwise be levied against their property, but mainly to preserve cemeteries for the particular uses to which they have been appropriated, and secure their perpetuity as places of burial, and thus, in accordance with the common sentiment of mankind, guard against the disturbance of the resting places of the dead, which would naturally ensue if the ground was liable to be sold to enforce the collection of taxes or assessments." *Oakland Cem. Assn. v.*

## CEMETERIES—CERTAIN—CERTAINTY.

**12. Exemption from Execution, etc.**—In many of the States the estate of the owner of a burial-lot is declared by statute to be real estate, and descendible to his heirs and divisible by will, or may be disposed of by the owner by sale, with the approval of the corporation.

It is also protected from attachment or execution for debt, and is not affected by the insolvent laws of the State.

At common law cemeteries were exempted from execution.<sup>1</sup>

**CERTAIN.** See note 2.

**CERTAINTY.** See CONTRACTS; DEEDS; INDICTMENT; PLEADING; WILLS.<sup>3</sup>

City of St. Paul, 32 N. W. Rep. 781 (Sup. C. Minn., May 5, 1887).

In *Mulroy v. Churchman*, 52 Iowa, 238, where out of 40 acres of land alleged to be held by a church as a burying-ground, only one acre, in fact, was actually used for burial purposes, the 39 acres remaining were held taxable.

1. At common law neither a churchyard nor the glebe of a parsonage or vicarage could be extended under an *eliget*. They were regarded as solemnly consecrated to God and religion. A sentiment of reverence towards the graves of companions and ancestors would certainly go far towards impelling the courts in this country to hold that a churchyard used as a cemetery is not subject to execution. *Freeman on Execution*.

"We have therefore complete authority for saying that at common law no process ever issued to a sheriff to levy on ecclesiastical property the debt due in an action." Lord Alvanly in *Arbuckle v. Cowtar*, 3 Bos. & Pull. 328.

The sentiment is sound, and has the sanction of mankind in all ages, which regards the resting-place of the dead as hallowed ground, not subject to the laws of ordinary property, nor liable to be devoted to common uses. *Brown v. Lutheran Church, etc.*, 23 Penn. St. 495.

2. In order to entitle a creditor, under sec. 28 of 3 & 4 Wm. IV. c. 42. to interest on a debt from the time the debt was payable, "if such debt be payable by virtue of some written instrument at a certain time," it is not necessary that the day for the payment should be mentioned in the instrument; it is sufficient if a time or event be fixed, the date of which can be ascertained afterwards. *Duncombe v. Hotel Co.*, L. R. 10 Q. B. 371.

**Twelve Months Certain.**—An agreement "for twelve months certain," after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice,

construed to mean an agreement for twelve months' certain, to expire without notice at all at the end of twelve months, and then to continue, if the parties so please, until terminated by a three months' notice. *Langton v. Carleton*, L. R. 9 Ex. 57; *Thompson v. Maberly*, 2 Campb 573.

**In Pleading.**—A declaration stating the sale of a certain horse at and for a certain quantity of oil, without more distinctly specifying the horse or quantity, was held bad for uncertainty, though not a sufficient objection to arrest judgment after verdict. *Ward v. Harris*, 2 Bos. & P. 265; *Andrews v. Whitehead*, 13 East, 102.

**In Lease.**—A lease for ninety-nine years, if A, B, or C, or any or either of them, should so long live, is not a holding for any term or number of years certain. *Doe v. Roe*, 9 Barn. & Cress. 2.

**In a Writing.**—The contention being that the language—"Received of G. W. S. & Co. a note . . . as collateral security for certain notes we hold of theirs"—was ambiguous as not specifying whether all the notes or some were meant, it was held that the word "certain" showed that the notes in the hands of the signers of said writing were those meant, and all of them. *Bell v. Martin*, 3 Harr. (N. J.) 167.

**Certain Rent.**—Payment of taxes and daubing and chinking a certain house is a certain rent within the act of 21st March, 1772. Pa. *Shaffer v. Sutton*, 5 Binn. (Pa.) 228.

**3 Moral Certainty.**— "The phrase 'moral certainty' has been introduced into our jurisprudence from the publicists and metaphysicians, and signifies only a very high degree of probability. It was observed by Puffendorf that 'when we declare such a thing to be morally certain because it has been confirmed by creditable witnesses, this moral certitude is nothing else but a strong presumption grounded on probable reasons, and which

**CERTIFICATE** (See also BANKS AND BANKING; SHARES; ADMIRALTY; BILLS AND NOTES; INSURANCE; TRIAL.)—A statement in writing by a person having a public or official status, concerning some matter within his knowledge or authority.<sup>1</sup>

very seldom fails and deceives us.' Law of Nature and Nations (Eng. Ed. 1749), book 1, c. 2, § 11. 'Probable evidence,' says Bishop Butler, in the opening sentence of his Analogy, 'is essentially distinguished from demonstrative by this, that it admits of degrees and of all variety of them, from the highest moral certainty to the very lowest presumption.' Proof 'beyond a reasonable doubt' is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof 'to a moral certainty' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. Accordingly, in *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, in which the jury were instructed that the burden of proof was on the prosecutor, and that they must be satisfied to a reasonable and moral certainty that the defendant had committed the murder for which he was indicted, Chief Justice Shaw concluded this part of his charge as follows: 'If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.' See also *Commonwealth v. Goodwin*, 14 Gray (Mass.), 55. Baron Parke, in a case tried before him, expressed the same thought

conversely, thus: 'Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all possible doubt.' *Regina v. Sterne*, cited in *Best on Ev.* § 95, and 3 *Greenleaf Ev.* § 29. And instructions that the jury should be satisfied of the defendant's guilt beyond a reasonable doubt have often been held sufficient, without further explanation. *Commonwealth v. Tuttle*, 12 Cush. (Mass.) 502; *Commonwealth v. Cobb*, 14 Gray (Mass.), 57. *Commonwealth v. Harman*, 4 Pa. St. 269; *Regina v. White*, 4 F. & F. 383."

**In a Warrant.**—A warrant is sufficiently certain to be sustained if the objects called for are identified by the testimony, or unless the calls would equally well suit more than one place. *Ross v. Reed*, 1 Wheat. (U. S.) 482.

1. *Rapalje & Lawrence.*

**Return of Constable.**—The return of a constable of the service of a summons is a certificate in both the technical and liberal sense of the term. *Miller v. Larmon*, 38 How. Pr. (N. Y.) 417.

**Certificate of Appraisement.**—An affidavit made and signed by three appraisers appointed to appraise land about to be sold by an administrator, with the appraisement immediately following and attached thereto, commencing "we appraise as follows," etc., is a sufficient compliance, although the signatures were not also appended to the appraisement, with a statute requiring the delivery of a certificate of the appraisement. *McVey v. McVey*, 51 Mo. 406.

**Collector's Certificate**—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged, and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession upon the certificate merely against a party showing a legal title.

**Perjury.**—In *U. S. v. Ambrose*, 2 Fed. Rep. 556, it was questioned whether the sworn statements required to be made by a clerk of a United States court, in his accounts with and returns to the government, are "declarations" or "certificates" within the statutes punishing perjury.

**CERTIORARI** (See also APPEAL; WRIT OF ERROR.)*Definition, 60.**By What Courts Granted, 60.**The Return, 61.**What Matters Reviewed, 62.**General Principles upon which Granted or Refused, 62.**Effect of Issuing Writ, 66.**Judgment, 66.**Costs, 67.**As an Ancillary Process, 67.*

1. **Definition.**—A *certiorari* is a writ issuing from a superior court to an inferior court, tribunal, or officer exercising judicial powers, whose proceedings are summary or in a course different from the common law, commanding the latter to return the records of a cause depending before it to the superior court.<sup>1</sup>

2. **By What Courts Granted.**—At common law the writ issued from chancery or king's bench.<sup>2</sup> In this country the writ is generally provided for by statute; but where no such provision is made, and no appeal or other mode of review is provided from the decisions of any inferior jurisdiction, the circuit or district court of the State or other tribunal exercising general original common-law jurisdiction has an inherent authority to revise the proceedings by *certiorari*,<sup>3</sup> unless expressly forbidden to do so.<sup>4</sup> Even when the inferior tribunal is given the power to finally hear and determine a cause, the superior court may thus revise its proceedings.<sup>5</sup>

**Condition Precedent.**—Defendant was to pay for building upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, and sent them to defendant. *Held*, that this did not amount to such a certificate of satisfaction as to enable the builder to sue defendant, although defendant had not objected to pay on the ground that no sufficient certificate had been rendered. *Morgan v. Birnie*, 9 Bing. 672.

**In a Will.**—The word "certificates" in a will was held not to include warrants for bounty lands, though sometimes used synonymously, it being also in proof that the certificates might refer to other instruments more properly; that the testatrix had previously in her will devised all her lands to her husband for life; that the parties had acquiesced in a settlement on the basis that the warrants did not pass as certificates; and that the person in whose hands the warrants were referred to as being never had them. *Edmondson v. Bloomshire*, 11 Wall. (U. S.) 382.

**Written Statement or Certificate.**—The words "written statement or certificate of the number of votes cast," in statute, which the judges are required to make, will not justify a statement indorsed without the signatures of the judges.

The words "statement and certificate" are there used as equivalent terms, and the word "or" in the sense of "to wit." *People v. Nordheim*, 99 Ill. 560.

1. *Farmington, etc., Co. v. Commissioners*, 112 Mass. 206; *Tidd's Pr.* 397.

"A *certiorari* is an original writ issuing out of chancery or the king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause." *Bacon's Abr. Certiorari*, title (a).

2. *Tidd's Pr.* 397.

3. *Miller v. School Trustees*, 88 Ill. 26; *Thompson v. School District*, 25 Mich. 483; *Lessee v. Suk*, 9 Ohio, 142; *Ridgway v. Hinton*, 25 W. Va. 554.

**Statutory Writ.**—The statutory writ of *certiorari* is generally a much more flexible remedy than the common-law *certiorari*. *Washington v. Parker*, 60 Ala. 447; *Cooley on Tax*. 447.

4. *Rev. Stat. Neb.* (1883) sec. 599. p. 610; *Dass. Rev. Stat. Kans.* sec. 3796. The writ is not in use in *Connecticut* and *Oregon*. *Williams v. H. & M. H. R.*, 13 Conn. 118; s. c., 2 Or. 42.

5. *People v. Turner*, 1 Cal. 152; *Rex*

**3. The Return.**—The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court to determine whether the former had jurisdiction, or had exceeded its jurisdiction,<sup>1</sup> or had failed to proceed according to the essential requirements of the law.<sup>2</sup> It is proper also to require the inferior court to state its rulings in law on facts stated in the petition for the writ.<sup>3</sup> And it is said that when any fact is denied that goes to the jurisdiction of the inferior tribunal, the evidence in support of such fact should be certified to the revisory court.<sup>4</sup>

*v. Morely*, 2 Burr. 1040; *Hartley v. Hooker*, Cowp. 524; 2 Hawk. P. C. 286. But it would seem that in such cases the question of jurisdiction in the inferior tribunal should be the only one reviewed. *Ex parte Childs*, 12 Pick. (Mass.) 358; *Richardson v. Smith*, 59 N. H. 517.

1. *Ex parte Hayward*, 10 Pick. (Mass.) 358; *Richardson v. Smith*, 59 N. H. 517.

The record of the inferior court should show all facts necessary to sustain its jurisdiction. *Molett v. Keenan*, 22 Ala. 484.

2. Many authorities seem to hold that the revisory court on *certiorari* can only inquire as to the jurisdiction of the inferior tribunal, but the better opinion seems to be that errors in law affecting the merits of the case occurring in the course of the proceedings may be reviewed. *McAllhiley v. Horton*, 75 Ala. 491; *Donahue v. Will County*, 100 Ill. 94; *Hyslop v. Finch*, 99 Ill. 171; *State v. Dodge County*, 56 Wis. 79.

**New York.**—The growth of opinion in *New York* is fairly stated by *Folger, J.*, in *People v. Betts*, 55 N. Y. 600: "The office of a common-law *certiorari* is, in strictness, merely to bring up the record of the proceedings in an inferior court or tribunal, to enable the court of review to determine whether the former has proceeded within its jurisdiction, and not to correct mere errors in its proceedings. *People v. Commissioners of Highways*, etc., 30 N. Y. 72. True, it has been sometimes intimated and sometimes held that in the absence of any other remedy, and to prevent a failure of justice, the party will be suffered by it to bring up, not only the naked question of jurisdiction, but the evidence as well as the ground or principles on which the inferior body acted, and the questions of law on which the relator relies. *Susquehanna Bank v. Supervisors*, etc., 25 N. Y. 312; *Baldwin v. Buffalo*, 35 N. Y. 380; *Swift v. Poughkeepsie*, 37 N. Y. 511. Many cases are cited in the *People v. Assessors*, 39 N. Y. 81, and it is there held

that the office of the writ extends to the review of all questions of jurisdiction, power, and authority of inferior tribunals to do the acts complained of, and to all questions of regularity of their proceedings. In *People v. Assessors*, 40 N. Y. 154, it is held that the writ may bring up for review the decision that a given state of facts is not legally sufficient to compel a board of supervisors to the conclusion that certain property was not liable to assessment; in other words, a decision of law. . . . And in *People v. Allen*, 52 N. Y. 538, a *certiorari* brought up for review the decision of the defendants upon a question of law. It is thus seen that the office of a common-law writ of *certiorari* has been somewhat enlarged since the decision in 30 N. Y. 72. But it will also be seen that it is in cases where the relator has no other available remedy, and where injustice would be done if the writ was not permitted to do its work. The rule still remains unimpaired, at least in principle, that where there is a remedy by appeal, the writ will be confined to its original and more appropriate office." *Storm v. Odell*, 2 Wend. (N. Y.) 287. See also *In re Mt. Morris Square*, 2 Hill (N. Y.), 14, 27. Compare *People v. Burney*, 29 Cal. 459; *Central Pacific R. v. Placer County*, 46 Cal. 667; *Phillips v. Welch*, 12 Neb. 158.

3. *Mendon v. Commissioners*, 5 Allen (Mass.), 13; *Farmington*, etc., Co. v. Commissioners, 112 Mass. 206; *Tewksbury v. Commissioners*, 117 Mass. 117; *Milwaukee Iron Co. v. Schabel*, 29 Wis. 447.

4. *Whitney v. Board of Delegates*, 14 Cal. 480; *People v. Board of Police*, 69 N. Y. 409; *People v. Board of Police*, 72 N. Y. 15.

When a *certiorari* is issued to county commissioners, all should join in the return, which should be the record and not an answer as in a suit. *Tewksbury v. Commissioners*, 117 Mass. 563; *Farmington*, etc., Co. v. Commissioners, 112 Mass. 206.

4. **What Matters Reviewed.**—When its scope is not enlarged by statute, *certiorari* lies only to correct errors in law and not to review the evidence.<sup>1</sup> According to the better view, however, it is proper to inquire whether there was *any* evidence to establish some essential fact,<sup>2</sup> and also as to the rulings below upon the admission of alleged incompetent evidence where no other and competent evidence was introduced tending to prove a necessary finding.<sup>3</sup> But the record of an inferior court or other tribunal of matters in its jurisdiction cannot be disputed by other evidence, nor its finding of facts when supported by *any* competent evidence.<sup>4</sup>

5. **General Principles upon which Granted or Refused.**—The writ of

1. McAllilley v. Horton, 75 Ala. 491; Central Pacific R. v. Placer County, 43 Cal. 365; Betts v. Warren, 5 Harr. (Del.) 4; Hyslop v. Finch, 99 Ill. 171; *Ex parte* Nightengale, 11 Pick. (Mass.) 168; Gibbs v. Commissioners, 19 Pick. (Mass.) 298; Corrie v. Corrie, 42 Mich. 509; Rawson v. McIlvane, 49 Mich. 194; Williamson v. Carman, 1 G. & J. (Md.) 196; Rayner v. State, 52 Md. 368; De Rocherbrune v. Southernier, 12 Minn. 78; Lapan v. Commissioners, 65 Me. 160; State v. Davis, 48 N. J. L. 112; State v. Hudson, 32 N. J. L. 365; State v. Bill, 13 Ired. (N. Car.) 373; People v. Assessors, 39 N. Y. 81; Independence v. Pompton, 4 Halst. (Tenn.) 209; *In re* Kensington County, 97 Pa. St. 260; Healey v. Kneeland, 48 Wis. 407; State v. Kemen, 61 Wis. 494; Poe v. Machine Works, 24 W. Va. 517. Compare Calaway v. Calaway, 3 Harr. (Del.) 84; Hill v. Faison, 27 Tex. 428.

*Certiorari* is said not to lie to set aside proceedings of county commissioners in allowing illegal claim. Andrews v. Pratt, 44 Cal. 309. Compare People v. Supervisors, 51 N. Y. 442.

2. "Not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the superior tribunal." Jackson v. People, 10 Mich. 111. *Ex parte* Madison Turnpike Co., 62 Ala. 93; Camden v. Block, 65 Ala. 236; Rawson v. McIlvane, 49 Mich. 194; Hyde v. Nelson, 11 Mich. 357; People v. Police Board, 72 N. Y. 415; People v. Police Board, 69 N. Y. 408; People v. Weigant, 14 Hun (N. Y.), 546; Moreland v. Whitford, 54 Wis. 150.

The record of a summary conviction under a penal statute by an inferior court

should contain the evidence upon which conviction was had. Mullin v. People, 24 N. Y. 399.

3. Farmington, etc., Co. v. Commissioners, 112 Mass. 206; Cobb v. Lucas, 15 Pick. (Mass.) 1; Gleason v. Sloper, 24 Pick. (Mass.) 181; St. Paul v. Marvin, 16 Minn. 91; Gerdes v. Champion, 108 Ill. 137; Hosford v. Wilson, 1 Taunt. 13.

The objection to the competency of evidence should have been made below. Cousins v. Cowing, 23 Pick. (Mass.) 208; Stratton v. Commissioners, 10 Met. (Mass.) 217.

**Assignment of Error.**—It has been said that the revisory court without assignment of errors will inspect the record and give judgment. Commissioners v. Sheldon, 3 Mass. 188. But compare Platt v. Hook, 5 Harr. (Del.) 352; Deputy v. Betts, 4 Harr. (Del.) 352. And the statutes of the States generally provide for an assignment of errors on *certiorari*.

4. Fore v. Fore, 44 Ala. 478; Miller v. McCullough, 21 Ark. 426; Deputy v. Betts, 4 Harr. (Del.) 352; Burton v. Ferguson, 69 Ind. 486; Mendon v. Commissioners, 5 Allen (Mass.), 13; Tewksbury v. Commissioners, 117 Mass. 563; Emery v. Braun, 67 Me. 39; McGregor v. Supervisors, 37 Mich. 388; Hannibal R. v. State Board of Equalization, 64 Mo. 294; Williamson v. Carman, 1 G. & J. (Md.) 196; State v. Miller, 94 N. Car. 902; People v. Fire Commissioners, 73 N. Y. 437; State v. Board of Equalization, 7 Nev. 83; Richardson v. Smith, 59 N. H. 517; Andrews v. Andrews, 14 N. J. L. 141; State v. Kernan, 61 Wis. 494; Cassidy v. Millerich, 52 Wis. 389; State v. Senft, 2 Hill (S. Car.), 367.

**Jurisdictional Fact Disputable.**—It has been held that a fact which goes to the jurisdiction of the inferior tribunal may be disputed. Whitney v. Board of Delegates, 14 Cal. 480-501; Cullen v. Lowery, 2 Harr. (Del.) 459.

*certiorari* is not a writ of right, except when made so by statute or when issued at the instance of the sovereign power;<sup>1</sup> but it rests in the sound discretion of the court to grant or refuse it under the circumstances of the case.<sup>2</sup> It will not be granted unless required to do substantial justice.<sup>3</sup> It lies only to inferior courts and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative.<sup>4</sup>

1. Bacon's Abr. *Certiorari*, title (a); 4 Black. Com. 320; *Mendon v. Commissioners*, 5 Allen (Mass.), 13; *Duggen v. McGruder*, Walk. (Miss.) 112; s. c., 12 Am. Dec. 527; *Supervisors v. Magoon*, 109 Ill. 142; *Ex parte Hitz*, 111 U. S. 766.

2. *Flourney v. Payne*, 28 Ark. 87; *Keys v. Marin County*, 42 Cal. 252; *Scroggin v. State*, 55 Ga. 380; *Basnet v. Jacksonville*, 16 Fla. 523; *Bannister v. Allen*, 1 Blackf. (Ind.) 414; *Freeman v. Oldham*, 4 T. B. Mon. (Ky.) 420; *Duggen v. McGruder*, Walk. (Miss.) 112; *Specht v. Detroit*, 20 Mich. 168; *Bath Bridge v. Magoon*, 8 Greenl. (Me.) 293; *Farmington, etc., Co. v. Commissioners*, 112 Mass. 206; *Huse v. Gaines*, 2 N. H. 210; *People v. Supervisors*, 15 Wend. (N. Y.) 198; *State v. Senft*, 2 Hill (S. Car.), 367; *Erwin v. Erwin*, 3 Dev. (N. Car.) 528; *State v. Taxing District*, 16 Lea (Tenn.), 240; *Crosby v. Probate Court*, 3 Utah. 50; *Walbridge v. Walbridge*, 46 Vt. 617; *Knapp v. Heller*, 32 Wis. 467.

"The discretion was not an arbitrary one, but one to be exercised in subordination to legal principles, and we may always inquire whether those principles have been adhered to or departed from." *Trustees v. Directors*, 88 Ill. 100.

3. *Edgar v. Greer*, 14 Iowa, 211; *Hyslop v. Finck*, 99 Ill. 171; *Cobb v. Lucas*, 15 Pick. (Mass.) 181; *Gager v. Supervisors*, 47 Mich. 167; *French v. Barre*, 58 Vt. 567; *State v. Kernan*, 61 Wis. 494.

**Substantial Justice.**—Upon the application for the writ evidence may be introduced to show that substantial justice has been done, and in such event the petitioner may introduce contradictory evidence, but it must be limited to this point. *Farmington, etc., Co. v. Commissioners*, 112 Mass. 206; *Gleason v. Sloper*, 24 Pick. (Mass.) 181; *Charlestown v. Commissioners*, 109 Mass. 270; *Hyslop v. Finck*, 99 Ill. 171.

**Petitioner's Interest.**—The petitioner must have an individual pecuniary interest in the proceedings sought to be reviewed. *Powell v. Commissioners*, 34 Ala. 278; *Watson v. May*, 6 Ala. 133;

*Bath Bridge Co. v. Magoon*, 8 Greenl. (Me.) 292; *Tucker's Petition*, 28 N. H. 405; *Daids County v. Horne*, 4 G. Greene (Iowa), 133.

But if he have such an interest he need not be a party to the record. *Moore v. Hancock*, 11 Ala. 245; *Dyer v. Lowell*, 30 Me. 217. Compare *McCreary v. O'Flinn*, 63 Miss. 204.

A statutory provision requiring the writ to be brought within two years does not take away its discretionary character; nor does a provision for its allowance out of court by one judge. *In re Lantis*, 9 Mich. 324; *Thompson v. Multnomah County*, 2 Ore. 34.

4. *Robinson v. Supervisors*, 16 Cal. 208; *State v. Mansfield*, 34 Minn. 250; *In re Wilson*, 32 Minn. 145; *Ex parte Fay*, 15 Pick. (Mass.) 243; *Lock v. Lexington*, 112 Mass. 290; *Stone v. Mayor*, 25 Wend. (N. Y.) 157; *Esmeralda County v. District Court*, 18 Nev. 438; *Thompson v. Multnomah County*, 2 Ore. 34.

**New Jersey.**—But in *New Jersey*, *certiorari* is considered a proper proceeding to test the validity of the acts of municipal corporations, whether judicial, legislative, or ministerial. *Camden v. Mulford*, 2 Dutch. (N. J.) 49; 2 Dil. Mun. Corp. (3d Ed.) sec. 927.

**Acts Not Judicial.**—Among many cases the following acts have been declared non-judicial, and hence not reviewable on *certiorari*: The appointment of a supervisor by a county judge. *People v. Bush*, 40 Cal. 344. The delegating to a committee of the power to locate a "Children's Home" by supervisors. *People v. Supervisors*, 25 Hun (N. Y.), 131. A resolution at a town meeting to pay bounties to soldiers. *People v. Supervisors*, 43 Barb. (N. Y.) 232. The selection of text-books by a board of education. *People v. Board of Education*, 54 Cal. 375. The creation of a swamp-land district by supervisors. *Williams v. Supervisors*, 65 Cal. 160. The selection of an official newspaper. *Iowa News Co. v. Harris*, 62 Iowa, 501. The rejection of a bid for public printing. *Townsend v. Copeland*, 56 Cal. 612.

**Writ directed to one having Record.**—The writ should be directed to the court,

It does not lie when an appeal, writ of error, or other mode of review is given;<sup>1</sup> but if an appeal is improperly denied or the party is deprived of it by fraud or accident, a writ of *certiorari* is sometimes granted and the whole case reviewed both as to law and fact.<sup>2</sup> This writ does not lie to correct mere irregularities in the proceedings of the inferior jurisdiction;<sup>3</sup> nor where errors and individual hardship are manifest, if great public inconvenience would ensue;<sup>4</sup> nor where the matter sought to be reviewed rests in the discretion of the tribunal below;<sup>5</sup> nor where the party seeking it has been guilty of laches;<sup>6</sup> nor generally, in analogy to the writ of error, where the time in which the latter might be brought has expired.<sup>7</sup> The writ is not granted to review interlocu-

tribunal, or officer having charge of the record at the time the writ is issued. *Farmington, etc., Co. v. Commissioners*, 112 Mass. 206; *Commissioners v. Winthrop*, 10 Mass. 177; *Williams v. Williams*, 71 N. Car. 427.

1. *Dean v. State*, 63 Ala. 153; *Reilly v. Tyng*, 1 Ariz. 510; *People v. Turner*, 1 Cal. 152; *Withowski v. Skalowski*, 46 Ga. 41; *People v. Lindsay*, 1 Idaho, 394; *Ennis v. Ennis*, 110 Ill. 78; *Macklot v. Davenport*, 17 Iowa, 379; *Edgar v. Greer*, 14 Iowa, 211; *Lynch v. Crosby*, 34 Mass. 313; *Jones v. Boston*, 104 Mass. 461; *Williamson v. Carman*, 1 G. & J. (Md.) 196; *Edgerton v. Green Cove Springs*, 18 Fla. 528; *State v. Sluder*, 8 Ired. (N. Car.) 487; *State v. Apgar*, 31 N. J. 358; *Peacock v. Leonard*, 8 Nev. 84-157-247; *State v. Cohen*, 13 S. Car. 198; *Poe v. Machine Works*, 24 W. Va. 517; *Hauser v. State*, 33 Wis. 678. *Compare* *Krumick v. Krumick*, 2 Green (N. J.), 39; *N. J. Rd. v. Suydam*, 2 Harr. (N. J.) 25; *Ray v. Parsons*, 14 Tex. 370; *Murfee v. Leeper*, 1 Overt. (Tenn.) 1.

An appeal from a justice has been declared cumulative. *Williams v. Burchinal*, 3 Harr. (Del.) 83.

And in another case it has been said that where the inferior court has exceeded its jurisdiction an appeal is not proper, but the case should be reviewed on *certiorari*. *Baxter v. Brooks*, 29 Ark. 173; *People v. Judges*, 24 Wend. (N. Y.) 249.

2. *Hodges v. Lassiter*, 94 N. Car. 294; *Syme v. Broughton*, 84 N. Car. 114; *Simmons v. Dowd*, 77 N. Car. 155; *Perkins v. Hadley*, 4 Hayw. (Tenn.) 143; *Poe v. Machine Works*, 24 W. Va. 517.

3. *St. Louis, etc., R. v. Barnes*, 35 Ark. 95; *Basnet v. Jacksonville*, 18 Fla. 523; *Hopkins v. Fogler*, 60 Me. 266; *Galloway v. Corbitt*, 52 Mich. 460; *Kennedy v. State*, 5 R. I. 385.

4. *Trustees v. Directors*, 88 Ill. 100; *Rutland v. Commissioners*, 20 Pick.

(Mass.) 79; *In re Lantis*, 9 Mich. 324; *Elmendorf v. Mayor*, 25 Wend. (N. Y.) 693; *Bell v. Overseers*, 14 N. J. L. 131; *Dailey v. Bertholomew*, 1 Ashm. (Tenn.) 135; *Crosby v. Probate Court*, 3 Utah, 50.

Accordingly, fifteen months after a school district was organized and had assumed corporate functions the writ was denied. *Fractional School District v. Joint Board*, 27 Mich. 3.

So in tax cases the writ is frequently refused. *Weaver v. Devendorf*, 3 Denio (N. Y.), 117.

5. *Benton v. Taylor*, 46 Ala. 388; *Brooks v. Kirby*, 19 Ala. 72; *Hildreth v. Crawford*, 65 Iowa, 339; *Supervisors v. Auditor-General*, 27 Mich. 165; *Dwight v. Springfield*, 4 Gray (Mass.), 107; *People v. Supervisors*, 15 Wend. (N. Y.) 198; *Livingston v. Rector*, 45 N. J. L. 230; *Commissioners v. Kane*, 2 Jones (N. Car.) 288; *Wildy v. Washburn*, 16 Johns. (N. Y.) 49.

Questions of *expediency* as to the establishing of roads, making public improvements, etc., are of this nature. *Tiedt v. Carstensen*, 61 Iowa, 334.

6. *Hagar v. Supervisors*, 47 Cal. 222; *Tilton v. Larimer County, etc.*, 6 Col. 288; *State v. Lawrence*, 81 N. Car. 522; *Brown v. Williams*, 84 N. Car. 116; *People v. Police Board*, 24 Hun (N. Y.) 289; *Tye v. Noel*, 85 Ill. 290; *Trustees v. Directors*, 88 Ill. 100; *Stone v. Boston*, 2 Metc. (Mass.) 220; *State v. Hudson*, 5 Dutch. (N. J.) 115; *Bannister v. Allen*, 1 Blackf. (Ind.) 414; *Fagg v. Parker*, 11 Iowa, 187; *Poe v. Machine Works*, 24 W. Va. 517.

The writ should be applied for while the record is still in the hands of the tribunal whose action is sought to be reviewed. *People v. Delaney*, 49 N. Y. 655.

7. But upon a strong showing the writ may be granted after such time. *Kimple v. San Francisco*, 66 Cal. 136; *Trustees*



tory orders.<sup>1</sup> The petition for the writ should disclose a proper case upon its face.<sup>2</sup> Even where the writ has issued, it may be dismissed without a hearing, when in the opinion of the court it has been granted improvidently.<sup>3</sup> *Certiorari* is, however, an important remedy, and the right to issue it in proper cases has been steadily maintained by the courts.<sup>4</sup>

*v. Directors*, 88 Ill. 100; *State v. St. Louis*, 4 Mo. App. 577; *Rutland v. Commissioners*, 20 Pick. (Mass.) 83; *In re Lantis*, 9 Mich. 324; *People v. Commissioners*, 77 N. Y. 605; *State v. Milwaukee Co.*, 58 Wis. 4.

1. *People v. County Judge*, 40 Cal. 479; *People v. Lindsay*, 1 Idaho. 394; *Palms v. Campau*, 11 Mich. 109; *Stakes v. Early*, 45 N. J. L. 478; *Richardson v. Smith*, 59 N. H. 517; *Ex parte Hamilton*, 58 How. Pr. (N. Y.) 290; *Noble v. Board of Pilots*, 37 Barb. (N. Y.) 126; *In re Road, etc.*, 2 S. & R. (Pa.) 419. Compare *Commonwealth v. Simpson*, 2 Grant's Cas. (Pa.) 438; *State v. Patterson*, 39 N. J. L. 489. And in criminal cases. *State v. Jefferson*, 66 N. Car. 309.

But in *England certiorari* issues either before or after final order. 1 Tidd's Pr. 398.

2. *Russell v. Pickering*, 17 Ill. 31; *Lee v. Childs*, 17 Mass. 351; *Willis v. Dunn, Wright (O.)*, 130.

3. *Magee v. Cutler*, 43 Barb. (N. Y.) 239; *Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *In re Lantis*, 9 Mich. 324; *People v. Lindsay*, 1 Idaho, 394; *Burke v. Coolidge*, 35 Ark. 180.

**Notice.**—The statutes of the several States generally provide that the writ shall issue only on notice to the opposite party, and it would seem that such notice should be given in any event. *Farmington, etc., Co. v. Commissioners*, 112 Mass. 206; *Commissioners v. Downing*, 6 Mass. 72.

**Motion to Quash or Supersede.**—A motion to supersede the writ is the proper motion before the return is made, and a motion to quash only lies after the return has been made. *State v. Milwaukee Co.*, 58 Wis. 4; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; s. c., 9 Am. Rep. 591; *Rall v. Warren*, 16 How. Pr. (N. Y.) 379; *Ferguson v. Jones*, 12 Wend. (N. Y.) 241; 1 Tidd's Pr. 444.

4. Where there is no statutory inhibition, and no appeal or other mode of review is given, *certiorari* will lie in the following cases:

**Streets and Highways.**—The proceedings of supervisors, commissioners, city councils, etc., in opening, altering, improving or discontinuing public streets and roads as to their legality and regular-

ity, but not as to the questions of the *expediency* of such improvements. *Ex parte Keenan*, 21 Ala. 558; *Commissioners v. Thompson*, 15 Ala. 134; *Murray v. Mariposa County*, 23 Cal. 492; *Tewksbury v. Commissioners*, 117 Mass. 563; *Parks v. Boston*, 8 Pick. (Mass.) 218; *Kingman v. Commissioners*, 6 Cush. (Mass.) 306; *French v. Commissioners*, 12 Mich. 267; *Duffield v. Detroit*, 15 Mich. 474; *People v. Brighton*, 20 Mich. 57; *Preble v. Portland*, 45 Me. 241; *St. Charles v. Rogers*, 49 Mo. 530; *Swan v. Cumberland*, 8 Gill (Md.), 150; *Nickols v. Sutton*, 22 Ga. 369; *Spray v. Thompson*, 9 Iowa, 500; *Deitrich v. Commissioners*, 6 Ill. App. 70; *Lawton v. Commissioners*, 2 Caines (N. Y.), 179; *Dorchester v. Wentworth*, 31 N. H. 451; *Camden v. Mulford*, 2 Dutch. (N. J.) 49; *Prigden v. Bannerman*, 8 Jones (N. Car.), 53; *Ruhlman v. Commonwealth*, 5 Binn. (Pa.) 26; *White's Case*, 2 Overt. (Tenn.) 109; *French v. Barre*, 58 Vt. 567; *State v. Stewart*, 5 Strob. L. (S. Car.) 29; *State v. Cockrell*, 2 Rich. L. (S. Car.) 6; *State v. McCune*, 24 Wis. 286; *Ewing v. St. Louis*, 5 Wall. (U. S.) 413.

**Vermont.**—The rule obtains as regards such proceedings in a county court in *Vermont*. *Woodstock v. Gallup*, 28 Vt. 587.

**New York and Ohio.**—In *New York* and *Ohio* it has been held that *certiorari* does not lie in cases like the above—*People v. Mayor*, 2 Hill (N. Y.), 9; *People v. Stilwell*, 19 N. Y. 531; *Dixon v. Cincinnati*, 14 Ohio, 240—but the weight of authority is for the rule announced.

**Taxes and Assessments.**—*Certiorari* lies to correct illegalities in the levying of taxes and local assessments by assessors, commissioners, etc., under the above qualifications, but it is granted with great care, and frequently refused on grounds of public convenience. *Carroll v. Mayor*, 12 Ala. 173; *Ex parte Buckner*, 4 Eng. (Ark.) 73; *California, etc., R. v. Supervisors*, 18 Cal. 671; *Gilkey v. Watertown*, 141 Mass. 317; *Worcester County v. Worcester*, 116 Mass. 193; *Sisson v. New Bedford*, 137 Mass. 255; *Royce v. Jenney*, 50 Iowa, 679; *State v. Jersey City*, 35 N. J. 381; *Weaver v. Devendorf*, 3 Denio (N. Y.), 198; *Leroy v. New*

In *England*<sup>1</sup> and a number of the States of the Union it issues in both civil and criminal cases.<sup>2</sup>

**6. Effect of Issuing Writ.**—The issuing of the writ of *certiorari* stays all proceedings by the inferior tribunal, except in cases where the execution of its order has already begun.<sup>3</sup>

**7. The Judgment.**—The judgment on the hearing is that the proceedings below be either quashed or affirmed in whole or in part.<sup>4</sup>

York, 20 Johns. (N. Y.) 430; *O. & M. R. v. Lawrence County*, 27 Ill. 50; *Shelby County v. M. & T. R.*, 16 Lea (Tenn.), 401; *State v. County Clerk*, 59 Wis. 15.

The writ does not lie to correct errors in valuation or equalization. *Randle v. Williams*, 18 Ark. 380; *Jones v. Boston*, 104 Mass. 461; *People v. Ogdensburg*, 48 N. Y. 390; *Smith v. Supervisors*, 30 Iowa, 531.

The writ has been denied where the defence of illegality could be made at the hearing for judgment. *Pease v. Chicago*, 21 Ill. 500.

It should not be allowed where the purpose is to enable a party to recover back taxes by a reversal of the proceedings. *People v. Commissioners*, 43 Barb. (N. Y.) 494.

And it has been said that where the relief would affect all tax-payers alike, all should join in the application for the writ. *Libby v. West St. Paul*, 14 Minn. 248.

**Municipal Courts.**—The legality of convictions in municipal courts will be reviewed on *certiorari*. *Camden v. Black*, 65 Ala. 236; *Marion v. Chandler*, 6 Ala. 899; *Taylor v. Americus*, 39 Ga. 59; *Corbett v. Duncan*, 84 Miss. 84; *Jackson v. People*, 10 Mich. 111.

**Justices.**—So of many proceedings before justices. *Rex v. Inhabitants*, 1 Ld. Raym. 580; *Marble v. Laney*, 41 Ga. 626; *Chicago, etc., R. v. Fell*, 22 Ill. 333; *Gleason v. Sloper*, 24 Pick. (Mass.) 181; *Morris, etc., Co. v. Mitchell*, 31 N. J. L. 99; *Commonwealth v. Betts*, 76 Pa. St. 465; *McNeil v. Hallmark*, 28 Tex. 157; *Whittington v. Southworth*, 26 Mich. 381; *Coombs v. Dunlap*, 19 Wis. 591.

**Contested Elections.**—*Certiorari* lies to review the proceedings of inferior tribunals invested with the power of hearing and deciding election cases. *Whitney v. Board of Delegates*, 14 Cal. 480; *State v. Marlow*, 15 Ohio St. 114; *Commonwealth v. Leech*, 44 Pa. St. 332; *Gibbons v. Sheppard*, 65 Pa. St. 20; *Chenoweth v. Commissioners*, 26 W. Va. 230; *State v. Cockrell*, 2 Rich. L. (S. Car.) 6; 1 Dill, Mun. Corp. (3d Ed.) 232. *Compare O'Docherty v. Archer*, 9 Tex. 275.

**Other Cases.**—As further illustrations

of the use of this writ, it has been held to lie to school trustees and superintendents in dividing school districts. *Miller v. Trustees*, 88 Ill. 26; *Moreland v. Whitford*, 54 Wis. 150. To town board in removing an assessor. *Merrick v. Town Board*, 41 Mich. 630. To a city council removing a city officer. *Mayor v. Shaw*, 16 Ga. 172. To a city council to review the granting of a ferry license. *Ex parte Fay*, 15 Pick. (Mass.) 243. To review proceeding of supervisors in ordering an election to relocate a county-seat. *Herrick v. Carpenter*, 6 N. W. Rep. 574. To a probate court allowing a claim without notice. *Baskins v. Wylds*, 39 Ark. 347. To review forcible entry and detainer proceedings. *Thorn v. Reed*, 1 Ark. 480; *McDonald v. Cousins*, 23 Ga. 227; *Russell v. Wheeler*, 1 Hempst. (Tenn.) 3. To review proceedings of quarter sessions in incorporating boroughs. *Borough of Quakertown*, 3 Grant Cas. (Pa.) 203. And to remove an indictment from the court of oyer and terminer before trial to the supreme court. *People v. Baker*, 3 Park. (N. Y.) 181. It has been said to lie to test the validity of the proceedings of a court-martial. *People v. Townsend*, 10 Abb. N. C. (N. Y.) 169. But *compare Dunbar's Case*, 14 Mass. 393. And the Supreme Court of the United States has no power to review the proceedings of a military commission ordered by a general officer of the army. *Ex parte Vallandigham*, 1 Wall. (U. S.) 243.

1. *Rex v. Inhabitants*, 1 B. & C. 142; 4 Black Com. 265.

2. *John v. State*, 1 Ala. 95; *People v. Turner*, 1 Cal. 152; *State v. Stone*, 3 H. & M'H. (Md.) 115; *People v. Vermilyea*, 7 Cow. (N. Y.) 141; *State v. Gibbons*, 1 South. (N. J.) 40; *State v. Miller*, 94 N. Car. 902; *Commonwealth v. Balph*, 111 Pa. St. 365; *Kenney v. State*, 5 R. I. 385; *State v. Taxing District*, 16 Lea (Tenn.), 240; *Macaboy v. Commonwealth*, 2 Va. Cas. 268. *Compare Winn v. State*, 10 Ohio, 345.

3. *John v. State*, 1 Ala. 95; *Hyslop v. Finck*, 99 Ill. 171; *State v. Hunt*, 46 N. J. L. 59.

4. *McAllilley v. Horton*, 75 Ala. 491; *Baxter v. Brooks*, 29 Ark. 173; *Barne*

Unless authorized by statute, the revisory court has no power to enter a different order or judgment on the merits.<sup>1</sup>

8. *Costs*.—At common law neither party recovered costs;<sup>2</sup> but this matter is now regulated largely by statute.

9. *As an Ancillary Process*.—The writ of *certiorari* is frequently used as an ancillary process to obtain a full return to other process. It is the proper ancillary process to a writ of *habeas corpus*, when it is desired to bring the full record of the proceedings upon which the party was committed below before the court issuing the *habeas corpus*.<sup>3</sup> And where a cause has been brought before a superior court on appeal, writ of error or other mode, and there appears to be a manifest defect in the record, or diminution is suggested, a writ of *certiorari* lies to obtain a perfect transcript and all papers.<sup>4</sup>

**CESTUI QUE TRUST.** See TRUSTS AND TRUSTEES.

**CHAIN.**—A series of links or rings, connected or fitted into one another.<sup>5</sup>

**CHAIR.**—A movable seat with a back intended for one person.<sup>6</sup>

1. Jacksonville, 18 Fla. 523; Hamilton v. Harwood, 113 Ill. 154; Taylor v. Gay, 20 Ga. 77; Commissioners v. Blue Hill Turnpike Corp., 5 Mass. 420; Dudley v. Staples, 15 Johns. (N. Y.) 195; Hopkinton v. Smith, 15 N. H. 152; Peacock v. Leonard, 8 Nev. 157; White v. Commonwealth, 3 Brewst. (Pa.) 30; Wooton v. Manning, 11 Tex. 327; Bandlow v. Thieme, 53 Wis. 57; Kelly v. Story, 2 Heisk. (Tenn.) 202. Compare State v. Milwaukee Co., 58 Wis. 4.

1. Commissioners v. West Boston Bridge, 13 Pick. (Mass.) 195; Lowell v. Commissioners, 6 Allen (Mass.), 131; Thompson v. School District, 25 Mich. 483.

2. Commissioners v. Ellis, 11 Mass. 465; State v. Leavitt, 3 N. H. 44; Baldwin v. Wheaton, 12 Wend. (N. Y.) 262; Wheeler v. Roberts, 7 Cow. (N. Y.) 536.

*Certiorari* will not lie to correct a wrong taxing of costs below. Young v. Blaisdel, 138 Mass. 344.

3. State v. Glenn, 54 Md. 572-609; Corrie v. Corrie, 42 Mich. 509; *In re* Martin, 5 Blatchf. (U. S. C. C.) 303; Church Hab. Corp. 330; Bac. Abr. tit. Hab. Corp. (B.) 4.

4. Las Animas County v. Bond, 3 Col. 222; Reed v. Curry, 40 Ill. 73; Figart v. Halderman, 59 Ind. 424; Franklin v. Academy, 16 B. Mon. (Ky.) 472; Thatcher v. Miller., 111 Mass. 414; Burr v. Waterman, 2 Cow. (N. Y.) 38; Brackett v. State, 2 Tyler (Vt.), 152; Scott v. Hall, 2 Muni. (Va.) 229, U. S. v. Adams,

9 Wall. (U. S.) 661; Fowler v. Lindsay, 3 Dall. (U. S.) 413.

Diminution of the record will not be presumed, and must be alleged by affidavit. Mullary v. Caskaden, Minor (Ala.), 20; Van Glahn v. Raymond, 40 Ill. 73; Williams v. Quin, 7 Cow. (N. Y.) 539.

The writ will not be granted till after the record is certified. James v. McCormick, Minor (Ala.), 20.

As to diminution of evidence, see Russell v. Hepburn, 5 Harr. (Del.) 386.

**Authorities for Certiorari.**—1 Tidd's Pr. (3d Am. Ed.) c. 16; 1 Crary Spec. Proc. (3d Ed.) c. 6 and 12; Powell App. Proc. 347 *et seq.*; 2 Dil. Munic. Corp.; 2 Add. Torts, secs. 1467-1480; Cooley Tax.; 12 Am. Dec. 529, note; Smith Sheriffs, etc., 413-431; Hilliard New Trials, 686.

5. Webster.

The description "horn chains" in a contract is sufficiently answered by supplying chains made partly of hoof and partly of horn. Sweet v. Schumway, 102 Mass. 365.

6. Webster.

Insurance on stock contained in a chair factory covers not only stock in the main building of the factory where the manufacturing was done, but also in an engine building which was appurtenant to the main building and connected to it by a platform, and by the belting to the machinery. Liebenstein v. Ins. Co., 45 Ill. 301.

## CHAIRMAN—CHAMBERS—CHAMPAGNE—CHAMPERTY.

**CHAIRMAN.**—The presiding officer of a deliberative body, legislative or otherwise.<sup>1</sup>

**CHALLENGE** (in Practice). See DUELLING; JURIES AND JURY TRIALS.

**CHAMBERS.**—The office or private rooms of a judge, where parties are heard and orders are made and other business transacted in matters which do not require to be done in open court.<sup>2</sup>

Parts of the ocean included within lines drawn from one promontory to another, or perhaps between points a league distant from each of two promontories.<sup>3</sup>

**CHAMPAGNE.**—A kind of brisk, sparkling wine, from Champagne, France.<sup>4</sup>

**CHAMPERTY AND MAINTENANCE.** (See also ATTORNEY AND CLIENT.)

*Definition and General Nature, 68.*

*Existence of the Old Law in the United States, 73.*

*Recognized Exceptions, 76.*

*Contingent Fees, 78.*

*After Litigation Ended, 79.*

*Advancing Costs, 79.*

*Pretended Titles and Things in Litigation, 80.*

*Effect of Maintenance, 85.*

*Champerty as a Defence, 86.*

*Quantum, Meruit, 86.*

**1. Definition and General Nature.**—Maintenance is an officious intermeddling in a suit that noway belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it,<sup>5</sup> and signifies an unlawful taking in hand or uphold-

**1.** Rapalje & Lawrence L.D.

Where a statute incorporating a railway provided that the proceedings of all meetings should be entered in a book and "signed by the chairman of such respective meetings, it was held that the chairman who presided when the proceedings took place might sign the entry of the same at the next meeting; and where the same person was chairman of two meetings held on August 18 and 24, it was a good signature of the proceedings of August 18 to subscribe them "Confirmed 24 Aug., 1836, W. G." W. L. Ry. Co. v. Bernard, 3 Q. B. 873.

**2.** Jurisdiction at chambers is incidental to and grows out of the jurisdiction of the court itself. It is the power to hear and determine, out of court, such questions arising between the parties to a controversy, as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge out of court without requiring them to be brought before the court in actual session. It follows that the jurisdiction of a court at chambers cannot go beyond the jurisdiction of the court to which he belongs, or extend to matters with which his court has nothing

to do. And the constitution, in granting such jurisdiction at chambers to the judges of the several courts of the State, as may be directed by law, is to be understood as limiting the jurisdiction of each to such subject-matters as are within the jurisdiction of his proper court, and to which, *ex vi termini*, he is limited." P. F. W. & C. Ry. Co. v. Hurd, 17 O. St. 144.

"The averment of an indictment that the motion for a new trial was heard by the justice of the superior court "at his chambers," is satisfied by proof that the hearing took place in an apartment appropriated to the use of that court for the transaction of business not requiring the presence of a jury. Commonwealth v. McLaughlin, 122 Mass. 449.

**3.** 1 Pet. Adm. Dec. 29 n.; 1 Kent. Com. 30; Jacobsen's Laws of the Sea, 416.

**4.** Webster.

Champagne is within the term "liquors" in an act forbidding the sale of such on credit to a greater amount than ten dollars. Kizer v. Randleman, 5 Jones L. (N. C.) 428.

**5.** 4 Bl. Com. 135; Burrill's Law Dic., tit. Maintenance; Andrews v. Thayer, 30 Wis. 228.

ing of quarrels or sides, to the disturbance or hindrance of common right.<sup>1</sup> Champerty is a species of maintenance, being a bargain with a plaintiff or defendant, *campum partice*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the suit at his own expense.<sup>2</sup> Hawkins, followed by Coke<sup>3</sup> and Sir William Grant,<sup>4</sup> defines it as "the unlawful maintenance of a suit in consideration of a part of the debt or other thing in dispute."<sup>5</sup> Under this

In 2 Bouvier's Law. Dic. (14th Ed.) 90 it is defined to be "a malicious or at least officious interference in a suit in which the offender has no interest, to assist one of the parties to it against the other with money or advice to prosecute or defend the action, without any authority of law." See also 1 Russ. Cr. Law, 176.

1. 1 Hawk. P. C. (Curw. Ed.) 454; Brown v. Beauchamp, 5 T. B. Monroe (Ky.), 413; s. c., 17 Am. Dec. 81.

"This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression, and therefore by the Roman law it was a species of the *crimen falsi* to enter into any confederacy, or do any act, to support another's lawsuit by money, witnesses, or patronage." 4 Bl. Com. 135; 2 Inst. 208.

The penalties of maintenance are applicable to maintenance of any kind of suits, whether at common law or otherwise. Wallis v. Duke of Portland, 3 Ves. (Eng.) 494.

The following is the account given of the rise and growth of the law of maintenance in the leading case of Thalhimer v. Brinkerhoff, 3 Cow. (N. Y.) 623; s. c., 15 Am. Dec. 308: "The English law of maintenance arose from causes peculiar to the state of society in which it was established. The great reason for the suppression of champerty and maintenance was an apprehension that justice itself was endangered by these practices. Blackstone, 4 Com. 135, speaks of this offence as perverting the process of the law into an engine of oppression. In the case of Slyright v. Page, 1 Leon. 167, it was said by the whole court of common pleas, that the meaning of the 32 Hen. VIII. concerning maintenance was to repress the practices of many, who when they thought they had title or right to any land, for the furtherance of their pretended right conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors. . . . The power of great men to whom rights of action were transferred, in order to obtain suit and favor

in suits brought to assert those rights, the confederacies which were thus formed, and the oppression which followed from the influence of great men in such cases are themes of complaint in the early books of English law. While the power of nobles and great men was felt in the administration of justice, these practices seem to have produced real and great evils. In that state of things, instead of invigorating the administration of justice as the direct remedy for such evils, the laws concerning champerty and maintenance were established as penal regulations intended to operate upon the parties to these transactions. . . . 'Nothing,' says Coke (Co. Litt. 114 a), 'nothing in action, entry or re-entry can be granted over, for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed.' Feeble, partial, and corrupt must have been the administration of justice when such a reason could have force."

Especially is this seen to be true in cases triable by jury, for the juries were (a change of venue not being allowed in those days) generally the tenants of the lord in whose vicinity the suit was brought. 3 Stubbs Const. Hist. 532, 539, 541; 3 Stephen Hist. Eng. Cr. Law, 236, 237, 238.

2. 4 Bl. Com. 435.

3. Co. Litt. 368 b.

4. "Champerty is the unlawful maintenance of a suit in consideration of a bargain for a part of the thing or some profit out of it." Stevens v. Bagwell, 15 Ves. 139.

5. Hawk. P. C. ch. 84, § 1. Chitty and Bouvier follow Blackstone. 2 Chit. Cr. L. 234 (n) a; 1 Bouv. Dic. 235. But see 1 Add. Cont. § 257; Rapalje Lawrence's Dic., "Champerty;" Abbott Law Dic., "Champerty;" Box v. Barnby, Hob. 117; Co. Litt. 368 b.

"The offence of champerty is defined in the old books to be the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it." Tindal, C. J., in Stanley v. Jones, 7 Bing. 369.

definition it is not necessary that the champertor carry on the suit at his own expense. Maintenance was an indictable offence at common law and by statute, and is even said to have been *malum in se*.<sup>1</sup> While the offence may be committed although there is no suit actually commenced,<sup>2</sup> it is essential that there be actual assistance, and not merely an offer to assist.<sup>3</sup> Champerty and maintenance form no exception to the general principle of criminal law, that there can be no offence if the party acts under a misapprehension of the material facts.<sup>4</sup> The offence is not confined to

*Compare* Holloway v. Lowe, 7 Port. (Ala.) 488; Thurston v. Percival, 1 Pick. (Mass.) 416; Key v. Vattier, 1 Ohio, 132; Brown v. Beauchamp, 5 T. B. Monr. (Ky.), 416; Rust v. Larue, 4 Litt. (Ky.) 417.

"The gist of the offence, therefore, consists in the mode of compensation irrespective of the particular manner in which the suit is to be maintained, because all maintenance of a suit by a stranger was at common law unlawful." Sedgwick v. Stanton, 4 Kern. (N. Y.) 289.

"The distinction between maintenance and champerty seems to be this: When there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but where he stipulates to receive part of the thing in suit he is guilty of champerty." 4 Cooley's Bl. Com. 134 n; Bell v. Smith, 7 D. & R. 846; s. c., 5 B. & C. 188.

The distinction between maintenance and champerty is not always borne in mind, and the words are carelessly used interchangeably. Scobey v. Ross, 13 Ind. 117.

1. "It appeareth that the end of champerty and maintenance is to suppress justice and truth, or at least to work delay, and therefore it is *malum in se*, and against the common law." 2 Inst. 208 See also 2 Inst 212; 1 Hawk. P. C. 283 sec. 36. p 543; and for good general discussion, Brown v. Beauchamp, 5 T. B. Monr. (Ky.) 413; s. c., 17 Am. Dec. 84.

"He that mayntaineth other men's suits shall in some cases be three yeres imprisoned, and further punished at the king's pleasure"; the offence being deemed as grave as perjury or forgery. Palton de Pace, Ed. of 1615, 426. See also 1 Bish. Crim. Law, § 942. See also Thurston v. Percival, 1 Pick. (Mass.) 415; Rust v. Larue, 4 Litt. (Ky.) 411, 425; Brown v. Beauchamp, 5 T. B. Mon (Ky.) 413, 416; s. c., 17 Am. Dec. 81; Duglass v. Wood, 1 Swan (Tenn.), 393; Pechell v. Watson, 8 M. & W. (Eng.) 691; Fletcher v. Ellis, 1 Hempst. (Ark.) 300.

The better opinion is that so far as the substance of these offences is concerned the statutes of West. 1, c. 25. 3 Edw. I., 28 Edw. I. c. 11, 33 Edw. I., 32 Hen. VIII. c. 9, were merely declaratory of the common law, and that the fundamental doctrines of the law upon this subject existed before the statutes. Lord Rosslyn in Willer v. Duke of Portland, 3 Ves. 494; Tindal. C. J., in Stanley v. Jones, 7 Bing. 369; Pecke v. Watson, 8 Mes. & W. 691; s. c., 4 Bl. Com. 135; Story Eq. Jur. § 1048; Parker, C. J., in Swett v. Poor, 11 Mass. 354; Thurston v. Percival, 1 Pick. (Mass.) 415; Backus v. Byron, 4 Mich. 535.

2. Rust v. Larue, 4 Litt. (Ky.) 411; Martin v. Amos, 13 Ire. (N. Car.) 201.

3. Fletcher v. Ellis, 1 Hempst. (Ark.) 300.

4. Etheridge v. Cromwell, 8 Wend. (N. Y.) 629. See Swett v. Poor, 11 Mass. 549, 553; Everenden v. Beaumont, 7 Mass. 76, 78; Brinley v. Whiting, 5 Pick. (Mass.) 348, 350.

No one has been punished criminally for the offence of maintenance or champerty within the memory of living man. Backus v. Byron, 4 Mich. 535; 3 Stephen Hist. of Crim. Law, 234.

While, however, in the absence of criminal intent no one can be subjected to criminal liability, it is also true that a contract innocently entered into and honestly carried out by the parties may prove to be champertous, when judicially construed, and incapable of enforcement. Thompson v. Reynolds, 73 Ill. 11.

"Maintenance properly so called can only be in a court of justice or in reference to matter pending or to be brought there. Still there is a kind of indictable conspiracy, sometimes treated of under the head of maintenance, having no necessary reference to a court of justice. Persons guilty of it are described in stat. 33 Edw. I. c. 2 to be such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth." 2 Bish. Cr. Law (7th Ed.), § 124.



attorneys, and may be committed by laymen under the same circumstances as an attorney may commit.<sup>1</sup>

The extent to which the old common law applied the principles of the law of maintenance is well illustrated by a few instances taken from Hawkins: "Speaking in the cause as one of the counsel of the party," "giving any public countenance to another in relation to the suit," "soliciting the judge to give judgment according to the verdict," "perhaps barely going along with him to inquire for a person learned in the law," were indictable offences: He admits that a juror may exhort his companions to render the verdict which he deems right himself, and even that a non-professional man may impart to his neighbor gratuitously "friendly advice what action is proper for him to bring for the recovery of a certain debt." "Yet it is said that a man of great power not learned in the law may be guilty of maintenance by telling another who asks his advice that he has a good title."<sup>2</sup> Precisely how far these principles are now in force it is difficult to determine. Perhaps indeed we can certainly set down as saved from the old law only what Hawkins terms "assisting another with money to carry on his cause; as by retaining one to be counsel for him or otherwise bearing him out in the whole or part of the expense of the suit." This done under some circumstances is indictable now, and the assistance rendered need not evidently be money: it may be any other thing valuable for accomplishing the object.<sup>3</sup> The offence of maintenance seems further, now, to be confined to the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing litigation.<sup>4</sup> It may be further laid down as a general principle, that the interference to be maintenous must have some tendency to pervert the course of justice.<sup>5</sup> Thus it is champertous for one man to agree to

1. *Stanley v. Jones*, 7 Bing. 369; *Weakly v. Hall*, 13 Ohio. 167; *Gilert v. Holmes*, 64 Ill. 548; *Barker v. Barker*, 14 Wis. 142; *Miller v. Larson*, 19 Wis. 486; *Ogden v. Desartes*, 4 Duer (N. Y.) 275; *Hovey v. Hobson*, 51 Me. 62; *Martin v. Ames*, 13 Ire. (N. Car.) 198; *Stotsenburg v. Marks*, 79 Ind. 193.

2. 1 Hawk. P. C. (Curw. Ed.), 455, 456. §§ 5-11.

3. *Stanley v. Jones*, 7 Bing. 369; 2 Bish. Cr. Law (7th Ed.). § 126.

4. Lord Abinger in *Findon v. Parker*, 11 Mees. & W. 682; *Dorwin v. Smith*, 35 Vt. 69.

"It is curious and not altogether useless to see how the doctrine of maintenance has from time to time been received at Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance.

Bro. Abr., tit. Maintenance, 7, 14, 17, etc. Nay, if he officiously gave evidence it was maintenance; so that he must have had a subpoena or suppress the truth. That such a doctrine, repugnant to every feeling of the human heart, should be soon laid aside must be expected." Buller, J., in *Master v. Miller*, 4 T. R. 340. For an extensive review of the ancient law and its various changes see this case.

5. This was the foundation of the decision in *Stanley v. Jones*, 7 Bing. 369. "For a man to be guilty of maintenance there must be another to be maintained; whence it follows that the combination of force to oppress lies at the foundation of the law of maintenance, the same as of the law of conspiracy. Therefore, in reason, if neither unlawful means nor unlawful ends are contemplated, the combination is not criminal, though it be to use the courts of the country for establishing or defending against a private

use and exert his utmost influence and means to procure such evidence as should or might be requisite to substantiate the claim of another in consideration of one eighth part of the sum recovered by means of the production of such evidence.<sup>1</sup>

A contract between an attorney at law and a client that the attorney shall prosecute a claim at his own cost for a part of the subject in litigation is champertous.<sup>2</sup> Similarly, a guarantee of a claim by an attorney and a promise to pay any judgment which may be rendered against his client cannot be enforced.<sup>3</sup> A contract that the attorney shall retain a certain per cent of the money collected or be paid \$200, as he shall elect, is entire, and being tainted with champerty, is wholly void, and the attorney can recover nothing.<sup>4</sup> The transfer of the subject-matter of the suit to the attorney by assignment as security for his costs is not deemed champertous, though an absolute sale might be.<sup>5</sup> Nor is there any champerty in an agreement to allow the attorney the first fifty dollars that is collected;<sup>6</sup> nor in an agreement between contesting clients and their attorneys in the settlement of a dispute that a portion of the property in litigation should be divided between the opposing attorneys;<sup>7</sup> nor in a contract which provides that A is to buy land and convey one half interest therein to B, B then to bring suit for the land and pay half the costs of the litigation.<sup>8</sup>

claim." 2 Bish. Cr. Law (7th Ed.), § 129.

1. Stanley v. Jones, 7 Bing. 369; Sprye v. Porter, 7 Ell. & B. 58; Powell v. Knowles, 2 Atk. 224.

On the other hand, a contract merely to communicate to another certain documents and information then in the parties' possession, no suit being depending, and there being no stipulation for the commencement of any suit for the recovery of the property, is not champertous. Sprye v. Porter, 7 Ell. & B. 58. See also, for instances in which the contract was held champertous, Wallis v. Duke of Portland, 3 Ves. 494; Stevens v. Bagwell, 15 Ves. 139; Reynell v. Sprye, 1 De G., M. & G. 677. See also, for a good general discussion of the old law, Prosser v. Edmonds, 1 Y. & C. Exch. 481.

2. Martin v. Clarke, 8 R. I. 389; 5 Am. Rep. 586. See also Lafferty v. Jelley, 22 Ind. 471.

3. Adye v. Hanna, 47 Iowa, 264; Boardman v. Thompson, 25 Iowa, 488; Mitchell v. Bell, Cam. & N. (N. Car.) 17; 2 Am. Dec. 627.

4. Elliott v. McClelland, 17 Ala. 206. See also Brown v. Beauchamp, 5 T. B. Mon. (Ky.) 413; s. c., 17 Am. Dec. 81.

5. Anderson v. Radcliffe, Ell. B. & E. (Eng.) 806.

A purchase *pendente lite* of the subject

of the action by the attorney is champertous. Simpson v. Lamb, 7 E. & B. (Eng.) 84. For modern doctrine see "Attorney and Client," § 9, 1 Am. & Eng. Enc. of Law. 958.

6. Harmon v. Scott, 109 Mass. 237; s. c., 12 Am. Rep. 686.

"There is no understanding disclosed or implied on the part of the plaintiff to carry on any suit at his own expense, or to look alone to that which might be recovered for his compensation. It does not appear that the pay was dependent on his success, which is the important element, deemed prejudicial to the public repose, and therefore illegal. Here the written agreement appears to be nothing more than a mode adopted for giving the plaintiff a lien on a portion of the debt claimed to be due as security for his services and disbursements."

7. Price v. Carney, 75 Ala. 546.

8. Moore v. Ringo, 82 Mo. 468. "By the contract B.'s interest in the land was to be created before the suit was to be brought. Having a half interest in the land, it would have been right and proper that the plaintiff should contribute half of the costs of suit." P. 474.

A contract is valid whereby the vendor and purchaser of land agree that the costs and expenses incurred by the latter in a joint defence against an ejectment suit for the land and in a proceeding to



Parol evidence is always admissible to show that the contract is champertous.<sup>1</sup>

**2. Existence of the Old Law in United States.**—In the *United States* the doctrines of maintenance and champerty have not generally found favor, and, where they exist at all, have been in many States materially modified by legislation.<sup>2</sup> In *Texas, California, New Jersey, and Michigan* they do not exist.<sup>3</sup> In *Arkansas, Vermont, Connecticut, and Pennsylvania* their existence is still undetermined.<sup>4</sup> In *Maine, Kansas, Alabama, Ohio, Oregon, West Vir-*

enjoin such suit should be equally divided, and that the latter's share should be indorsed upon a purchase-money mortgage given by him to the vendor. *Jones v. Shaw*, 56 Mich. 332.

The transfer of an overdue note for the consideration of the principal, and with the understanding that the transferee shall have the accrued interest if he can collect it, and that if the note cannot be collected it shall be retransferred, is not champerty, and cannot be pleaded in defence to suit on the note unless in some way the agreement is injurious to the maker of the note. *Taylor v. Gilman*, 58 N. H. 417.

In *Maine* it is held that if the defendant in a suit at the request of a third person permits him to assume the defence upon a promise of such third person to indemnify him and pay all costs recovered against him, such promise cannot be avoided upon the ground of maintenance. *Knight v. Sawin*, 6 Me. 361; *Goodspeed v. Fuller*, 46 Me. 141; *Industry v. Starks*, 65 Me. 167.

1. *Martin v. Clarke*, 8 R. I. 389; *Allen v. Hawks*, 13 Pick. (Mass.) 79.

2. *Graham v. Graham*, 10 W. Va. 355; *Grier, J.*, in *Roberts v. Cooper*, 20 How. (U. S.) 467. See also *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Barrell v. Mohawk*, 8 Wall. (U. S.) 153; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258.

3. *Bentinck v. Franklin*, 38 Tex. 58. See also *Campbell v. Everts*, 45 Tex. 106.

In the earlier cases the law of maintenance had been recognized by implication. *White v. Gay*, 1 Tex. 386; *McMullen v. Guest*, 6 Tex. 275; *Carder v. McDermott*, 12 Tex. 546; *Mathewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal. 564; *Ballard v. Carr*, 48 Cal. 74; *Howard v. Throckmorton*, 48 Cal. 482; *Sharpstein v. Friedlander*, 4 Pac. C. L. J. (S. C. Cal.) 473.

In *New Jersey* the English statutes against maintenance, 1 Ed. III. c. 14; 20 El. c. 4. etc.; 3 Ed. I. c. 25; 28 Ed. I. c. 11, were omitted as inapplicable in the

revision of the English statutes in force in that State made under the act of Nov. 24, 1792, P. L. 794. *Schomp v. Schenck*, 40 N. J. L. 195.

In *Whitney v. Kirtland*, 27 N. J. Eq. 333, however, the existence of the law of maintenance appears to have been taken for granted. How. Stat. Mich. § 9004; *Wildey v. Crane*, 30 N. W. Rep. 327.

In these States, therefore, there is nothing illegal or improper in an attorney agreeing to prosecute a suit for a part of the subject-matter of the litigation, and such a contract will be enforced. *Sharpstein v. Friedlander*, 4 Pac. C. L. J. (S. C. Cal.) 473.

4. In *Arkansas* the case of *Fletcher v. Ellis*, 1 Hempst. 300, appeared to recognize the existence of the law of maintenance by necessary implication; but a different opinion seems to have prevailed in *Lytle v. State*, 17 Ark. 608, in which it was held that an attorney-at law may purchase of his client an interest in the suit in consideration of services rendered and to be rendered in the prosecution of the suit, and become bound for the costs in the prosecution of his own and client's rights without the violation of any law of champerty in the State. In neither case, however, was the determination of the question absolutely necessary to the decision. See also *Merrick & Fenno v. Hult*, 15 Ark. Rep. 344.

In *Danforth v. Streeter*, 28 Vt. 490, C. J. Redfield suggests a doubt whether the offences of maintenance and champerty exist in that State. See also *Dorwin v. Smith*, 35 Vt. 69.

Their existence in *Connecticut* has never been directly adjudicated upon. It was incidentally referred to in *Stoddard v. Mix*, 14 Conn. 23, and in *Bridgeport Bank v. N. Y., etc., R. Co.*, 30 Conn. 231. In *Richardson v. Rowtan*, 40 Conn. 565, the court inclined to think the law of maintenance did not exist in that State.

In *County of Chester v. Barber*, 1 Ont. (Pa.) 463, *Paxson, J.*, seems to have

*ginia*, and the *District of Columbia* their existence has been distinctly recognized;<sup>1</sup> while in *Maryland*, *Virginia*, *South Carolina*, and *New Hampshire* it has been recognized by necessary implication.<sup>2</sup> In *New York* the old law upon the subject has been abolished, saving in so far as it has been re-enacted by statute;<sup>3</sup>

considered the existence of the doctrine in Pennsylvania doubtful. But see *Com. v. Dupuy*, Brightly (Pa.), 44; *Patten v. Wilson*, 34 Pa. St. 299.

1. *Gowers v. Norvell*, 1 Me. 292; *Palmer v. Dougherty*, 33 Me. 502; R. S. c. 122, § 12. In *Frost v. Paine*, 12 Me. 111, the existence of the doctrine was recognized by implication. As to the statutory abrogation of 32 Hen. VIII. c. 9, see *Pratt v. Peirce*, 36 Me. 448; *Hovey v. Hobson*, 51 Me. 62; *Atchison*, *Topeka*, etc., R. Co. *v. Johnson*, 29 Kan. 218; *Holloway v. Lowe*, 7 Porter (Ala.), 488; *Byrd v. Odem*, 9 Ala. 755; *Elliott v. McClelland*, 17 Ala. 206; *Thompson v. Marshall*, 36 Ala. 504; *Jenkins v. Bradford*, 59 Ala. 400; *Ware v. Russell*, 70 Ala. 174; 45 Am. Rep. 82; *Ins. Co. v. Tunstall*, 72 Ala. 142; *Key v. Vattier*, 1 Ohio, 132; *Meakly v. Hall*, 13 Ohio, 167; *Graham v. Graham*, 10 W. Va. 355; *Anderson v. Caraway*, 27 W. Va. 396; *Dahms v. Sears*, 11 Pac. Rep. (S. C. Or.) 891; *Stanton v. Haskin*, 1 McArthur (U. S. C. C.), 558.

In none of these cases was the question whether it is an essential element of champerty that the champertor maintain the suit at his own expense directly adjudicated.

2. *Schaferman v. O'Brien*, 28 Md. 565; *Major's Ex'rs v. Gibson*, 1 P. & H. (Va.) 48.

Neither the *Virginia* Code compiled in 1863 nor the *Maryland* Revised Code of 1878 has any provision upon the subject.

In *South Carolina*, while the existence of the old law in a modified form is recognized, it is said that champerty does not apply to a *bona fide* purchaser of any right whether in possession or in action. *Verdier v. Simmons*, 2 McCord (S. C.), 385; *Fraser v. Charleston*, 13 S. Car. 533; *State v. Chitty*, *Bailey* (S. Car.), 401; *Knox v. Martin*, 8 N. H. 157; *Christie v. Sawyer*, 44 N. H. 298; *Taylor v. Gelman*, 58 N. H. 417.

3. *Sedgwick v. Stanton*, 14 N. Y. 289.

The statute 3 R. S. (6th Ed.) 449, §§ 59, 60; Code §§ 73, 74, forbids, first, the purchase of obligations (named therein) by an attorney for the purpose and with the intent of bringing suit thereon; any loan or advance or agreement to loan or advance "as an inducement to the plac-

ing, or in consideration of having placed, in the hands of such an attorney" any demand for collection. The code revision changed somewhat the language of the prohibition, but nevertheless must be deemed a substantial re-enactment of the earlier sections. *Browning v. Marvin*, 100 N. Y. 148.

A devisee whose title under the will is threatened by proceedings before the surrogate may give an attorney a deed for one undivided half part of the property, taking back his covenant to conduct the defence to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability without violation of the statute.

"The agreement appears to have been purely one of compensation. . . . The contract in no respect induced the litigation. That was already begun, and existed independently of the agreement, and originated in other causes. It did not tend to prolong the litigation. It made it to the interest of the attorney to close it as briefly and as promptly as possible, and at as little cost and expense as prudence would permit. . . . The plaintiff, therefore, stirred up no strife, induced no litigation. . . . The statute presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance transferred by the attorney, and in which the latter by officious interference procures a suit to be brought and obtains a retainer in it. . . . The attorney loaned nothing and he advanced nothing to the client which the latter was bound to reimburse. Simply he was paid in advance an agreed price, taken in land instead of money, and out of which he was first to pay costs and expenses. The facts before us are not within the terms of the statute, as it respects a 'demand,' which is the subject of 'collection;' but our conclusion rests more strongly upon the conviction that the agreement made was one for compensation merely, and had in it no vicious ele-

and in *Louisiana* the whole matter is regulated by the code.<sup>1</sup> In *Delaware, Georgia, Illinois, Iowa, Missouri, Wisconsin, Minnesota, Mississippi, Tennessee, West Virginia*, and *Rhode Island* to render the contract champertous a stipulation for the payment of costs by the alleged champertor is essential.<sup>2</sup> In *Indiana, Kentucky,*

ment of inducing litigation or holding out bribes for a retainer." *Fowler v. Callan*, 5 East. Rep. 549. See also *Mott v. Small*, 20 Wend. (N. Y.) 212; *Small v. Mott*, 22 Wend. (N. Y.) 403; 102 N. Y. 395; *Hall v. Gird*, 7 Hill (N. Y.), 586; *Voorhees v. Dorr*, 51 Barb. (N. Y.) 580.

As to services of unprofessional character, not strictly prohibited by statute, see *Harris v. Roof*, 10 Barb. (N. Y.) 489; *Sedgwick v. Stanton*, 14 N. Y. 289.

The statute does not apply to the advances made to assist a needy client in supporting his family, long after the suit has been commenced, and after one trial has been had. *Bristol v. Dann*, 12 Wend. (N. Y.), 142; s. c., 27 Am. Dec. 122, decided under 2 Rev. Stat. 288, §§ 71, 72.

The provisions of 2 Rev. Stat. 288, §§ 71, 73, making it an offence for an attorney to purchase a chose in action for the purpose of bringing suit thereon, only apply where the purchase is made with an intent to bring suit upon the demand. Where there is no suit, the mere purchase of a chose in action is not *per se* within the statute. The illegal intent must be proved. *Hall v. Bartlett*, 9 Barb. (N. Y.) 297.

The statute is not violated by a purchase in good faith for the purpose of protecting some other right. *Van Rensselaer v. Sheriff*, 1 Cow. (N. Y.) 443; *Searing v. Brinkerhoff*, 5 Johns. Ch. 329; *Williams v. Mathews*, 3 Cow. (N. Y.) 252; *Baldwin v. Laeson*, 2 Barb. Ch. (N. Y.) 306.

The prohibition applies to suits in equity as well as law. *Mann v. Fairchild*, 14 Barb. (N. Y.) 548. Compare *Mann v. Fairchild*, 5 Barb. (N. Y.) 108.

The prohibition only applies to courts of record. *Goodell v. People*, 5 Park. Cr. (N. Y.) 206.

The statute does not embrace a case where some other purpose induced the purchase, and the intent to sue was merely incidental and contingent. Where therefore, in an action by an attorney as an assignee upon a bond, the evidence tended to show that the purpose of the plaintiff in purchasing a bond was to use it to compel the defendant, as a condition of the extension of the time of payment, to assign to him certain stock of a corporation, and, if he would not comply, to

sue, it was held not within the statute. *Moses v. McDivitt*, 88 N. Y. 62.

If before the purchase a suit was instituted and was then pending, the purchase is not within the act. *Wetmore v. Hegeman*, 88 N. Y. 69.

As to buying and selling dormant titles, see *post*, § 7.

1. Article 2624 of the Code of Louisiana provides that "Public officers connected with courts of justice, such as judges, advocates, attorneys, clerks, and sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity and of having to defray all costs, damages, and interest." See also *McMicken v. Perin*, 18 How. (U. S.) 507.

The transfer of litigious rights to other persons is regulated by chapter 12, Revised Civil Code, art. 2652, which provides that he against whom a litigious right has been transferred may get himself released by paying to the transferee the real price of the transfer, together with interest from its date. *Clay v. Ballard*, 9 Rob. (La.) 308; *Flower v. O'Connor*, 7 La. 207; *Morgan v. Brown*, 12 La. Ann. 159; *Walker v. Bietry*, 24 La. Ann. 349.

2. *Bayard v. McLane*, 3 Harr. (Del.) 139; *Moses v. Bagley*, 55 Ga. 283; *Meeks v. Dewberry*, 57 Ga. 263; *Taylor v. Hinton*, 66 Ga. 743; *Thompson v. Reynolds*, 73 Ill. 11; *Coleman v. Billings*, 89 Ill. 183; *West Park Comm'rs v. Coleman*, 108 Ill. 591. The decisions in this State are vacillating. In the last case it was said to be essential that the costs of the suit or some of them be paid, or agreed to be paid, by the champertor. In *Newkirk v. Cone*, 18 Ill. 453, the old law was said to have been abolished, but this was substantially overruled in *Thompson v. Reynolds*, 73 Ill. 11. See also *Fetrow v. Merriwether*, 53 Ill. 275; *Zeigler v. Hughes*, 55 Ill. 288; *C. & N. W. R. Co. v. Boller*, 7 Brad. (Ill.) 625. Compare *McGoon v. Ankeny*, 11 Ill. 558; *Norton v. Tuttle*, 60 Ill. 130; *Gilbert v. Holmes*, 64 Ill. 548; *Torrence v. Shedd*, 112 Ill. 466; *Jewell v. Neidy*, 61 Iowa, 299; 16 N. W. Rep. 141; *Vimont v. Chicago, etc., R. Co.*, 64 Iowa, 513; *Adye v. Hanna*, 47 Iowa, 264. In *Wright v. Meek*, 3 G. Gr. 472, it

*Massachusetts*, and *North Carolina* Hawkins' definition is followed, and such stipulation is unnecessary.<sup>1</sup>

**3. Recognized Exceptions.**—It has been seen that the gist of the offence of maintenance is that the interference is officious;<sup>2</sup> where, therefore, a party either has, or honestly believes that he has, an interest, either in the subject-matter of the litigation or in the question to be determined, he may assist in the prosecution or defence of the suit, either by furnishing counsel or contributing to the expenses,<sup>3</sup> and may, in order to strengthen his position, purchase the interest of another party in addition to his own.<sup>4</sup> The interest may be either small or great, certain or uncertain,

was held that the law of maintenance did not exist in that State, but this position was overruled in *Boardman v. Thompson*, 25 Iowa, 488; and *McDonald v. Chicago R. Co.*, 29 Iowa, 170; *Duke v. Harper*, 66 Mo. 51; *Jeffries v. Mut. L. Ins. Co.*, 29 Alb. L. J. (U. S. S. C.) 192; s. c., 4 Sup. Ct. Rep. 8; *Million v. Ohnsorg*, 10 Mo. App. 432; *Allard v. Lamirande*, 29 Wis. 502; *Kusterer v. City of Beaver Dam*, 56 Wis. 471. See also *Stearns v. Felker*, 28 Wis. 594; and *McLimans v. City of Lancaster*, 23 N. W. Rep. N. S. (S. C. Wis.) 689; *Canty v. Lattner*, 31 Minn. 239.

In *Mississippi*, to bring an agreement within the rule against champerty it must appear that the champertor agreed to carry on the suit at his own expense, and that the agreement was made before suit commenced, and was its moving cause. *Moody v. Harper*, 38 Miss. 601.

In *Tennessee*, see *Hayney v. Coyne*, 10 Heisk. (Tenn.) 339; *Vincent v. Ashley*, 5 Humph. (Tenn.) 594; and *Anderson v. Caraway*, 27 W. Va. 396; *Martin v. Clarke*, 8 R. I. 389; 5 Am. Rep. 586; *Orr v. Tanner*, 12 R. I. 94.

1. *Scobey v. Ross*, 13 Ind. 117; *Quigley v. Thompson*, 53 Ind. 317; *Rust v. Larue*, 4 Litt. (Ky.) 419; 14 Am. Dec. 172; *Brown v. Beauchamp*, 5 T. B. Mon. (Ky.) 413; s. c., 17 Am. Dec. 81; *Rust v. La Rue*, 4 Litt. (Ky.) 411; *Davis v. Sharron*, 15 B. Mon. (Ky.) 64; *Thurston v. Percival*, 1 Pick. (Mass.) 418; *Lathrop v. Amherst Bank*, 9 Met. 489; *Martin v. Amos*, 13 Ire. (N. C.) 201; *Barnes v. Strong*, 1 Jones Eq. (N. C.) 100; *Slade v. Rhodes*, 2 Dev. & B. (N. Car.) 24.

The English authorities do not require an agreement to pay costs to render the contract void. *Stanley v. Jones*, 7 Bing. (N. C.) 367; *Reynell v. Sprye*, 21 L. J. Ch. 533; *Sprye v. Porter*, 7 El. & Bl. 80; 26 L. J. Q. B. 64; *Hilton v. Woods*, L. R. Eq. 432; 37 L. J. Ch. 194; *Prince v.*

*Beattie*, 32 L. J. Ch. 734; *Earle v. Hopwood*, 9 C. B. N. S. 566; 30 L. J. C. B. 217.

2. *Thompson v. Marshall*, 36 Ala. 504; s. c., 76 Am. Dec. 328.

3. "Wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, etc., by the same title, they may maintain one another in a suit relating to the same." 1 Hawk. P. C. (Curw. Ed.) 458. § 24; *Hunter v. Daniel*, 4 Hare (Eng.), 420; *Frost v. Paine*, 12 Me. 111; *Call v. Calef*, 13 Met. (Mass.) 362; *Thalhimer v. Brinkerhoff*, 3 Cow. (N. Y.) 623; s. c., 15 Am. Dec. 308; *Tilman v. Searcy*, 7 Humph. (Tenn.) 347.

The interest may be merely in the determination of the question. Thus where several persons, being taxed for the support of public worship by a parish not of their denomination, bound themselves each to pay his proportion of the expense of defending any suit against any one of their number for such taxes, and the cost of any other legal mode of resisting payment thereof, it was held not to be maintenance. *Gowers v. Nowell*, 1 Me. 292; *Findon v. Parker*, 11 Mees. & W. (Eng.) 675.

On the same principle one may lawfully contribute to the expenses of a criminal prosecution, for every member of the community is in some sense a party to such a suit. *Com. v. Dupuy*, Brightly (Pa.), 44.

It is sufficient if the party honestly believes that he has an interest in the determination of the question, although it may turn out that he was mistaken. *Findon v. Parker*, 11 Mees. & W. 675; *McCall v. Copehart*, 20 Ala. 521; *Vaughan v. Marable*, 64 Ala. 60; *Story on Cont.* § 579; *Wickham v. Conklin*, 8 Johns. (N. Y.) 220.

4. *Thompson v. Marshall*, 36 Ala. 504; s. c., 76 Am. Dec. 328; *Blackerly v. Holton*, 5 Dana (Ky.), 520.

vested or contingent; but it is essential that it be distinct from what he may acquire from the party maintained.<sup>1</sup>

Thus a vendor with warranty may uphold his vendee in a suit about the title;<sup>2</sup> an heir-apparent may do the same for an ancestor of lands in fee;<sup>3</sup> a husband may join in measures to recover lands in which his wife has a potential interest;<sup>4</sup> a cotenant agree to clear the title by suit at his own expense;<sup>5</sup> and a guarantor assist in prosecuting a suit against the principal debtor.<sup>6</sup>

In an action for maintenance it is a good defence that the party maintaining the suit and the party maintained are united by ties of kindred or affinity, or stand in the relation of landlord and tenant, or master and servant, or that the defendant assisted the party out of charity, believing him to be oppressed.<sup>7</sup> Mere relationship by blood or marriage will justify parties in assisting each other in their suits, so far as mutual affection and regard for each other's rights and interests may induce them to do so; but the exception can only be carried so far as is consistent with the idea that the party is influenced by that desire to benefit his relation which the law supposes, and not by motives of self-interest.<sup>8</sup> It

1. *Master v. Miller*, 4 T. R. (Eng.) 340; *Lathrop v. Amherst Bank*, 9 Met. (Mass.) 489; *Hawk. P. C.* (Curw. Ed.) p. 456, §§ 14-17, 20-23. See also *Wickham v. Conklin*, 8 Johns. (N. Y.) 220; *Perine v. Dunn*, 3 Johns. Ch. (N. Y.) 508; *Tilman v. Searcy*, 7 Humph. (Tenn.) 347; *Cooley v. Osborne*, 50 Iowa, 526.

2. *Williamson v. Sammons*, 34 Ala. 691; *Goodspeat v. Fuller*, 46 Me. 141.

3. *Hawk. P. C.* (Curw. Ed.) 457, § 18. See also *Persse v. Persse*, 7 Cl. & F. (Eng.) 279.

A contract between the vendor and purchaser of a parcel of land to share between them the expenses of a successful defence to a foreclosure suit in which they were codefendants is not champertous. *Allen v. Frazee*, 85 Ind. 283. See also *Jones v. Shaw*, 56 Mich. 332.

4. *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623; s. c., 15 Am. Dec. 308; *Gilliland v. Failing*, 5 Den. (N. Y.) 308.

5. *Anderson v. Caraway*, 27 W. Va. 396. See also *Thompson v. Marshall*, 36 Ala. 504.

One who is really a party in interest and bound for the costs may agree with another party in interest to pay the entire costs if the latter will join in the suit. *Jewel v. Neidy*, 16 N. W. Rep. (Iowa) 141.

6. *Bartholomew County Commissioners v. Jameson*, 86 Ind. 154.

7. 1 *Hawk. P. C.* 458 (Curw. Ed.), § 26 et seq.; 2 *Bouv. Dict.* 90; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623; s. c., 15 Am. Dec. 308; *Lathrop v. Amherst Bank*,

9 Met. (Mass.) 489; *Perine v. Dunn*, 3 Johns. Ch. 508; *Elborough v. Ayers*, L. R. 10 Eq. (Eng.) 367; *Findon v. Parker*, 11 Mees. & W. (Eng.) 675; *Harris v. Briseo*, L. R. 17 Q. B. D. 504; 55 L. J. Q. B. 423; 55 L. T. 14; 34 W. R. 729; *Bristol v. Dam*, 12 Wend. (N. Y.) 142.

It has been held in New Hampshire that an attorney may render services and advance money in carrying on a lawsuit for a man without property, relying upon an agreement that he shall be first paid out of the funds recovered. *Christie v. Sawyer*, 44 N. H. 298.

In *State v. Chitty*, 1 Bailey (S. Car.), 401, it was said that justice alone must be the end in view in maintaining a poor litigant, and if the transaction be turned to purposes of speculation by a stipulation for a share of the verdict or judgment, it will be champerty.

8. *Barker v. Barker*, 14 Wis. 131.

A son may agree to assist his father in the defence of a suit brought against him. Yet, if he agree to do so for an interest in the property, it has been held that the agreement will be void for champerty, because he will not be allowed to make a financial speculation out of his filial duty. *Barnes v. Strong*, 1 Jones Eq. (N. Car.) 100; *Burke v. Greene*, 2 B. & B. Eq. (Eng.) 521. See also *Cholmondeley v. Clinton*, 2 Jac. & Walk. (Eng.) 135; *Powell v. Knowles*, 2 Atk. (Eng.) 224; *Bayly v. Tyrrel*, 2 B. & Beat. (Eng.) 358.

Where, however, poor young women, confiding in their uncle, conveyed to him their interest in land in order that



is also a good defence that the defendant is an attorney or counsellor at law, and rendered the assistance complained of in the exercise of his profession.<sup>1</sup>

**4. Contingent Fees**—The general rule appears to be that contracts to pay contingent fees for legal services, made in abundant good faith, *uberrima fide*, without suppression or reservation of facts, or exaggeration of apprehended difficulties, or undue influence of any sort or degree, and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by "all good fidelity to the client," are valid, and will be enforced.<sup>2</sup> Thus an agreement to pay counsel a fee equal to one fourth the value of the land recovered,<sup>3</sup> to pay a reasonable percentage upon the amount recovered,<sup>4</sup> or to pay "a sum equal to one tenth the damages which might be recovered,"<sup>5</sup> or to pay a specific sum of money out of the proceeds of the land in suit, when sold by the client, if recovered, is not champertous.<sup>6</sup> The validity

he might bring an action in his own name for its recovery—he to be compensated in case of success—it was held that the arrangement was free from champerty, and equity would compel him to convey the land. *Wright v. Cain*, 9 N. Car. 296.

1. 2 Bouv. Dict. 90; *Thompson v. Quigley*, 53 Ind. 61; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623; 15 Am. Dec. 308.

The assistance rendered, however, must be strictly professional, for a lawyer is not more justified in giving money to his client than another man. 1 Russell Crimes, 179.

2. *Ex parte Plitt*, 2 Wall. Jr. (U. S.) 453; s. c., 16 Cent. L. J. 462.

3. *Ramsey v. Trent*, 10 B. Mon. (Ky.) 336.

4. *Wright v. Tebbits*, 91 U. S. 252.

5. *Evans v. Bell*, 6 Dana (Ky.), 479; *Major v. Gibson*, 1 Patton & H. (Ky.), 48.

6. *McPherson v. Cox*, 96 U. S. 404.

In the leading case of *Ramsey v. Trent*, 10 B. Mon. (Ky.) 341, above referred to, a contract to pay counsel a fee equal to one fourth of the value of the land recovered less costs of suit, and to wait until the land was sold, was held not champertous. "Although the contract implies that the employers may look to the sale of the land for the means of paying the fee, it does not give to the attorneys any specific right to the proceeds, and the reference to *one fourth* of the value of the land is only for the purpose of measuring or ascertaining the fee. The terms of the contract show that the fee was to be regulated by the value of the recovery, in a certain manner with

the costs and expenses. It does not show that the attorneys were to have *part* or *profit out of the thing in contest*, or that the contract was made in its actual form in order to secure such part or profit in evasion of the statute." *Marshall, C. J.* In *Withite v. Roberts*, 4 Dana (Ky.), 172, it was further said that the litigant may regulate his attorney's fee by the value or half the value of the property in contest, as well as by the value of any other property. In *McPherson v. Cox*, 96 U. S. 404, it is to be observed that the attorney, by the contract, was neither to pay the costs, nor accept the land or any part thereof, as his compensation. See also *Stanton v. Embrey*, 93 U. S. 548; *Wylie v. Coxe*, 15 How. (U. S.) 415; *Trist v. Child*, 21 Wall. (U. S.) 441; s. c., 1 McA. 1; *Stanton v. Haskin*, 1 McArthur (D.C.), 558.

As supporting or recognizing the validity of contracts for contingent fees, see *Kusterer v. Beaver Dam*, 56 Wis. 471; s. c., 43 Am. Rep. 725; *Clay v. Ballard*, 9 Rob. (La.) 308; *Flower v. O'Connor*, 7 La. 207; *Morgan v. Brown*, 12 La. Ann. 159; *Walker v. Bietry*, 24 La. Ann. 349; *Whitehead v. Ducker*, 11 S. & M. (Miss.) 98; *Quint v. Ophiss*, 4 Nev. 305; *Christie v. Sawyer*, 44 N. H. 298; *Taylor v. Gilman*, 58 N. H. 417; *Cross v. Bloomer*, 6 Bax. (Tenn.) 74; *Dickinson v. Devlin*, 46 N. Y. Sup. Ct. 332; *Allison v. Scheeper*, 9 Daly (N. Y.), 365; *Porter v. Pomly*, 39 N. Y. Super. Ct. 219; *Haight v. Moore*, 37 N. Y. Super. Ct. 161; *Marsh v. Holbrook*, 2 Abb. App. Dec. (N. Y.) 176; *Benedict v. Stuart*, 23 Barb. (N. Y.) 424; *Ogden v. Des Artes*, 4 Duer (N. Y.), 275; *Coughlin v. N. Y. R. Co.*, 71 N. Y. 443; s. c., 27 Am. Rep. 75; *Lytle v. State*, 17

of such a contract is not interfered with by the fact that the attorney is also a material witness in the case, when it does not appear that the fee was at all intended as a reward for the attorney's services as a witness.<sup>1</sup>

**5. After Litigation Ended.**—After the litigation is ended an attorney may lawfully contract for remuneration out of the subject of the suit, even where such a contract, if previously made, would be regarded as champertous.<sup>2</sup> Thus the purchase of an interest in property in litigation by an attorney, after a judgment, is not illegal,<sup>3</sup> nor is an assignment to him of a part of a judgment for his fee void.<sup>4</sup>

**6. Advancing Costs.**—The law against champerty and maintenance has never forbidden an attorney retained in a case to advance money to pay the incidental costs of the litigation; and even though he advance money to pay such costs without special agreement he may recover from his client the amount so advanced.<sup>5</sup> Where the special contract between the attorney and client is void for champerty, the attorney has been allowed to retain the amount of costs actually advanced.<sup>6</sup> If, however, the contract amounts to a war-

Ark. 608; *Backus v. Byron*, 4 Mich. 535; *Dahms v. Sears*, 11 Pac. Rep. (Or.) 891; *Bent v. Priest*, 10 Mo. App. 543; *Davis v. Sparrow*, 15 Iowa, 68; *Boardman v. Thompson*, 25 Iowa, 489; *McDonald v. Chicago R. Co.*, 25 Iowa, 171; *Jewel v. Neidy*, 61 Iowa, 235; s. c., 16 N. W. Rep. 141; *Gilchrist v. Brand*, 58 Wis. 184; *Miles v. O'Hara*, 1 S. & R. (Pa.) 32; *Boulden v. Hebel*, 17 S. & R. (Pa.) 312; *Strohecker v. Hoffman*, 7 Harris (Pa.), 227; *McFarland's Est.*, 4 Barr (Pa.), 149; *Dickerson v. Pyle*, 4 Phila. (Pa.) 257; *Chester Co. v. Barber* 97 Pa. St. 455; *Perry v. Dicken*, 18 Cent. L. J. 353; s. c., 105 Pa. St. 83; s. c., 51 Am. Rep. 181; *Hickey v. Baird*, 9 Mich. 32; *Stansell v. Lindsay*, 50 Ga. 360; *Newkirk v. Cone*, 18 Ill. 449.

Such contracts are not favored in England. *Stanley v. Jones*, 7 Bing. 309; s. c., 5 M. & P. 193; *Sprye v. Porter*, 7 E. & B. 58; *Reynell v. Sprye*, 8 Hare, 222; 1 D. M. & G. 660; *Morgan v. Taylor*, 105 C. B. N. S. 653. Nor is the Kentucky case followed in Alabama. *Holloway v. Lowe*, 7 Port. (Ala.) 488.

An agreement to pay a contingent compensation creates an equitable lien on the fund recovered. *Williams v. Ingersoll*, 23 Hun (N. Y.), 284; *Wylie v. Coxe*, 15 How. (U. S.) 416. See also *Maylin v. Raymond*, 15 Bank. Reg. 353; *Coughlin v. N. Y. C. R. Co.*, 15 N. Y. Sup. Ct. 136; *Walsh v. Flatbush*, 18 N. Y. Sup. Ct. 190. See also "Attorney and Client," 1 Am. & Eng. Enc. of Law, 13.

1. *Perry v. Dicken*, 105 Pa. St. 83; s. c., 51 Am. Rep. 181, 18 Cent. L. J. 353.

The fact that a client has contracted to pay a contingent compensation does not discredit him as a witness; nor does it give the attorney such an interest in the cause of action as to make his admissions competent or to make him liable for costs. *Sussdorf v. Schmidt*, 56 N. Y. 319.

2. *Walker v. Cuthbert*, 10 Ala. 213; *Floyd v. Goodwin*, 8 Yerger (Tenn.) 484; s. c., 29 Am. Dec. 130. See *Lytle v. State*, 17 Ark. 608; *Hickey v. Baird*, 9 Mich. 32.

3. *McMicken v. Perin*, 18 How. (U. S.) 507. The decision, however, was made under the Louisiana Code.

4. *Ross v. Chicago, etc., R. Co.*, 55 Iowa, 691.

After a sale and purchase of property, the champertous contract entered into to obtain the judgment cannot be raised. *Whitney v. Kirtland*, 27 N. J. Eq. 333.

5. *Lewis v. Samuel*, 8 Q. B. 485; *Box v. Barnaby*, Hob. 117; *Guy v. Gower*, March, 273; *Christy v. Douglass*, Wright, 485; *Anderson v. Radcliffe*, El. Bl. & El. 817; 28 L. J. Q. B. 32; *Scott v. Miller*, 28 L. J. Ch. 584; *Hawkins P. C.* vol. i. 460.

As to the question whether a solicitor can make an agreement to take a fixed sum either "to bring the suit to a conclusion," or "in satisfaction of all demands for costs," see *Uppington v. Bullen*, 2 Dru. & Warr. (Eng.) 184; *Re Whitcombe*, 8 Beav. (Eng.) 140.

6. *Wood v. Downs*, 18 Ves. (Eng.) 120; *Grell v. Levy*, 6 C. B. N. S. (Eng.) 73; 10 Jur. 210; 12 W. R. 378; 9 L. T. N. S.

ranty against the client's liability to pay costs, it will be tainted with the vice of champerty.<sup>1</sup>

**7. Pretended Titles and Things in Litigation.**—Buying and selling dormant titles or things in litigation was a particular form of maintenance to guard against which the statute 32 Hen. VIII. c. 9 enacted that no one shall sell or purchase any pretended right or title to land unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall forfeit the value of the land to the king and the prosecutor.<sup>2</sup> In most of the States this statute has been either substantially re-enacted or adopted as a part of the common law.<sup>3</sup>

(Eng.) 721. See *Morgan v. Taylor*, 5 C. B. N. S. (Eng.) 653; 5 Jur. N. S. 791; L. J. C. P. (Eng.) 178; *Collins v. Broot*, 1 F. & F. Eng. 407; 4 Hurl. & Nor. 270; 28 L. J. Exch. 143; *Puette v. Beard*, 86 Ind. 172; s. c., 44 Am. Rep. 280; *Bristol v. Dam*, 12 Wend. (N. Y.) 142.

1. *McEgan v. Cochrane*, 10 L. T. (Eng.) 37; *Mitchell v. Bell*, Cam. & N. (N. Car.) 17. *Contra*, in Vermont. *Gregory v. Glead*, 33 Vt. 405.

2. 4 Bl. Com. 135. For text see *Cassidy v. Jackson*, 45 Miss. 397.

In *England* the old law has been to a great extent abrogated by the 8 & 9 Vic. c. 106, s. 6, which allows a right of entry to be disposed of by deed. See *Hunt v. Bishop*, 8 Exch. 675; *Hunt v. Remnant*, 9 Exch. 635.

3. In *Maine* and *Michigan* the 32 Hen. VIII. c. 9, was abrogated by statute. R. S. of Maine, c. 73, § 1, and R. S. c. 104; Revised Code Mich. of 1846, p. 262; *Roberts v. Cooper*, 20 How. (U. S.) 467.

A disseisee having right of entry may convey as freely as if there had been no disseisin. *Pratt v. Pierce*, 36 Me. 448; s. c., 58 Am. Dec. 758; *Hovey v. Hobson*, 51 Me. 62.

The same thing was accomplished in *Mississippi* by art. 1, p. 36, Rev. Code of 1857, which changes the common law as to the effect of adverse possession upon a conveyance of real estate, and allows any one having an interest or claim to land to convey the same, although it may be in the adverse possession of a third person claiming under color of title. *Cassidy v. Jackson*, 45 Miss. 397.

In *Ohio*, *New Jersey*, *Texas*, *California*, *Pennsylvania*, and *Georgia* the statute is held not to be in force. *Key v. Attier*, 1 Ohio, 132; *Hall v. Ashby*, 9 Ohio, 96; *Scomp v. Schenck*, 40 N. J. L. 195; *Bentinck v. Franklin*, 38 Tex. 458;

*Campbell v. Everts*, 45 Tex. 106; *Mathewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal. 564; *Ballard v. Carr*, 48 Cal. 74; *Howard v. Throckmorton*, 48 Cal. 482; *Cresson v. Miller*, 2 Watts (Pa.), 272; *Cain v. Monroe*, 23 Ga. 82; *Harring v. Barwick*, 24 Ga. 59; *Webb v. Camp*, 26 Ga. 354.

Though it seems to have been thought otherwise in *Georgia* in earlier decisions. *Pitts v. Bullard*, 3 Ga. 5; *Harris v. Cannon*, 6 Ga. 382; *Harrison v. Adcock*, 8 Ga. 68; *Milsap v. Johnson*, 22 Ga. 105.

This would also appear to be the view taken in *Illinois*. *Torrence v. Shedd*, 112 Ill. 466; *Fetrow v. Merriwether*, 53 Ill. 275.

In *Maryland* and *South Carolina* it is practically obsolete. *Schaferman v. O'Brien*, 28 Md. 565; *Poyas v. Wilkins*, 12 Rich. (S. Car.) 420.

In *Massachusetts*, *Indiana*, and *North Carolina* the statute is held to apply. *Sweet v. Poor*, 11 Mass. 553; *Everenden v. Beaumont*, 7 Mass. 78; *Wolcot v. Knight*, 6 Mass. 424; *Brinley v. Whiting*, 5 Pick. (Mass.) 348; *German Mut. Ins. Co. v. Grim*, 32 Ind. 249; *Steeple v. Downing*, 60 Ind. 478; *Patterson v. Nixon*, 79 Ind. 251; *Stotsenburg v. Marks*, 79 Ind. 197; *Justice v. Eddings*, 75 N. Car. 581.

In *Kentucky* the Rev. Stat. § 2, ch. 12, declare all sales and conveyances of any land of which any other person at the time of such sale, contract, or conveyance has adverse possession null and void. *Harmon v. Brewster*, 7 Bush (Ky.), 355. See also *Baley v. Deakins*, 5 B. Mon. (Ky.) 159; *Cardwell v. Sprigg's Heirs*, 7 Dana (Ky.), 36; *Chiles v. Conley's Heirs*, 9 Dana (Ky.), 385.

A similar provision exists in *Tennessee*. *Hardwick v. Beard*, 10 Heisk. (Tenn.) 659; *Whitesides v. Martin*, 7 Verg. (Tenn.) 384.



To avoid a deed for maintenance under the statute the lands must be shown to have been in the actual possession of one claiming under a title adverse to the grantor.<sup>1</sup> If such is the case the deed is void, although neither vendor nor vendee is liable to the penalties of the act unless the sale is made with knowledge of the adverse possession.<sup>2</sup>

In *New York* the old law has been abrogated except in so far as contained in the statute. The Rev. Stat. 2 R. S. 691, §§ 5, 7, prohibit any officer or other person from taking any conveyance of lands from any person not in possession while such lands are the subject of controversy by suit, knowing of the pendency of such suit, and the buying or selling of any pretended title to lands, unless the grantor, or those under whom he claims, shall have been in possession for the space of a year before the sale. By sec. 7 mortgages of lands by persons not in possession, and conveyances by such persons to those in possession, are excepted. *Sedwick v. Stanton*, 14 N. Y. 289. See for prior law, 1 R. L. 172; *Thalhimer v. Brinkerhoff*, 3 Cow. (N. Y.) 90; *Pepper v. Haight*, 20 Barb. (N. Y.) 429.

The *Missouri* statute renders it a misdemeanor for one to make, execute, or deliver any deed or writing for the conveyance or assurance of any lands, tenements, or hereditaments, goods, or chattels, which he, previously by deed or writing, sold, conveyed, mortgaged, or assured, or covenanted to convey or assure, to any other person, such first deed being outstanding and in force, and shall not in such deed or writing recite or describe such former deed or writing, or the substance thereof, with intent to defraud. 2 Wagn. Stat. 462. Under this act the intent to defraud is the gravamen of the offence. *Armstrong v. Winfrey*, 61 Mo. 355.

1. *Dawley v. Brown*, 79 N. Y. 390; *Norton v. Sanders*, 1 Dana (Ky.), 14, 17; *Chiles v. Conley*, 9 Dana (Ky.), 385; *Parks v. Hendricks*, 11 Wend. (N. Y.) 442.

2. Possession under a bond for a deed or a contract of purchase is not adverse to the vendor. Possession is not adverse unless accompanied by a claim to the entire title. The possessor must not recognize a higher title as vested in another person. *Jackson v. Johnson*, 5 Cow. (N. Y.) 74; s. c., 15 Am. Dec. 433.

Possession without either claim or color of title is not adverse so as to forbid a sale by the real owner. *Monnot v.*

*Hudson*, 39 How. Pr. (N. Y.) 447; *Bowie v. Brahe*, 3 Duer (N. Y.), 35.

Nor where the occupant assents to the sale. *McIntire v. Patton*, 9 Humph. (Tenn.) 447.

But attornment by a tenant to a stranger without consent of the landlord, or authority from a judicial decision, cannot give the latter such constructive possession as will sustain a deed by him against the objection of champerty. *Turner v. Thomas*, 13 Bush. (Ky.) 518.

A *cestui que trust* may assign without being guilty of champerty when he or his trustee is in possession, although another person may for a short time have held possession of a portion of the land. *Falls v. Carpenter*, 1 Dev. & B. Eq. (N. Car.) 237; 28 Am. Dec. 592.

When the tenant by the curtesy and the heir are out of possession and the land is held adversely to both, the tenant by the curtesy cannot convey or release to the heir; and it will make no difference that the heir is a child of the tenant by the curtesy. *Vrooman v. Shepherd*, 14 Barb. (N. Y.) 441. For good discussion of common-law doctrine see this case.

The possession of a tenant in common of lands who has ousted his co-tenant and holds adversely to him does not impair a conveyance by the latter of his interest. The doctrine of champerty has no application to such a case; the purchaser may assume, and act upon the assumption so far as the question of maintenance is concerned that the possession of one tenant in common is the possession of all, and for the benefit of all, whatever the real facts may be. *Patterson v. Nixon*, 79 Ind. 251.

Under the *Tennessee* statute a non-resident's deed for land that he owns in the State is not void unless the same is at the time held adversely by some one under deed, devise, or inheritance. Code, 1779. In such case mere naked adverse possession will not avoid the deed. *Hardwick v. Beard*, 10 Heisk. (Tenn.) 659. See also *Whitesides v. Martin*, 7 Yerg. (Tenn.) 384.

While, however, the owner of land cannot convey it to a third person when in the possession of another, he may convey it to the disseisor. *Schwartz v.*

The statute applies to mortgages and sales of property *pendente lite*,<sup>1</sup> but not to wills, being without the mischief to be reme-

Kuhn, 10 Me. 274; s. c., 25 Am. Dec. 239; Williams v. Connell, 4 Jones (N. Car.), 206.

For sundry points adjudged under 32 Hen. VIII. c. 9, see 1 Hawk. P. C. (Curw. Ed.) pp. 470, 472 *et seq.* See also Bullard v. Copps, 2 Humph. (Tenn.) 409; s. c., 37 Am. Dec. 561. See Cassidy v. Jackson, 45 Miss. 397, for good review of law.

"In this point the statute has not altered the common law, for the common law before the statute was that he who was out of possession ought not to bargain, grant, or let his title; and if he had done so it should have been void, and then the statute was made in affirmation of the common law, and not in alteration of it; and all that the statute has done is that it has added a greater penalty to that which was void by the common law." Patridge v. Strange, 1 Plow. (Eng.) Ed. of 1816, 770; Dexter v. Nelson, 6 Ala. 68; Cassidy v. Jackson, 45 Miss. 403.

As the deed is a mere nullity the title to the land is not affected by the transaction. 4 Kent Com. 448; Barry v. Adams, 3 Allen (Mass.), 493; Loud v. Darling, 7 Allen (Mass.), 206; Kincaid v. Meadows, 3 Head (Tenn.), 192; Tabb v. Baird, 3 Call. (Va.) 475; Meredith v. Kennedy, 6 Litt. (Ky.) 522; Shortall v. Hinckley, 31 Ill. 219; Lathrop v. Demont, 9 Johns. (N. Y.) 55; Slyright v. Page, 1 Leonard (Eng.), 166; Jackson v. Andrews, 7 Wend. (N. Y.) 152; s. c., 22 Am. Dec. 574.

Any after-deed from the grantor to any other person after he shall have obtained possession will convey the title, notwithstanding the prior conveyance. The original grantor can recover the possession from the tenant. Brinley v. Whiting, 5 Pick. (Mass.) 348. See also Co. Litt. 214 a; Gilson v. Shearer, 1 Murph. (N. Car.) 114; Bledsoe v. Little, 4 How. (Miss.) 13, 24; Martin v. Pace, 6 Blackf. (Ind.) 99; Kercheval v. Triplett's Heirs, 1 A. K. Marshall (Ky.), 493; Justice v. Eddings, 75 N. Car. 581; German Mutual Ins. Co. v. Grim, 32 Ind. 249.

But as between the parties to the deed it might operate by way of estoppel. 4 Kent Com. 448. And in *Indiana* it is held that though such a conveyance is void as against the party in possession and his privies, it is good between the grantor and grantee, and persons standing in legal privity with them. Steeple v. Downing, 60 Ind. 478; Patterson v.

Nixon, 79 Ind. 255; Stotsenburg v. Marks, 79 Ind. 197.

In *Massachusetts*, *New York*, and *Vermont* the deed is now held good against all parties saving the disseisor or party in possession and his privies. McMahan v. Bave, 114 Mass. 140; Livingston v. Proseus, 2 Hill (N. Y.), 526; University of Vermont v. Joslyn, 21 Vt. 52.

As to right of grantee to maintain an action in name of grantor, see *post*, § 9.

A conveyance by a grantor to a grantee, both out of possession, given to remedy a defect in a former deed executed by the grantor, and to fortify the title of the possessor of the premises or that derived from him, is valid for that purpose, and to estop the grantor from setting up the defect. Fryer v. Rockefeller, 63 N. Y. 268.

The mere possibility that the purchaser of a title may be obliged to bring a suit to perfect his right does not render the purchase illegal for the reasons that apply to the purchase of property in litigation. Kellar v. Blanchard, 21 La. Ann. 38. See also, upon the general subject, Simpson v. Montgomery, 25 Ark. 365; Jackson v. Burchin, 14 Johns. (N. Y.) 124; Jones v. Chiles, 2 Dana (Ky.), 35; Batterton v. Chiles, 12 B. Mon. (Ky.) 348; Dantorth v. Streeter, 28 Vt. 490; Jackson v. Ketchum, 8 Johns. (N. Y.) 484; Jackson v. Andrews, 7 Wend. (N. Y.) 152; Rowe v. Beckett, 30 Ind. 154; Harman v. Brewster, 7 Bush (Ky.), 355; Hassenfratz v. Kelly, 13 Johns. (N. Y.) 466; Preston v. Hunt, 7 Wend. (N. Y.) 53; Sessions v. Reynolds, 7 Sm. & M. (Miss.) 130; Verdier v. Simmons, 2 McCord Ch. (S. Car.) 385; Jackson v. Andrews, 7 Wend. (N. Y.) 152; s. c., 22 Am. Dec. 574.

Even though the vendor knew that he himself had no title. Ethridge v. Cromwell, 8 Wend. (N. Y.) 629. See also Le Roy v. Veeder, 1 Johns. Cas. (N. Y.) 417.

The presumption is, however, that the vendor knew the condition of his own property, and it rests with him to show the contrary. See also Lane v. Shears, 1 Wend. (N. Y.) 433. See also Whitaker v. Cone, 2 Johns. Cas. (N. Y.) 59; Jackson v. Todd, 2 Caines (N. Y.), 183.

1. Vandiver v. Stickney, 75 Ala. 225; Redman v. Sanders, 2 Dana (Ky.), 68, 69; Wash. v. McBrayer, 1 Dana (Ky.), 565, 566. *Contra* in Connecticut. Leonard v. Bosworth, 4 Conn. 421. In *Vermont* it does not apply to the assignment of a mortgage. Converse v. Searls, 10 Vt.

died,<sup>1</sup> nor to conveyances made by the State or sales made under a judicial decree,<sup>2</sup> and the purchaser at such sale may convey without champerty, notwithstanding possession by the original debtor.<sup>3</sup> The doctrine of common law, in affirmance of which the 32 Hen. VIII. c. 9, was passed, has never been accepted by courts of equity; but while it is extremely clear that an equitable interest under a contract of purchase may be the subject of sale,<sup>4</sup> a bare right to file a bill in equity to set aside a transaction which, according to the doctrines of equity, is liable to be rescinded on the ground of fraud, cannot be assigned.<sup>5</sup>

578; *Bryant v. Ketchum*, 8 Johns. (N. Y.) 479; *Jackson v. Andrews*, 7 Wend. (N. Y.) 152; *Murray v. Ballow*, 1 Johns. Ch. (N. Y.) 566. 570; *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441. See *Parks v. Jackson*, 11 Wend. (N. Y.) 442; *Sweet v. Poor*, 11 Mass. 549; *Webb v. Bindon*, 21 Wend. (N. Y.) 98.

In *Alabama* it has been held that a sale of lands *pendente lite* by one in possession is not void at the common law. *Camp v. Forrest*, 13 Ala. 114. See also *Lewis v. Bell*, 17 How. (U. S.) 616; 2 Story Eq. Jur. §§ 1049-1054.

In *Indiana*, the conveyance of land, pending a suit to set aside a deed therefor, if made to one not having any connection with the action or knowledge of it, is not void for champerty. *Rowe v. Becket*, 30 Ind. 154. But a purchase by an attorney from his client, pending the litigation of the subject matter of the suit, is void. *West v. Raymond*, 21 Ind. 305. In *Cockell v. Taylor*, 15 Beav. (Eng.) 103, Sir J. Romilly, M. R., held that a party prosecuting a claim to fund in court might mortgage it *pendente lite*.

1. *Clay v. Wyatt*, 6 J. J. Mar. (Ky.) 583; *May v. Slaughter*, 3 A. K. Mar. (Ky.) 507.

2. *Hoyt v. Thompson*, 5 N. Y. 320; *Frizzle v. Veach*, 1 Dana (Ky.), 216; *Dubois v. Marshall*, 3 Dana (Ky.), 337; *Little v. Bishop*, 9 B. Mon. (Ky.) 240; *Hanna v. Renfro*, 32 Miss. 132; *Jarrett v. Tomlinson*, 3 Watts & S. (Pa.) 114; *Batterton v. Chiles*, 12 B. Mon. (Ky.) 348; *Turner v. Thomas*, 13 Bush (Ky.), 518; *Snowden v. McKinney*, 7 B. Mon. (Ky.) 258; *Smith v. Scholtz*, 68 N. Y. 41; *Tuttle v. Hills*, 6 Wend. (N. Y.) 213; *Anderson v. Anderson*, 4 Wend. (N. Y.) 474; *Hoyt v. Thompson*, 1 Seld. (N. Y.) 320; *Truax v. Thorn*, 2 Barb. (N. Y.) 156; *Williams v. Bennett*, 4 Ire. (N. C.) 122; *Sims v. Cross*, 10 Yerg. (Tenn.) 460; *McGill v. McCall*, 9 Ind. 306; *Saunders v. Groves*, 2 J. J. Marsh. (Ky.) 106; *Cook v. Faris*, 20 N. Y. 300. See also *Cummins v.*

*Latham*, 4 T. B. Mon. (Ky.) 105; *Martin v. Pace*, 6 Blackf. (Ind.) 99.

3. *Snowden v. McKinney*, 7 B. Mon. (Ky.) 258.

The execution-debtor's possession is not adverse to the purchaser under the execution, but is that of a *quasi* tenant at will, until actual disseisin or disclaimer, and does not therefore render a subsequent sale by the purchaser void for champerty. *Mitchell v. Lipe*, 8 Yerg. (Tenn.) 179; s. c., 29 Am. Dec. 116.

See further upon the construction of the statute, especially in reference to conveyances to *cestuis que trust*, *Saunders v. Groves*, 2 J. J. Marsh. (Ky.) 407; *Cardwell v. Spriggs*, 7 Dana (Ky.), 36; *Moss v. Scott*, 2 Dana (Ky.), 271, 274; *Swartwout v. Johnson*, 5 Cow. (N. Y.) 74; *Poage v. Chinn*, 4 Dana (Ky.), 50; *Chiles v. Jones*, 4 Dana (Ky.), 479; *Allen v. Smith*, 1 Leigh (Va.), 231, 248; *Whitesides v. Martin*, 7 Yerg. (Tenn.) 384; *Lipe v. Mitchell*, 2 Yerg. (Tenn.) 400, 403; *Dickinson v. Burrell*, L. R. 1 Eq. 337.

As to partial eviction from the land, see *Mitchell v. Churchman*, 4 Humph. (Tenn.) 218; *Pickens v. Delozier*, 2 Humph. (Tenn.) 400; *Hyde v. Morgan*, 14 Conn. 104; *Van Dyck v. Van Beuren*, 1 Johns. Ch. (N. Y.) 345.

As to conveyances between near relatives, see *Morris v. Henderson*, 37 Miss. 492.

4. *Wood v. Griffith*, 1 Swanst. (Eng.) 55. 56.

5. *Prosser v. Edmonds*, 1 Y. & C. Exch. (Eng.) 581. In this case a *cestui que trust*, who had assigned to one of the executors and trustees under his father's will all his interest under the said will, assigned to a third party the right to rescind the assignment to the executor, which it was assumed existed. The assignee filed a bill to set aside the transaction between the *cestui que trust* and the executor, in which suit, however, the *cestui que trust* refused to join as plaintiff.

Lord Abinger, C. B., in delivering the judgment, said: "The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this—whether or not parties who either become purchasers for valuable consideration, or take an assignment in trust of a mere naked right to file a bill in equity, shall be permitted to become plaintiffs, in respect of the title so acquired. Now in the course of the argument it was urged that an equitable as well as a legal interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned it appears to me that in order to give the assignee a *locus standi* in a court of equity the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to upset a legal instrument. For instance, that a mortgagor who conveys his estate in fee to a mortgagee has in himself an equitable right to compel a reconveyance when the mortgage money is paid, is true. But that is a right reserved to himself by the original security: it is a right coupled with possession and receipt of rent; and he is prohibited so long as the interest is paid; and it does not follow that the assignee of the mortgagor and the mortgagee may not adjust their rights without the intervention of a court of equity. In the present case it is impossible that the assignee can obtain any benefit from his security, except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. So where a man takes an assignment of a bond he has the possession; and though a court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it. So other cases might be stated to show that where equity recognizes the assignment of an equitable interest, it is such an interest as is recognized also by third persons, and not merely by the party insisting on them." "Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there courts of equity will allow the assignee to stand in the right of the assignor. This is not that case. Robert Todd (*cestui que trust*), when he

assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity."

But although such a right cannot be assigned *inter vivos*, it is quite clear that it may be devised. In *England*, even prior to the Wills Act, 1 Vict. c. 26, and though it be not specially referred to, such right will pass under general terms. *Gresley v. Mousley*, 4 De G. & J. 78; *Stump v. Gaby*, 2 De G., M. & G. 623; *Uppington v. Bullen*, 2 Dru. & W. 184. See also, as to assignable rights, *Cholmondeley v. Clinton*, 4 Bligh, 42; *Hartley v. Russell*, 2 Sim. & St. (Eng.) 244; *Myers v. United Guarantee Society*, 7 De G., M. & G. (Eng.) 112; *Wilson v. Short*, 6 Hare, 384; *Scully v. Delaney*, 2 Ir. Eq. (N. C.) 379; *Hare v. London & N. W. R. Co.*, *Johnson*, 722; *Forrest v. Manchester R. Co.*, 9 W. R. 818; *Fisher v. Naieker*, 2 L. T. N. S. 94.

There is no champerty in an agreement to enable a *bona fide* purchaser of an estate to recover for rent due or injuries done to it previously to the purchase. *Williams v. Pothero*, 5 Bing. (Eng.) 309.

See further, as to the development of the doctrine, Vin. Ab., tit. Maintenance, B.; observations of Buller, J., in *Master v. Miller*, 4 T. R. 340; Chitty on Bills of Exchange (9th Ed.), p. 7. notes; *Movisdale v. Birchall*, 2 W. Black. Rep. (Eng.) 820.

In *Iowa* it is held that an assignment of a mere right to file a bill in equity for a fraud committed against the assignor, will be void as contrary to public policy and savoring of maintenance; but when property is conveyed, the mere fact that the grantee may be compelled to bring suit to enforce his right to the property does not render the conveyance void. *Traer v. Clews*, 115 U. S. 528.

Nor will the fact that both parties to the assignment of an obligation to pay the purchase-money for land, as evidenced by the written contract, signed by vendor and purchaser, knew that a suit would be necessary to enforce the purchaser's liability, render the assignment void. *Broughton v. Mitchell*, 64 Ala. 210.

The assignment of a legacy does not savor of maintenance, though the assignee may have to institute legal proceedings to protect the legacy from the claims of the testator's creditors. *Traser v. Charleston*, 13 S. Car. 533.

Since the beginning of the eighteenth century it would appear that any chose in action arising *ex contractu*, and founded

**8. Effect of Maintenance.**—A contract affected with champerty or maintenance cannot be enforced either at law or in equity. When such a contract is executed, money paid under it cannot be recovered back; the law leaves the parties where they have placed themselves, and applies the maxim *in pari delicto potior est conditio defendentis*.<sup>1</sup> If, however, the parties to the contract hold, or are about to hold, to one another the relation of attorney and client, they are not regarded as being *in pari delicto*, and the client may recover from the attorney money paid to him under the contract.<sup>2</sup> While the contract yet remains executory, money paid under it may be recovered back by an action founded on its disaffirmance,<sup>3</sup> or the contract itself may be rescinded by application to a court of equity.<sup>4</sup> It has also been held that the party directly injured by the maintenance may support an action on the case against the maintenor.<sup>5</sup> Where an attorney enters into a champertous agree-

on acquisition or loss in regard to some subject-matter of property, was capable of assignment. It is assumed as probable that, irrespective of special statutory enactment, no assignment of any right of action would be recognized either in law or equity, where at least the right would not have survived to the executors of the assignor, either by the common law or by the terms or the equity of the statute. 4 Edw. III. c. 7; Tapp. on Maintenance and Champerty, 77; Williams on Executors, pt. ii. bk. 3, c. 1, s. 1.

Under the above principle, it would appear that an unliquidated claim for damages for a personal tort, or for the breach of a contract which affects only the person or personal feelings, such as a contract to cure a man of a disease, or to marry,—cases sometimes described as those where vindictive damages would be given,—is not assignable. *Beckham v. Drake*, 2 H. of Lds. Cases. 579.

Such rights of action have never been held to pass to assignees under the English bankruptcy statutes, and it is quite clear that they do not survive to personal representatives. *Rogers v. Spence*, 12 Cl. & F. (Eng.) 700; Williams on Ex'rs, pt. ii. bk. 3, c. 1, s. 1. And see opinion of Williams, J., in *Beckham v. Drake*, 2 H. of Lds. Cas. 579. See remarks of Bosanquet and Parker, JJ., in *Stanley v. Jones*, 7 Bing. 375. But in *Vimont v. Chicago & N. W. R. Co.*, 21 N. W. Rep. N. S. (S. C. Iowa) 9, it was held that an unliquidated claim for damages for injury resulting from the negligence of a railroad company could be assigned. See also *Hyatt v. C. R. & N. R. Co.*, 27 N. W. Rep. (Iowa) 815. But compare *Metimans v. Lancaster*, 23 N. W. Rep. N. S. (S. C. Wis.) 689.

It is apprehended that after the amount has been ascertained and fixed by the judgment of a court, such judgment would become liable to the same rules as every other kind of property, and be assignable like any other debt. *Ex parte Charles*, 14 East (Eng.). 197. See *Simpson v. Lamb*, 7 Ell. & B. 84; opinion of Maule, J., in *Beakham v. Drake*, 2 H. of Lds. Cas. 579.

1 2 Wend. (N. Y.) 319; s. c., 20 Am. Dec. 607. See, as to the general subject of actions founded upon illegal contracts, *Gray v. Roberts*, 2 A. K. Marshall (Ky.), 208; s. c., 12 Am. Dec. 383 n.; *Waite v. Merrill*, 2 Greenleaf (Me.), 102; s. c., 16 Am. Dec. 238; *Roby v. West*, 4 N. H. 285; s. c., 17 Am. Dec. 423.

2. *Belding v. Smythe*, 138 Mass. 530.

The client may maintain an action for money had and received against the attorney for the whole amount so recovered, less the costs paid by him. *Ackert v. Barker*, 131 Mass. 436; *Grell v. Levy*, 16 C. B. N. S. 73; *Prince v. Beattie*, 32 L. J. N. S. Ch. 734. See also Opinion of Coleridge, J., *In re Masters*, 4 Dowl. P. C. 18.

3. *Morgan v. Groff*, 4 Barb. (N. Y.) 524.

4. *Wood v. Downes*, 18 Ves. 120. See also *Reynell v. Sprye*, 1 DeG., M. & G. 677.

5. *Pechell v. Watson*, 8 Mees. & W. 691.

To support such an action, however, the declaration must contain an averment of want of *reasonable* or *probable* cause. The court considered this species of wrong analogous to a malicious prosecution or arrest, and that here, as there, the want of reasonable or probable cause ought to be alleged. *Flight v. Leman*, 4 Ad. & Ell. N. S. 883.

"The averments in this declaration,"

ment with his client, he acquires no rights which will prevent or affect his client's settlement of the action. Any lien claimed by the attorney, by virtue of such contract, is void.<sup>1</sup>

**9. Quantum Meruit.**—Even though the special contract is void, the attorney does not forfeit his claim to full compensation for his services. The contract being void it is as if it had never been, and should not be allowed to affect the rights of the parties except in so far as they claim directly under it.<sup>2</sup>

**10. Champerty as a Defence.**—When an action is brought directly upon a champertous contract, champerty is a good defence, and may be set up by way of answer; and if the true character of the contract appears upon the face of the pleading, such pleading may be successfully demurred to. The better opinion would appear to be that the defence of champerty can only be set up when the champertous contract itself is sought to be enforced, and that the existence of a champertous agreement between the plaintiff and his attorney, or the fact that the plaintiff is prosecuting the case upon a contingent interest in the subject-matter of the litigation dependent upon success, is no defence to the action against the defendant.<sup>3</sup> In some States, however, it is held to be the duty

said Williams. J., in the last case cited, "might be sustained by proof that the defendant, not being an attorney, had held a conversation with Thomas, and had said, 'If your story is correct, you might sue Flight.' No action could be maintained on that, unless it further appeared that the now defendant knew that there was no right to sue the now plaintiff."

1. *Kusterer v. Beaver Dam*, 56 Wis. 471; s. c., 43 Am. Rep. 725; *Weakly v. Hall*, 13 Ohio, 167; *Maybin v. Raymond*, 15 Bank Reg. 353; *Davis v. Sharron*, 15 B. Mon. (Ky.) 67. See also *Couglin v. Railroad Co.*, 71 N. Y. 443; s. c., 27 Am. Rep. 75; *Atchison, Topeka, etc., R. Co. v. Johnson*, 29 Kan. 218.

2. *Rust v. Larue*, 4 Litt. (Ky.) 412; s. c., 14 Am. Dec. 172; *Caldwell v. Shepherd*, 67 B. Mon. (Ky.) 389; *Stearns v. Felker*, 28 Wis. 594; *Weeks on Attorneys*, § 345; *Merrit v. Lambert*, 10 Paige (N. Y.), 352; s. c., 2 Denio (N. Y.), 607; *Berrian v. McLane*, 1 Hoff. Ch. 421. See *Walsh v. Shumway*, 65 Ill. 471; *Moyers v. Graham*, 15 Lea (Tenn.), 57; *Ryan v. Martin*, 16 Wis. 57; *Martin v. Veeder*, 20 Wis. 491; *Satterlee v. Frazer*, 2 Sandf. (N. Y.) 141; *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Wickham v. Conklin*, 8 Johns. (N. Y.) 220.

Particularly ought the attorney to be allowed to recover for such services as were rendered before the champertous contract was entered into. *Thurston v. Percival*, 1 Pick. (Mass.) 415. But in

*Davis v. Sharron*, 15 B. Mon. (Ky.) 64, it was held that an attorney serving under a champertous contract with his client had no lien on the judgment even for reasonable compensation.

In a number of instances the attorney has been compelled to refund all the money collected under the agreement, and his claim for services has been entirely ignored. *Prince v. Beattie*, 32 L. J. Ch. 734; *Grell v. Levy*, 16 C. B. N. S. 73; 10 Jur. (N. S.) 210; 12 W. R. 378; 9 L. T. N. S. 727.

3. *Hilton v. Woods*, L. R. 4 Eq. Cas. 432; *Elborough v. Ayers*, L. R. 10 Eq. Cas. 367; *Knight v. Bowyer*, 2 DeG. & J. 446. In *Hilton v. Woods*, L. R. 4 Eq. Cas. 432, Malins, V. C., said: "I have carefully examined all the authorities referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff, in respect of which he sues, is *derived under a title founded on champerty or maintenance*, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that when a plaintiff has an original and good title to property he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between the plaintiff and Mr. Wright (the solicitor) amounted to maintenance; and if the



of the court to dismiss the suit as soon as it appears upon the trial, to its satisfaction, that the action is being prosecuted under a champertous agreement, and that it is unnecessary to file a plea setting up the champerty.<sup>1</sup> Under this rule the rescission of a

latter had been the plaintiff, suing by virtue of a title derived under that contract it would have been my duty to dismiss his suit." See *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robinson v. Beale*, 26 Ga. 17; *McMullen v. Guest*, 6 Tex. 275; *Fetrow v. Merriweather*, 53 Ill. 275; *Chicago & N. W. R. Co. v. Boller*, 7 Brad. (Ill.) 625; *Gilbert v. Holmes*, 64 Ill. 548; *Torrence v. Shedd*, 112 Ill. 466; 21 Cent. L. J. 37; *Burnes v. Scott*, 6 Sup. Ct. Rep. (U.S.) 865; *Boone v. Chiles*, 10 Pet (U.S.) 177; *Knadler v. Sharp*, 36 Iowa, 232; *Allison v. Chicago & N. W. R. Co.*, 42 Iowa, 274; *Small v. Chicago, R. I. & P. R. Co.*, 55 Iowa, 582; 8 N. W. Rep. N. S. 437; *Ross v. Chicago R. I. & P. R. Co.*, 55 Iowa, 691; s. c., 8 N. W. Rep. N. S. 644; *Vimont v. Chicago & N. W. R. Co.*, 28 N. W. Rep. (Iowa) 612; *Courtright v. Burnes*, 3 McCrary C. Ct. Rep. 60; *Lackland v. Smith*, 7 Mo. App. 593; *Million v. Ohnsorg*, 10 Mo. App. 432; *Bent v. Priest*, 10 Mo. App. 547; *Burnes v. Scott*, 117 U. S. 582; *Hovey v. Hobson*, 51 Me. 62; *Brinley v. Whiting*, 5 Pick. (Mass.) 348.

1. "The question whether a suit is prosecuted upon a champertous agreement is one outside the real merits of the case; and although an issue might possibly be made on it, yet we think it need not necessarily be pleaded; but that if it comes to the knowledge of the court in any proper manner it will refuse longer to entertain the proceeding. It would seem to stand upon similar grounds with an action for divorce prosecuted by collusion between the parties. The court, in arriving at a knowledge of the fact, would not be confined to the strict rules applicable to evidence offered on the trial of the case, though it undoubtedly should not proceed upon mere suspicion or without giving opportunity for avoiding the alleged champerty by proper proofs on the other side." *Barker v. Barker*, 14 Wis. 131 (142); *Allard v. Lamirande*, 29 Wis. 502. See also *Andrews v. Thayer*, 30 Wis. 228; *Weedon v. Wallace*, Meigs (Tenn.), 286; *Webb v. Armstrong*, 5 Humph. (Tenn.) 379; *Vincent v. Ashley*, 5 Humph. (Tenn.) 554; *Hunt v. Lyle*, 8 Yerg. (Tenn.) 142; *Greenman v. Cohee*, 61 Ind. 201; *Allen v. Frazee*, 85 Ind. 283; *Board v. Jameson*, 86 Ind. 154.

In *Iowa* it is said that champerty, if available at all as a defence, must be

pleaded, and is not ground for abatement. *Allison v. C. N. & W. R. Co.*, 42 Iowa, 275.

In *New York*, when the defendant sets up the defence that the demand on which the action is founded "has been bought or sold or received for prosecution" by an attorney or counsellor, contrary to the Rev. Stat. 288, §§ 71, 73, the court and not the jury are to pass upon the question. If determined against the plaintiff, he must be nonsuited; and if in his favor, the jury must be instructed accordingly. *Orcutt v. Pettit*, 4 Den. (N. Y.) 233. But the mere fact that a demand has been bought or sold, contrary to the above provisions, is no defence to a suit in chancery brought to enforce it, and even at law such demand may be purged of its illegal taint; and when prosecuted for the benefit of the real and *bona fide* holder a recovery may be had. But an agreement between the complainant in a bill to foreclose a mortgage, and his solicitor, by which the latter is to have part of the claim when collected, is not within the act. *Hall v. Gird*, 7 Hill (N. Y.), 586.

In *England* the purchaser of a contested title cannot bring an action of ejectment in his own name, but he may get rid of the difficulty by bringing the action in the name of his vendor. *Evans v. Pothero*, cited by James, V. C., L. R. 10 Eq. 373.

Upon the same principle it was held in *Massachusetts* and *Indiana* that a deed by one out of possession of land entitles the grantee to an action to recover the land in the name of the grantor, but to his own use, even against the disseizor. *Brinley v. Whiting*, 5 Pick. (Mass.) 348; *McMahan v. Bowe*, 114 Mass. 145; *Steeple v. Downing*, 60 Ind. 478; *Patterson v. Nixon*, 70 Ind. 256.

In *North Carolina* the same result was reached under the Code. *Justice v. Eddings*, 75 N. C. 581.

"To establish such a defence," it was said in *Brinley v. Whiting*, 5 Pick. (Mass.) 355, 356, "would be in fact to transfer the title to the land from the defendant to the tenant by way of punishment for the attempt to convey it unlawfully. To say that the person in possession should hold the land against the claim of the owner, because he had committed an offence, would be to impose a punishment not provided by the statute

champertous contract after the action has commenced does not relate back to the commencement of the suit, and preclude the legal bar to the action. If a meritorious defence is pleaded the plaintiff can not reply that the defendants are guilty of champerty between themselves in the defence they have set up.<sup>2</sup>

**CHANCE.**—The absence of any defined or recognized cause.<sup>3</sup>

of Henry, nor known to the common law."

In *Kentucky* it is held that there can be no recovery of the land upon the title of the vendor, when it appears to the satisfaction of the jury that the action is brought for the benefit of the champertous purchaser; but if the action is prosecuted *bona fide* for the benefit of the vendor, he may recover; and whether it is so brought is a question for the jury. *Bayley v. Deakins*, 5 B. Mon. (Ky.) 159; *Cardwell v. Spriggs*, 7 Dana (Ky.), 36; *Chiles v. Conley's Heirs*, 9 Dana (Ky.), 385.

1. *Harman v. Brewster*, 7 Bush (Ky.), 355.

2. *Allen v. Frazee*, 85 Ind. 283.

3. Webster.

"Pure chance consists in the entire absence of all the means of calculating results; accident is the unusual prevention of an effect naturally resulting from the means employed." *Harless v. U. S. Morr.* (Iowa) 169.

**By Chance.**—Under a statute which permits proof of misconduct of jurors by the affidavits of the jurors in case of resort by the jury to determination by chance, that is not a chance verdict, the amount of which is determined by each juror's writing an amount upon a piece of paper and dividing the sum of these amounts by twelve, the quotient to stand as the verdict. "There is no element of chance in such a verdict. Each juror marks a sum which in his judgment represents the true amount of damages. Neither of these sums is the result of chance: on the contrary, each is the result of the judgment or will of the juror by whom it was marked. Neither is the aggregate of these sums, nor the quotient resulting from a division of the aggregate by twelve, the result of chance, but, on the contrary, the result of the most accurate of the sciences." *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397; *Boyce v. Cal. Stage Co.*, 25 Cal. 460; and *cf.* *Wilson v. Berryman*, 5 Cal. 44; *Cowperthwaite v. Jones*, 2 Dal. (Pa.) 55; *Smith v. Cheetham*, 3 Caines (N. Y.), 61; *Thompson's Case*, 8 Gratt. (Va.) 637.

In *Goodman v. Cody*, 1 Wash. Ty. 329, the contrary is held, and the decision of *Turner v. Water Co.*, criticised: "The

learned judge erred doubly; first, he overlooked the fact that the verdict is already determined and fixed, as soon as the twelve sums are ascertained, and before the exact science is applied, within the maxim, *Id certum est quod certum fiat*, and second, he evidently mistook the nature of chance, falsely fancying that what is certain in result or is brought about by known or intelligent agencies, cannot be said to result from chance."

"According to generally accepted and ordinary use of the word, anything is said to have happened by chance to any one, which was neither understandingly brought about by his act nor pre-estimated by his understanding." "A juror resorts to the determination of chance for a verdict whenever he resorts to any method of determination, the steps and results of which are beyond his calculation and unfollowed and unparticipated in by his understanding, and all the jurors resort to such a method when they resort to the method of average."

**Game of Chance** is "such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance." Ten-pins is not such a game. *State v. Gupton*, 8 Ired L. (N. Car.) 271. Rattle and snap, a game of cards and dice, is a game of chance. *State v. Nates*, 3 Hill (S. Car.), 200. The jury having found that rondo was a game of chance, the court refused to interfere with their verdict in *Glascok v. State*, 10 Mo. 508. So where the jury found shuffle-board not to be such a game. *State v. Bishop*, 8 Ired. L. (N. Car.) 266. Horse-racing is not a game of chance. *Harless v. U. S., Morr.* (Iowa) 169; *State v. Lemon*, 46 Mo. 375. Depositing a half-sovereign as a bet on a dog-race is not "betting a coin as an instrument of gaming on a game of chance." *Hirst v. Molesbury*, L. R. 6 Q. B. 130. A person betting at a horse-race at a *pari mutuel*, a machine which registers the amount betted on each horse, and the total amount betted which was to be divided, less ten per cent, among those who placed their money on the winner, is one playing or betting with an instrument at any game of chance. *Tollett v.*



**Definition.** *CHANCELLOR—CHANCERY—CHANGE.* **Definition.**

**CHANCELLOR.**—The chief or presiding judicial officer of a court of chancery.<sup>1</sup>

**CHANCERY.** See EQUITY.

**CHANGE.**—To cause to turn or pass from one state to another: to alter or make different.<sup>2</sup>

A succession of one thing in place of another.<sup>3</sup>

Thomas. L. R. 6 Q. B. 516. A game into which more skill than chance enters appears not to be a game of chance. *Glascock v. State*, 10 Mo. 508; but see *State v. Gupton*, 8 Ired. L. (N. Car.) 271.

**Chance - Medley.**—"The self-defence whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him." 4 Bl. Com. 184.

1. For an historical account of the office of chancellor, see 1 Spence's Eq. Jur. 355 *seq.*; Campbell's Lives of the Lord Chancellors, Introd. Chap.; Encyc. Brit. *sub verbo*.

2. Webster.

**Change its Original Purpose.**—The amending a bill introduced to prohibit the sale of liquor within four miles of a town, so that on passage it became a law forbidding such sale within eight miles, does not "change its original purpose." *Harrison v. Gordy*, 57 Ala. 49.

**Change the Form or Ground of Action.**—An amendment to the declaration in an action for breach of a covenant against incumbrances, by which a new count is added, setting forth a new and distinct incumbrance, does not change the form or ground of action within an exception to a statute of jeofails. *Spencer v. Howe*, 26 Conn. 200.

**Changed**—A transfer made under a bankrupt law by a register in bankruptcy to an assignee, does not avoid a policy of insurance, under a clause that "If the title to the property is transferred or changed, this policy shall be void." *Starkweather v. Cleveland Ins. Co.*, 2 Ab. (C. C.) 67.

3. Webster.

**Change in the Property, its Use or Occupation.**—Under a statute providing that "any change in the property insured, its use or occupation, . . . shall not affect the contract unless the risk was thereby materially increased," a change from occupancy to disuse was held to be such a change. *Cannel v. Phoenix Ins. Co.*, 59 Me. 582.

**Change of Grade.**—The raising of a street twelve inches by macadamizing done upon its surface is not a change of grade within an act forbidding such, except on petition of the owners of two

thirds in value of the property on both sides of the street. *Warren v. Henly*, 31 Iowa, 31.

**Change of Moorings.**—A vessel applied at a dock for landing, and being refused proceeded to another; *held*, this was not a change of moorings under a pilotage act, and the master being bound to have a pilot on board, the owners were discharged from responsibility for damage done to a barge into which the vessel ran. *McIntosh v. Slade*, 6 B. & C. 657.

**Change of Possession.**—Temporary absence of the assured from home with his family, leaving his house in the charge of another, is not a change of possession within the meaning of a clause of the policy, avoiding it for such. *Shearman v. Niagara F. I. Co.*, 46 N. Y. 526; s. c., 7 Am. Rep. 380. "Change of possession" was said to be a mere paraphrase of "delivery" in *Sims v. Sims' Admr.*, 8 Porter (Ala.), 461; s. c., 33 Am. Dec. 393.

**Change of Title.**—Under a policy of insurance, in which it was provided that "in case of any sale, transfer, or change of title in the property insured . . . such insurance shall be void and cease," it was said: "The change or transfer of title, to be in violation of the policy, must be more than nominal. . . . But if the real ownership remains the same—if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn or diminish the motive to guard the property from loss by fire, the policy is not violated." A transfer as collateral security is therefore not such a change of title as will avoid the policy. *Ayres v. Hartford F. I. Co.*, 17 Iowa, 176; s. c., 21 Iowa, 193. But a transfer by one partner to his copartner of his share of the insured partnership property is such a change of title. *Hartford F. I. Co. v. Ross*, 23 Ind. 179; *Dix v. Merc. Ins. Co.*, 22 Ill. 272. Policies with similar provisions were also held to be avoided, where the insured, who were partners, dissolved partnership and divided the partnership property. *Dreher v. Aetna Ins. Co.*, 18 Mo. 128. And where the insured, S. and K., who were partners, took N. into the firm and

**Definition.****CHANGE—CHANGE OF VENUE.****Definition.**

Exchange: "a fixed place where merchants meet at certain hours for the transaction of business with each other."<sup>1</sup>

**CHANGE OF VENUE.** (See also JURISDICTION; MANDAMUS; PRACTICE; TRIAL; VENUE.)

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1. **Definition.**—A change of venue is a change of the place of trial to another county.<sup>2</sup>

2. **To What County the Cause should be Moved.**—It is provided by statute in most of the States that when the venue is changed, the cause should be moved to the nearest county free from obstacles.

S. sold out to K. and N. *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424.

Where, at the time the policy was issued, the property was subject to a mortgage by which, on default, the mortgagee might consider the whole debt due and sell the property; and this was done and a conveyance made to the purchaser, who subsequently conveyed to another, there took place such a change of title as avoided the policy under the provision therein. *C. M. As. Co. v. Scammon*, 102 Ill. 46. An agreement between the owner of insured property and another to represent to the creditors of the former, in order to prevent attachments, that the property had been sold to such other person, is not a change of title which will avoid the policy which contained a provision similar to above. *Orrell v. H. F. Ins. Co.*, 13 Gray (Mass.), 431.

A mortgage is not within a clause in a policy of insurance avoiding it, "if any change takes place in the title or possession of the property, whether by sale, legal process, judicial decree, voluntary transfer, or conveyance." *Hartford F. I. Co. v. Walsh*, 54 Ill. 164.

**Actual Change of Possession.**—Where a vendor remains in possession of personally as the agent of the vendee, there is not such an "actual change of possession" as the statute requires to prevent a presumption of a fraudulent sale. *Grant v. Lewis*, 14 Wis. 487.

Where a mortgagee goes into a saloon and takes nominal possession of the tables, the mortgaged property, and puts

them in charge of the bar-tender, where they are subsequently used by the mortgagor, there is not an "actual and continued change of possession" under a chattel-mortgage. *Brunswick v. McClay*, 7 Neb. 137.

The issuance of a dray-ticket bearing the words "Dray-ticket for \$50. Knoxville Iron Co.", is merely a method of keeping accounts with draymen. It is not a 'change bill or ticket, the issuance of which is forbidden by statute. *State v. Fisk*, 3 Sneed, (Tenn.) 695.

1. *White v. Brownell*, 4 Abb. Pr. (N. Y.) N. S. 190.

"There may be property belonging to this body, derived from the payment of dues or fines, or consisting of the furniture of the room where the board meets, but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the body while it continues to exist. . . . When the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets."

2. *Abbott's Law Dict.*

In criminal proceedings a change of venue is where, by order of court, a cause is removed from the county in which the indictment was found, to an adjoining one for trial. 1 *Bishop on Crim. Proc.* (3d Ed.) § 68.

Such a statute imports that the judge is to decide which is such county,<sup>1</sup> and a change of venue to a county not one of the nearest, when no objection exists to those nearest, is erroneous.<sup>2</sup> But the venue in some cases may be changed to the "most convenient" unobjectionable county; which means the "most convenient" all things considered, and not the nearest one.<sup>3</sup> In case of a change of venue on account of the prejudice of the judge, the case may be properly transferred to another court in the same county.<sup>4</sup>

3. **When Change may be Had.—Generally.**—It depends to a large extent on the nature of the statute whether a party is entitled to a change of venue as a matter of right, or whether it is discretionary with the court to grant it. But where a statute provides that on application and showing in certain cases a party may have a change of venue, if the party brings himself within the statutory requisites, he is entitled thereto as a matter of right,<sup>5</sup> and if denied by the court may be enforced by *mandamus*.<sup>6</sup> The venue in most cases can be changed by consent, without a petition to the court;<sup>7</sup> or, when the court has jurisdiction, the parties to an ac-

1. *Ex parte* Hodges, 59 Ala. 305; Shaw v. Cade, 54 Tex. 307. So a motion for a change to a particular county is bad, and may be overruled for that reason alone. *Olive v. State*, 11 Neb. 1.

2. *Baxter v. People*, 7 Ill. 558. *Compare* *Kennedy v. Commonwealth*, 78 Ky. 447.

The Texas statute governing changes of venue provides that on granting a change of venue "the cause shall be removed to some adjoining county, the court-house of which is nearest the court-house of the county in which the suit is pending," etc. *Held*, that the nearest court-house, in the meaning of the statute, is not necessarily the one nearest by geometrical measurement, but may be the one most convenient of access, and nearest by the usual travelled route. *Shaw v. Cade*, 54 Tex. 307.

A change of venue cannot be made to a county other than one adjoining, merely because the parties cannot agree on one adjoining. *Miller v. Cobell*, 81 Ky. 178.

3. *Allen v. Skiff*, 2 Iowa, 433.

4. *State v. McArthur*, 13 Wis. 454; *Curran v. Beach*, 20 Ill. 219.

5. *Shattuck v. Myers*, 13 Ind. 47; 74 Am. Dec. 236, and note; *Mendanhall v. Gately*, 18 Ind. 148; *Heshion v. Pressley*, 80 Ind. 494; *Walsh v. Ray*, 38 Ill. 30; *Clark v. People*, 2 Ill. 107; *Freleigh v. State*, 8 Mo. 606; *People v. Yookum*, 53 Cal. 566; *Rines v. Boyd*, 7 Wis. 134; *Bachmann v. Milwaukee*, 47 Wis. 435; *Jones v. Chicago, etc., R. Co.*, 36 Iowa, 66; *Manly v. State*, 52 Ind. 215; *State v. Shaw*, 43 Ohio St. 324.

6. *Ex parte* Chase, 43 Ala. 303.

*Mandamus* will also lie to set aside an order made for a change of venue, in a criminal case, in the absence of the accused from the court-room. *Ex parte* Bryan, 44 Ala. 402.

7. *Pierson v. Finney*, 37 Ill. 29; *People v. Scates*, 4 Ill. 371; *Brennan v. People*, 15 Ill. 511; *Davidson v. Wheeler*, 1 Morr. (Iowa) 238.

Where a cause was transferred from one judicial district to another on a stipulation which provided that if a trial should not be had in the new district by a certain time, the cause should be transferred back to the original district, and the cause was so transferred back, *held*, not to be error. *Lyon County v. Washoe Co.*, 6 Nev. 241.

But in *Mississippi*, where the parties agreed to change the venue from the county of S. to the county of G., and the court entered an order on the minutes in accordance with the agreement, and suffered the case removed without a compliance with the statute, *held*, that this was error, and that the consent or agreement of the parties conferred no power on the court to change the venue in any mode except that prescribed by the statute, which is by petition under oath, addressed to the court, or to the judge of the district in vacation, setting forth the reasons for the application. *Wilson v. Rodewald*, 49 Miss. 506.

An applicant for a change of venue filed affidavits that he could not have an impartial trial in the county, and that many of the witnesses lived in C. county, in an adjoining circuit; whereupon the

tion may waive the venue.<sup>1</sup> In criminal cases the venue cannot be changed without the defendant's consent, and a statute therefore is unconstitutional.<sup>2</sup>

It is a general rule that in actions arising *ex delicto*, the venue will be changed to the county where the cause of action arose, unless the plaintiff stipulate to give material evidence arising in the county where the venue is laid.<sup>3</sup> But where, on application for a change of venue, a party stipulates not to give any evidence except what may be found in the county in which the venue is laid, the venue will not be changed.<sup>4</sup>

In civil actions the venue will not be changed on the application of one defendant, where there are several defendants in a cause;<sup>5</sup> nor has the defendant a right to change the venue by stipulating to pay the expenses of the plaintiff's witnesses.<sup>6</sup>

Where the venue of an action has been once changed, a further change may be ordered for good cause shown;<sup>7</sup> and where the venue in a criminal case has been changed, it may be changed back to the original county with the consent of the prisoner;<sup>8</sup> and where a defendant is let in to defend on the merits after a default, the plaintiff may change the venue, so as to obtain a speedy trial.<sup>9</sup>

Where land has been annexed to another county pending a suit for its possession, commenced in the county where it originally lay, the record will be transferred to the court of the county to which it last belongs.<sup>10</sup> And where a deputy sheriff of the county of A.

other party filed an affidavit showing that he could not have a fair trial in that county, and thereupon the venue was without objection changed to another county, not in an adjoining circuit. *Held*, that it would be presumed that the cause was sent to that county by agreement, and therefore objection to proceeding in that court should be overruled. *Newman v. Hazelrigg*, 96 Ind. 73.

After a cause, begun in one court, has been transferred to another, in which the parties have agreed it shall be tried, the plaintiff is not bound to submit to a trial in that court after new parties defendant have come into the case, as such new parties may have such relation to the court, or such influence in the community, as to jeopardize plaintiff's rights in that court. *Bixby v. Carskadden*, 63 Iowa, 164.

1. *Leach v. Western, etc.*, R. Co., 65 N. Car. 486.

2. *Kirk v. State*, 1 Coldw. (Tenn.) 344; *Commonwealth v. Pearce*, 6 Gratt. (Va.) 669; *Young's Case*, 9 Leigh (Va.), 638; *Osborn v. State*, 24 Ark. 629. Compare *Cox v. State*, 8 Tex. App. 254.

But where the venue has been changed at the instance of the prisoner he cannot afterwards object that there was not suf-

ficient cause for the change. *State v. McLendon*, 1 Stew. (Ala.) 195.

3. *Serially v. Wells*, 1 Cow. (N. Y.) 196; *Vander Zee v. Van Dyck*, 1 Cow. (N. Y.) 600.

4. *Smith v. Averill*, 1 Barb. (N. Y.) 28.

5. *Sailly v. Hutton*, 6 Wend. (N. Y.) 508; *Van Dyke v. Battle*, 1 Stew. (Ala.) 218. See WHO MAY APPLY FOR, *infra*.

6. Although it seems the plaintiff may retain his venue by stipulating to pay the expenses of the defendant's witnesses. *Harrower v. Betts*, 2 Cow. (N. Y.) 496; *Worthy v. Gilbert*, 4 Johns. (N. Y.) 492.

7. *People v. Hubbard*, 22 Cal. 34; *Herbert v. Beathard*, 26 Kan. 746. Compare *Musselman v. Pierce*, 40 Ind. 120.

8. *Paris v. State*, 36 Ala. 232.

Where an indictment was found in one county in Illinois, against several jointly, and the venue was changed to another county, on motion of one of the accused, without consent of the others, where he was tried, and afterwards the indictment was returned to the county where it was found, and the others held to answer, *held*, that the proceedings were regular. *Hunter v. People*, 2 Ill. 453.

9. *Payne v. Smith*, 19 Wend. (N. Y.) 122.

10. *Murdock v. Little*, 18 Ga. 719.

**When Change may be Had. CHANGE OF VENUE. Disqualification of Judge.**

is sued in the county of B., for an act done in the course of his official duty in the county of A., the court will, on affidavit of the fact, change the venue from B. to A.<sup>1</sup> So, where a part of the jury had been selected, but from prevalence of yellow fever in the shire town the court deemed the completion impracticable, it was proper to grant a change of venue.<sup>2</sup>

But one change of the venue of a cause, from the county where it is pending, can be obtained by the same party.<sup>3</sup>

A motion for a change of venue may be renewed as a matter of right, after having been once denied, if the facts have changed since the denial.<sup>4</sup> But where an application is contested on one ground alone, the right to demand a change on other grounds may be deemed waived.<sup>5</sup>

*Because of Disqualification of Judge.*—Bias or prejudice on the part of the judge is generally held to be a sufficient ground for a change of venue.<sup>6</sup> So is his pecuniary interest in the event of the

1. *Dennis v. Ford*, 7 N. J. L. 200.

2. *Sulinas v. Stillman*, 25 Tex. 12.

3. *Hutts v. Hutts*, 62 Ind. 240; *Feneilon v. Butts*, 53 Wis. 344. But in *Herbert v. Beathard*, 26 Kan. 746, it is held that where an action is commenced before a justice of the peace, and the defendant obtains a change of venue to another justice of the peace, such change of venue will not prevent the plaintiff from obtaining still another change if he has sufficient grounds therefor.

In *State v. Gates*, 20 Mo. 400, it was held that although it is provided by law that a second change of venue in the same cause shall not be allowed, yet it may be allowed when the judge has been counsel for the prisoner. *State v. Gates*, 20 Mo. 400. In *Schaengten v. Smith*, 48 Iowa, 359, it is held that, after one change of venue, the party applying for another change must allege and show that the cause upon which he bases his application, was not in existence when the first change was obtained.

A statute which provides that, after one change of venue, no party is entitled to another for any cause in existence when the first change was obtained, does not apply to a case where the first change was made by the agreement of parties. *Bixby v. Carskaddon*, 63 Iowa, 164.

4. *Veeder v. Baker*, 83 N. Y. 156.

5. *Keith v. Briggs*, 32 Minn. 185.

6. *McGoon v. Little*, 7 Ill. 42; *Curran v. Beach*, 20 Ill. 219; *Carrow v. People*, 113 Ill. 550; *Goldsby v. State*, 18 Ind. 147; *Vanderkarr v. State*, 51 Ind. 91; *Smelzer v. Lockhart*, 97 Ind. 315; *Leyner v. State*, 8 Ind. 490; *Berner v. Frazier*, 8 Iowa, 77; *Turner v. Hitchcock*, 20 Iowa, 310; *Runols v. Brown*, 11 Wis. 193;

*State v. McArthur*, 13 Wis. 454; *Ex parte Curtis*, 3 Minn. 274; *In re Peyton*, 12 Kan. 398. Compare *People v. Williams*, 24 Cal. 31; *People v. Shuler*, 28 Cal. 490; *Morris v. Graves*, 2 Ind. 354; *Millison v. Holmes*, 1 Ind. 45.

But a prejudice against the cause or defence of a party in the mind of the judge, and not against his person, is no cause for a change of venue. *Bent v. Lewis*, 15 Mo. App. 40.

A change may be had on the ground of prejudice of a judge who may be called upon to rule on certain motions, though it is certain that the case will not be tried before him. *Allerton v. Eldridge*, 56 Iowa, 709.

Where an application was made for a change of venue in a cause, upon the ground that the judge then presiding was prejudiced against the party, so that he could not obtain a fair trial, and the application was denied, and the cause was tried in the same court at a subsequent term, before another judge to whom no objection was made, *held*, that there was no force in the objection that the application had been denied. *Myers v. Walker*, 31 Ill. 353.

So where an application for a change of venue having been made upon the ground that there had been six hearings in relation to the case at bar before the sitting judge, and that he had decided erroneously in all of them, *held*, that no presumption was raised that the court was prejudiced, and that the motion must be denied. *Burke v. Mayall*, 10 Minn. 287.

Although an application for a change of the place of trial of a criminal case, on the ground of the prejudice of the judge,

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suit or the prosecution;<sup>1</sup> and in such a case it is not error for the judge to act upon his own knowledge;<sup>2</sup> or if, before the judge was elevated to the bench, he had been of counsel for either of the parties to the suit, or for the prisoner in the matter of the indictment;<sup>3</sup> and although it is provided by law that a second change

makes allegations upon which, if true, a change should be granted, it does not follow, as a matter of course, that the change must be granted; for the judge may consult his own feelings as well as the papers, and grant or deny the change, as he may think the right demands, in the exercise of a careful discretion. *State v. Foley*, 65 Iowa, 51.

And where a petition for change of venue alleged for cause that the judge entertained towards the plaintiff a violent prejudice, incapacitating him to do the plaintiff justice, and that the judge repeatedly, as the plaintiff had been informed and believed, spoke of the plaintiff in harsh and violent terms, derogatory to the plaintiff's character for fairness and honesty, *held*, that the petition did not show sufficient ground for the change of venue. *Millison v. Holmes*, 1 Ind. 45.

Where a case involving less than \$100 has been certified to the supreme court for the determination of questions of law, and both parties have acquiesced in the findings of fact on which such questions are based, the determination of such questions by that court leaves nothing for the trial court to do but to enter judgment in accordance with such determination; and in such a case, unless a new trial should be granted on account of newly-discovered evidence, a change of venue on the ground of the prejudice of the trial judge should not be granted. *Andrews v. Burdick*, 64 Iowa, 692.

After P., a temporary judge, had ordered a change of judge on the ground of averred bias, and the defendant had recognized to appear at the next term, S., the regular judge, died; and, on a trial before D., his successor, the jury disagreed, and were by consent of parties discharged. *Held*, that it was error to refuse an application for change of venue from D. for bias properly averred. There had been no change of judge on account of his bias; and, on a sufficient affidavit, every defendant in a criminal prosecution is entitled to one such change. *Duggins v. State*, 66 Ind. 350.

A court has no authority upon its own motion, to change the venue of a case, whether for the trial of a part or all the issues involved therein; and the fact that an application for a change of venue on the ground that the judge was prejudiced

had been filed and sustained in another case, involving the same issues, is no ground for such change. *Bennett v. Craey*, 57 Iowa, 221.

The statement of the mere belief of the defendant that the judge is prejudiced, when such belief is founded alone on alleged facts, of the existence of which defendant has no personal knowledge, is insufficient to overcome the presumption which arises from the denial which is implied in the order of the judge overruling the petition for a change of venue; but, with the unequivocal statement of the judge that the alleged facts on which the belief of defendant is based have no existence, the question of the correctness of the ruling is not left to depend on the presumption which arises under the law in its favor, but is affirmatively established. *State v. Hale*, 65 Iowa, 575.

1. *Jim v. State*, 3 Mo. 147; *Jefferson County v. Milwaukee County*, 20 Wis. 147.

Where the president judge gives the requisite certificate, and returns the cause for trial at a special court, and the parties go to trial without exception, it is not an objection to the jurisdiction of the special court that the judge stated, in the certificate, that in his own opinion he was not interested; and that, on the trial, he was admitted as a witness. *Barrington v. Bank of Washington*, 14 Serg. & R. (Pa.) 405.

An affidavit to change the place of trial of an action, in which the deponent states that he is informed and believes that the judge is disqualified from hearing or trying the cause for the reason that he is interested in the subject-matter of the suit, is not sufficient; it is too loose and uncertain. *Table Mountain, etc., Co. v. Wallers, etc., Co.*, 4 Nev. 218.

Where the only evidence to show that the judge is interested is an affidavit which is insufficient, the refusal of the judge to grant a change of venue will not be sustained. *Lombard v. Hayner*, 5 Ill. App. 560.

2. So held where the judge in overruling a motion for change of venue gave as reason that he was not interested in the suit. *Table Mountain, etc., Co. v. Wallers, etc., Co.*, 4 Nev. 218.

3. *Bailey v. Kimbrough* 37 Mo. 182; *Van Rensselaer v. Douglass*, 2 Wend.

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of venue in the same cause shall not be allowed, yet it may be allowed when the judge has been of counsel for the prisoner.<sup>1</sup> Where the judge has been of counsel for one of the parties he may order the change of his own motion.<sup>2</sup>

*For Convenience of Witnesses.*—On an application to change the place of trial the courts should be governed by the convenience of witnesses, and the determination as to whether the ends of justice will be promoted by such a change.<sup>3</sup> In deciding such motions the courts, in whose discretion the determination largely rests, now look beyond the affidavits of the parties and the advice of their counsel to the pleadings and the issues to be tried; and from the whole case as presented by affidavits and the pleadings determine in which county the trial will accommodate the greatest number of witnesses whose attendance it will be necessary for the parties to secure in the reasonable exercise of care and prudence in preparing for trial.<sup>4</sup>

(N. Y.) 290; *State v. Houser*, 28 Mo. 233; *State v. Gates*, 20 Mo. 400.

Where the defendant claims in writing his right to have the venue of the action changed to the county in which he resided when the suit was brought and where the summons was served, it is the duty of the judge to order the change of venue, notwithstanding that the judge of that county had previously been retained as counsel for the plaintiff. *State v. McArthur*, 13 Wis. 454.

1. *State v. Gates*, 20 Mo. 400.

2. *Bruen v. Bruen*, 43 Ill. 408; *O'Connell v. Gavett*, 7 Col. 40; *Lux v. Haggin*, 13 Pac. Rep. (Cal.) 654. But, it seems, not for any other reason. *Bennett v. Carey*, 57 Iowa, 221.

3. *Jenkins v. California Stage Co.*, 22 Cal. 537.

4. *King v. Vanderbilt*, 7 How. Pr. (N. Y.) 385. See also *Benedict v. Hibbard*, 5 Hill (N. Y.), 509; *Jordon v. Garrison*, 6 How. Pr. (N. Y.) 6; *Hinchman v. Butler*, 7 How. Pr. (N. Y.) 462; *Sherwood v. Steele*, 12 Wend. (N. Y.) 295; *Hull v. Hull*, 1 Hill (N. Y.), 671; *Wood v. Bishop*, 5 Cow. (N. Y.) 414; *Austin v. Hinckley*, 13 How. Pr. (N. Y.) 576; *Lynes v. Eldred*, 47 Wis. 426.

In an action for use and occupation the venue will be changed to the county in which the premises are situated, and in which all the defendant's witnesses reside if the plaintiff does not show that he has any in the county in which it is laid. *Low v. Hallett*, 2 Cal. (N. Y.) 374. And in an action against a bank by a person in another county upon affidavit of the defendant that the cause of action arose at the bank, that the witnesses resided near it and were officers in it, and that

its books of account must be used at the trial, which it was inconvenient to transport, etc., the court directed the venue to be changed. *Kerr v. Bank*, 4 N. J. L. 363.

On a motion to change the place of trial, defendant's affidavit alleged that there were nineteen witnesses residing in another county, all of whom were material. Plaintiff's affidavit named no witnesses residing in the county where the venue was laid, but simply set forth facts tending to show that the defence sought to be established by defendant's witnesses had no existence in fact. *Held*, that the motion should be granted. *Wiggin v. Phelps*, 17 N. Y. Sup. Ct. 187.

Where the defendants state that if plaintiffs have more witnesses than they, it can only be to prove certain facts which defendants stipulate and admit; the plaintiffs, if they claim them on the ground of other facts, must state what those other facts are. *Carew v. Mechanics & F. Bank*, 2 How. Pr. (N. Y.) 148.

And where witnesses reside within one mile of the place where it is sought to have the trial take place, they are not to be disregarded in determining the place of trial because they do not reside in the same county. *Mason v. Brown*, 6 How. Pr. (N. Y.) 481. So the convenience of plaintiff's witnesses residing out of the State is not to be regarded as ground for denying the defendant's application to change the place of trial. *New Jersey Zinc Co. v. Blood*, 8 Abb. Pr. (N. Y.) 147; *Bowles v. Rome*, etc., R. Co., 38 Hun (N. Y.), 507. But it is no ground for a change that the applicant believes that witnesses in an adjoining State will



But a motion to change the venue will not always be granted on account of the mere preponderance in the number of witnesses.<sup>1</sup> If the plaintiff's witnesses reside in the county in which he has laid the venue, unless there is a great and striking preponderance against him the venue will not be changed.<sup>2</sup> It is not enough that the number is equal.<sup>3</sup> The facts and circumstances connected with the investigation have a more controlling influence than the mere number of witnesses,<sup>4</sup> and so the affidavits should state what is expected to be proved by the witnesses that the court may judge of their materiality; otherwise they will be slightly regarded.<sup>5</sup> In determining such motions the dispatch or oppressive delay of suits are also considerations not to be wholly overlooked; so if it appears that in the county where the greatest number of witnesses are shown to reside, the cause, in the ordinary course of things, will not be likely to be reached and tried until after several circuits have been held, and that the greatest convenience will not be secured by such change, the motion will be denied.<sup>6</sup>

But in a criminal case the place of trial cannot be changed for the convenience of witnesses or parties.<sup>7</sup>

*Because an Impartial Trial Cannot be Had.*—The granting of a change of venue on account of the prejudice of the citizens of a certain county against a party to the action is generally discretionary with the court, and subject to revision only in cases of abuse.<sup>8</sup> The allegation that a fair and impartial trial cannot be had must be clearly established, or the venue will not be changed. The

voluntarily attend if such change is had, no reason being given for the belief. *Shirley v. Nodine*, 1 Idaho N. S. 696.

1. *Wallace v. Bond*, 4 Hill (N. Y.), 536; *Porter v. Mann*, 4 Hill (N. Y.), 540; *Weed v. Halloday*, 1 How. Pr. (N. Y.) 73; *Jordon v. Garrison*, 6 How. Pr. (N. Y.) 6; *Goodrich v. Vanderbilt*, 7 How. Pr. (N. Y.) 467; *Benedict v. Hibbard*, 5 Hill (N. Y.), 509; *Hanchett v. Finch*, 49 Cal. 192.

2. *Duryee v. Orcott*, 9 Johns. (N. Y.) 248; *Demarest v. Hurd*, 46 N. J. L. 471.

Twenty-five witnesses on one side against ten witnesses on the other. *Held*, not such a preponderance of inconvenience as to induce the court to bring back the venue from the place where the cause of action (if any) arose. *Blackman v. Bainton*, 15 C. B. N. S. 432.

3. *Wood v. Bishop*, 5 Cow. (N. Y.) 414.

4. *Cook v. Pendergast*, 61 Cal. 72.

The mere circumstance of a plaintiff being an officer in the navy, and hoping to be shortly appointed to a ship, which would disable him from attending to give evidence at the trial if the venue was changed, is sufficient to induce the court to retain the venue where laid, although it is sworn that all the defendant's witnesses reside at the place to which it is

sought to change it. *Channon v. Parkhouse*, 13 C. B. N. S. 341.

In an action for the breach of a contract made at Liverpool, where the defendant resided, and where the contract was to be performed, the venue was laid in London. A judge on the defendant's application ordered the venue to be changed to Liverpool, upon an affidavit that all his witnesses, thirteen in number, resided there, and that a cross-action arising out of the contract was pending there, notwithstanding that the plaintiff's affidavit stated that all but one of his witnesses, twenty-eight in number, resided in London. The court refused to interfere. *Levy or Levi v. Rice or Wright*, 5 L. R. C. P. 119.

5. *Cook v. Pendergast*, 61 Cal. 72, citing *People v. Hays*, 7 How. Pr. (N. Y.) 249; *Am. Ex. Bank v. Hill*, 22 How. Pr. (N. Y.) 29; *Price v. Ft. Edw. Waterworks*, 16 How. Pr. (N. Y.) 51.

6. *King v. Vanderbilt*, 7 How. Pr. (N. Y.) 385; *Goodrich v. Vanderbilt*, 7 How. Pr. (N. Y.) 467.

7. *People v. Harris*, 4 Denio (N. Y.), 150.

8. *Watson v. Whitney*, 23 Cal. 375; *Hubbard v. State*, 7 Ind. 160; *Weeks v. State*, 31 Miss. 490.



court will not in general change it on a suggestion that an impartial trial cannot be had in the county in which the suit is instituted or the indictment has been found, unless the suggestion is accompanied by an affidavit stating the grounds of belief and setting forth the facts and circumstances so that the court may judge whether the application is well founded.<sup>1</sup> And if it appears that a fair trial cannot be had, the court will order the venue changed, even when laid in the proper county.<sup>2</sup>

1. *People v. Bodine*, 7 Hill (N. Y.), 147; *People v. McCauley*, 1 Cal. 379; *People v. Mahoney*, 18 Cal. 180; *Wormeley v. Commonwealth*, 10 Gratt. (Va.) 658; *State v. Windsor*, 5 Harr. (Del.) 512; *McNealy v. State*, 17 Fla. 198; *Lewis v. Fire Ins. Co.*, 2 Cranch (U. S.), 500; *Frank v. Avery*, 21 Wis. 168; *Kounsalaer v. Clarke*, 4 Cranch (U. S. C. C.), 98; *Cocheco Railroad v. Farrington*, 26 N. H. 428; *Dean v. White*, 5 Iowa, 266; *State v. Burris*, 4 Harr. (Del.) 582; *Cleveland v. Ward*, 11 Ohio, 128; *Irvin v. State*, 19 Fla. 872; *State v. Furbeck*, 29 Kan. 532.

But in *Rhode Island* it is held that proofs of such prejudice being naturally vague, great positiveness or definiteness in them cannot be required; and that it is sufficient for a petition to allege that, "by reason of local prejudice and the feeling entertained by the people of said county, the petitioner cannot have a full, fair, and impartial trial in said county," without setting forth the particular facts going to show the existence of the prejudice or feeling complained of. *Taylor v. Gardiner*, 11 R. I. 182.

2. *Murray v. New Jersey R. Co.*, 23 N. J. L. 63; *Lee v. Evalul*, 1 N. J. L. 283; *Ott v. McHenry*, 2 W. Va. 73; *People v. Harris*, 4 Denio (N. Y.), 150; *People v. Long Island R. Co.*, 4 Park. Cr. (N. Y.) 602. Compare *McNealy v. State*, 17 Fla. 198; *Hilliard v. Beattie*, 58 N. H. 112; *Healy v. Dettra*, 8 Atlantic Rep. (Pa.) 622; *Lady Franklin Min. Co. v. Delaney*, 12 Pac. Rep. (N. Mex.) 628.

An affidavit that one party has undue local influence and that an odium attaches to the defendant on account of local prejudices, is sufficient to call for a change of venue. *Shaw v. Hamilton*, 10 Ind. 182.

The venue will also be changed on the ground of excitement, where two ineffectual attempts have been made to obtain a verdict. *Messenger v. Holmes*, 12 Wend. (N. Y.) 203.

So it is sufficient ground to remove a cause if it appears by affidavit that the adverse party has considerable influence,

which he will probably exert, and that many persons hold freeholds under him, and may be turned off at pleasure. *Smith v. Hortler*, 1 Law Repos. (N. Car.) 518.

And where one hundred citizens united in employing counsel to prosecute the defendant, *held*, that this was a sufficient case to entitle the person to a change of venue. *People v. Lee*, 5 Cal. 353.

Where a prisoner indicted for murder showed that the sheriff of the county was against him, and wrote a letter calculated to prejudice him, which was published in a newspaper printed and circulated in the prisoner's county, and great excitement was shown to exist, and ten months after the homicide threats of lynching him were made by a mob, the most of whom lived in or near the county seat, where he would have to be tried; *held*, good cause was shown for a change of venue. *State v. Greer*, 22 W. Va. 800.

An application for a change of venue was based upon the excitement and prejudice against the defendant. It was supported by the affidavits of three citizens, of whom two were the defendant's attorneys, and there were no counter affidavits. The application was refused, and this decision was reversed upon appeal. *State v. Mooney*, 10 Iowa, 506.

In the trial upon an indictment for rape, and assault with intent to commit, the trial coming on a few weeks after the charge was made, the accused filed affidavits of leading citizens showing a strong bias and prejudice against him, so that a fair trial could not be had in that county, and the affidavits filed on behalf of the State did not deny these statements in clear and direct language. *Held*, that a change of venue should have been granted. *Richmond v. State*, 16 Neb. 388.

But it is not sufficient to authorize a change of venue that the community are prejudiced against the cause of the applicant; the prejudice must be against himself. *Charlotte v. Chouteau*, 33 Mo. 194.

The plaintiff corporation commenced a suit against the defendant for assessments upon shares, and a change of venue was moved for, on the ground that

a fair and impartial trial could not be had in the county where the venue was laid. It was shown in evidence that the plaintiff's road passed through four of the thirteen towns in the county, and that in those towns the subject-matter of the suit had been very generally discussed; and that of the 548 stockholders residing in the county all but 23 were residents of the four towns. It did not appear that the subject of the suit had been much discussed in the other nine towns, or that opinions had been formed or expressed in these towns. Upon these facts shown the motion was denied. *Cocheco Railroad v. Farrington*, 26 N. H. 428.

The court will not change the venue in a turnpike cause on an affidavit stating the disposition of the county to be unfavorable to turnpikes. *President, etc., Turnpike Road v. Wilson*, 3 Cai. (N. Y.) 127.

Nor will the court change the venue on an affidavit saying that there is a party spirit in the county against the person applying. *Zobieski v. Bauder*, 1 Caines (N. Y.), 488.

After two jury trials without a verdict a change of venue will not be granted, unless it clearly appears that a fair and impartial trial cannot be had in the county of defendant's residence. *Sommercamp v. Catlow*, 1 Idaho (N. S.), 716.

In support of an application to enter a suggestion to try a cause in Nottinghamshire instead of Lincolnshire, upon the ground that the lessor of the plaintiff could not have a fair and impartial trial in the former county, an affidavit was produced alleging that two attorneys, whom the lessor of the plaintiff had successively employed to conduct the cause, had abandoned his interest, the one on account of a bribe paid to him by the defendant, the other on account of an intimacy which existed between him and the defendant, and also that the defendant was a person of large property and possessing great influence in the county, and that he had said that he would "do as he liked at Lincoln," more especially as the lessor of the plaintiff was a poor man. *Held*, insufficient. *Doe d. Hickman v. Hickman*, 9 D. P. C. 364.

Nor is it a ground for changing the venue, in an action for a libel contained in a local newspaper, that the defendant, the proprietor, possesses much influence in the county in which the venue is laid, and has, since the commencement of the action, evinced a disposition to exercise it to the prejudice of the plaintiff. *Walker v. Brogden*, 17 C. B. (N. S.) 571.

Nor the fact that the people of the

county where the action is to be tried are generally interested in the question involved. Such interest does not amount to a disqualification. *Conley v. Chedie*, 7 Neb. 336.

On an application for a change of venue it appeared that the same was sworn to by a nominal party to the suit; that the prejudice of the inhabitants was alleged to be against him alone; and also that a number of counter affidavits were filed, but they were not preserved in the record. *Held*, that under these facts the supreme court could not say that error was committed in overruling the application. *Buchan v. Broadwell*, 88 Mo. 31.

Suit was brought for damages for fraudulent representations made by defendants in the sale of oats of a particular kind, which were extensively raised and sold by the farmers of the county to which the suit had been removed, who had combined into associations for that purpose. Plaintiff moved for a change of venue, filing affidavits of the above facts, and also that one of the defendants was a very influential man in the county; that the farmers were considerably excited over the matter, and that he was apprehensive that a fair trial could not be obtained there, etc. Numerous counter affidavits were filed. The motion for removal was refused. *Held*, that the court had not abused its discretion in so doing. *Ross v. Hanchett*, 52 Wis. 491.

An affidavit in support of a motion for a change of venue on the ground of undue influence of four attorneys retained by plaintiff is not sufficient, where two of the attorneys, subsequently to the motion, but before ruling upon it, have withdrawn their appearance for plaintiff. *Anderson v. Leverick*, 30 N. W. Rep. (Iowa) 39.

Editorials in a county newspaper are not competent to establish such a prejudice as would prevent an impartial trial. *State v. Barton*, 8 Mo. App. 15.

On an application for a change of venue, some six or seven newspaper articles were offered containing statements of facts similar to those disclosed by the State on the trial, and denouncing in strong and severe language the defendant; also the affidavit of a single witness, that he was one of the party engaged in the search for defendant immediately after the shooting, and that he heard bitter and threatening language in every direction against him. Opposed were the affidavits of twenty-one citizens from different parts of the county denying any general prejudice or any feeling which would prevent a fair trial. It was not

Where an application is made for a change of venue in a criminal case, on account of local prejudice, it is proper for the judge to receive the sworn statements of reputable citizens to aid him in the exercise of the discretion confided in him by the law;<sup>1</sup> or the court may deny the motion, until it can be shown by an examination of a sufficient number of jurors whether a fair and impartial trial can be obtained or not;<sup>2</sup> and the fact that a fair jury is ob-

shown that there was any difficulty in obtaining a jury, or any reason to suspect the candor and fairness of the jurors impanelled. *Held*, that the judgment ought not to be set aside because of the refusal to grant a change of venue. *State v. Rhea*, 25 Kan. 576.

Nor is the fact that some few people have contributed to employ an attorney to prosecute the moving party. *People v. Graham*, 21 Cal. 261.

There is no error in refusing one accused of murder a change of venue, because of prejudice and excitement against him, which was manifested only at the time of his arrest, and confined to the relatives and friends of the deceased. *Honeycut v. State*, 8 Baxt. (Tenn.) 371.

A refusal to grant a change of venue *held* no abuse of discretion when, although mob violence had been threatened at the time of the first trial, public excitement had subsided at the time of the trial in question. *Poe v. State*, 10 Lea (Tenn.), 673.

And the fact that thirty or forty persons have, upon solicitation, contributed small sums to employ a lawyer to assist the prosecuting attorney does not show such a state of feeling in the whole county as to preclude the obtaining of an impartial jury or to interfere with the impartial administration of the laws. *People v. Graham*, 21 Cal. 261. See also *State v. Williams*, 2 McCord (S. Car.), 383.

The defendant alleged in his affidavit that he could not have a fair and impartial trial because of the excitement and prejudice against him in the county. In opposition to the motion, the affidavits of sixty citizens, residing in different parts of the county, were presented, averring that they had a general acquaintance with the citizens of their respective neighborhoods, that they had heard of no excitement or prejudice against the prisoner, and that from their knowledge and acquaintance with the citizens of the county the prisoner could have a fair and impartial trial of his case at that term of the court. *Held*, that the question was one within the sound discretion of the court, and that there was no abuse of such discretion in

overruling the motion. *Bissot v. State*, 53 Ind. 408.

Accused and three supporting affiants swore positively to an influential combination against him, etc. The court below, despite objection by the accused, examined his affiants, and they disclosed their ignorance of such a combination, but concurred in stating that such a prejudice existed against the accused that he could not get a fair trial in the county. *Held*, that the application was correctly overruled, though no countervailing witnesses were called to disprove the alleged combination. *Dupree v. State*, 2 Tex. App. 613.

Ten witnesses testified that there was strong prejudice and excitement against defendant in their part of the county, and ten others testified that there was no excitement in their section; but none said that they did not think defendant would get a fair trial. *Held*, that a motion for a change of venue was properly overruled. *State v. Brownfield*, 83 Mo. 448.

The failure to get a jury on a particular day is not such a confirmation of the affidavit of the defendant, alleging that he was the victim of a general prejudice in the county, as to make it error in the court to refuse a change of venue when again requested. *People v. Mahoney*, 18 Cal. 180.

Upon an application for a change of venue in a murder case, on account of the excitement and prejudice in the county, the full and decisive affidavits of three disinterested witnesses make out a strong *prima facie* case, only to be overcome by very strong negative testimony. *State v. Nash*, 7 Iowa, 347.

As a general rule, the state of public excitement which entitles an accused to a change of venue is such a state only as will deter a jury from rendering an impartial verdict. *State v. Ferd*, 37 La. An. 443.

1. *Anderson v. State*, 28 Ind. 22; *Boswell v. Flockheart*, 8 Leigh (Va.), 364; *Porter v. State*, 3 Lea (Tenn.), 496; *Hyde v. Harkness*, 1 Idaho (N. S.) 601.

2. *State v. Gray*, 8 West Coast Rep. (Nev.) 72.

tained is an answer to the affidavit.<sup>1</sup> There is no fixed rule defining what shall or shall not be considered as proof of the fact that a fair and impartial trial cannot be had. It has been held that the venue may be changed, though there has been no actual experiment made by way of trying the cause or even impanelling a jury in the county where the venue is laid;<sup>2</sup> also, that there is no error in postponing the consideration of a motion to so change the venue until an attempt is made to impanel a jury.<sup>3</sup>

After there has been an order of a court, having original jurisdiction of a criminal cause, changing the venue in accordance with constitutional and statutory provisions, on the ground that an impartial trial cannot be had in the county in which the crime was committed, it cannot be attacked collaterally in the court in which the trial is had.<sup>4</sup>

In this class of cases the court in ordering the removal is not precluded from acting in part on personal knowledge possessed by it.<sup>5</sup>

*Because of Non-residence of Parties.*—The place of trial is sometimes changed on account of the residence of the defendant;<sup>6</sup> and

1. *Wright v. Commonwealth*, 33 Gratt. (Va.) 880.

2. *People v. Webb*, 1 Hill (N. Y.), 179. Compare *Messenger v. Holmes*, 12 Wend. (N. Y.) 203; *Patchin v. Sands*, 10 Wend. (N. Y.) 570; *Hunter v. State*, 43 Ga. 483.

3. *People v. Plummer*, 9 Cal. 298; *Hunter v. State*, 43 Ga. 483. See also *Ward v. Moorey*, 1 Wash. Ter. 122.

4. *Otter Creek Block Coal Co. v. Raney*, 34 Ind. 329.

5. *Giese v. Schlutz*, 60 Wis. 449.

6. *Spain v. Winter*, 1 Miss. 152; *Paige v. Carroll*, 61 Cal. 215.

But in an action where the people of the State are plaintiffs, the place of trial should not be changed on account of the residence of defendant. *People v. Cook*, 6 How. Pr. (N. Y.) 448.

A defendant who objects that the suit was brought in the wrong county must show, by proof of facts so notorious that the plaintiff could readily discover them, that his residence was not in the county where he was sued, and that it was in another county where the suit was instituted. 24 Tex. 615.

Where, in an action against a railroad company, commenced in the county of Henry, the defendants moved for a change of venue to the county of Des Moines, on the ground that they were a body corporate, organized under the laws of the State of Iowa, and had their principal place and officers for transacting their business at Burlington, Des Moines

county, and so had at the time the suit was commenced; that the original notice was served on defendants, in said Des Moines county, by service thereof by the sheriff of said county, on J. G. T., treasurer of defendants, at his office in Burlington, and on the track-master in Henry county, and in no other way or manner; and that the present suit was about a matter growing out of, and connected with, the said office; which motion was sustained, and the venue changed accordingly. *Richardson v. Burlington, etc.*, R. Co., 8 Iowa, 260. But a foreign corporation cannot obtain a change of venue on the ground of residence, for it has no residence in any county in the State. *Thomas v. Placerville G. Q. M. Co.*, 3 W. C. Rep. (Cal.) 777.

Where the place of trial of an action begun in Rockland county against the sheriff of that county and a codefendant, for acts done by the sheriff in his official character, was changed on application of the co-defendant, acquiesced in by the sheriff, to New York, and the case was tried there twice; yet it being afterwards shown that the co-defendant had died insolvent; that the cause of action arose in Rockland county; that both parties and a large number of witnesses reside there,—*held*, that the action, on application of defendant, should be retransferred to Rockland county, as well for the public interests as for the private interests of the parties. *Abrahams v. Bensen*, 60 How. Pr. (N. Y.) 208.

where the defendant asks for a change on this ground, if the plaintiff wishes to have the place of suit retained for the accommodation of witnesses, he should present this claim in opposition to the motion.<sup>1</sup> It is not an *ex parte* question, and the plaintiff has a right to be heard thereon.<sup>2</sup>

**4. Who May Apply For.**—An application for a change of venue cannot be made by any one who is not a party to the record; nor in civil cases by part among a number of defendants.<sup>4</sup> But merely formal parties defendant or those having no real interest in the subject-matter of the suit should not be allowed to defeat such an application made by the other defendants.<sup>5</sup>

And where one of the parties to a suit is served with process,

1. *Pierson v. McCahill*, 22 Cal. 127.

2. *Turner v. Maddox*, 6 Iowa. 489.

3. *Crowell v. Maughs*, 7 Ill. 419; *Sherry v. Denn*, 8 Blackf. (Ind.) 542; *Squires v. Chillicothe*, 89 Mo. 226.

4. *Legg v. Dorsheim et al.*, 19 Wend. (N. Y.) 700; *Sailly v. Hutton*, 6 Wend. (N. Y.) 508; *Rupp v. Swinesford*, 40 Wis. 28; *Jacubeck v. Hewitt*, 61 Wis. 96; *Remington S. M. Co. v. Cole*, 62 Cal. 311; *Pieper v. Land Co.*, 56 Cal. 173; *Welling v. Sweet*, 1 How. Pr. (N. Y.) 156; *Hanna v. People*, 86 Ill. 243; *Whitaker v. Reynolds*, 14 Bush. (Ky.) 616. Compare *Krutz v. Howard*, 70 Ind. 174, where it is held that one or more co parties to an action may take a change of venue, and thus change the venue as to his co parties as well as himself.

In an action against several defendants, originating in Hickory county, some of the defendants applied for a change of venue, and the court ordered a change, as to them, to Pettis county. The court in Pettis county afterward rendered judgment against one of the defendants who had not joined in the application for the change, and who never appeared to the action, and was served only by publication, and his land was sold to satisfy the judgment. In a suit brought by this party to set aside the sheriff's deed, these facts, among others, appeared in the petition. *Held*, that the petition was bad on demurrer; that the court in Pettis county obtained no jurisdiction of this party; that the judgment was therefore a nullity as against him, and the deed was void, and so there was nothing upon which a court of equity could act. *Holland v. Johnson*, 80 Mo. 34.

A motion to change the venue cannot be made by one of three defendants, without the consent of the other two, notwithstanding they have suffered judgment by default, and colluded with the

plaintiff to withhold their consent. *Anon*, 2 Chit. 417.

But the requisition that all parties shall join in an application for a change of venue extends only to such of them as have a trial pending; defendants in default need not join in the application; the whole cause will be removed and final judgment will be rendered for or against all in the court to which the cause is taken. *Hitt v. Allen*, 13 Ill. 592.

In *New York* there is an exception to the general rule in a joint action against the maker and indorser of a promissory note. Either defendant in such a case may demand and have the place of trial changed to the proper county as to himself without the other's consent, the same as if he had been separately sued. *Sherman v. Gregory*, 42 How. Pr. (N. Y.) 481.

Where all the plaintiffs or all the defendants join in applying for a change of venue on account of prejudice of the judge, an affidavit of prejudice by one of them is sufficient. *Walcott v. Walcott*, 32 Wis. 63.

Where all of several defendants did not join in an application for a change of venue, the plaintiff cannot on appeal object that the order of removal was erroneous, because the defendant, not joining in the application, was not notified of it. *Wilson v. Richards*, 28 Minn. 337.

5. *Walcott v. Walcott*, 32 Wis. 63.

By the original complaint in an action in the county of Santa Barbara it appeared that the defendant D. (a resident of San Francisco) was the only defendant against whom the facts alleged would justify judgment. *Held*, that he was entitled to a change in the place of trial, and that his right thereto could not be taken away by statements in an amended complaint (filed after his demand), setting up a cause of action against the other defendant. *Buell v. Dodge*, 57 Cal. 645.



and the other not, the one served may move for a change of venue, and the motion may be granted as to him, though the other may have been served meanwhile.<sup>1</sup> Nor does the denial of a motion for change of venue, made by one defendant, prejudice the right of another defendant, subsequently served with summons, to make a similar motion.<sup>2</sup>

But in criminal cases where parties are jointly indicted, the court has power to order a change of venue as to either of the defendants, upon his motion alone.<sup>3</sup> Such motion and order necessarily involve and include a motion and order for a separate trial of the party making the motion, and have all the force and effect of a motion and order for both purposes.<sup>4</sup>

A corporation is entitled to a change of venue equally with individuals; and where a corporation defendant moves for a change of venue, the principal affidavit therefor may be made by any officer or agent of the corporation sufficiently acquainted with the facts to make it conscientiously,<sup>5</sup> but an affidavit which does not show the official character of the affiant, except by an unverified recitation thereof in the body of the affidavit, is not sufficient.<sup>6</sup>

An infant may properly make the suggestion and affidavit for removal.<sup>7</sup>

**5. When the Motion May be Made.**—A motion for a change of venue must be made at the earliest opportunity, and not put off until just before the cause is to be called for trial; and if a party fails to do so, his rights will be barred.<sup>8</sup> He cannot wait until a

1. *Brodhead v. Stanton*, 2 How. Pr. (N. Y.) 278. See also *Eldred v. Becker*, 60 Wis. 48.

2. *New Jersey Zinc Co. v. Blood*, 8 Abb. Pr. (N. Y.) 147.

3. *Brown v. State*, 18 Ohio St. 497; *State v. Martin*, 2 Ire. (N. C.) 101.

4. *Brown v. State*, 18 Ohio St. 297; *State v. Netherford*, 25 Mo. 439.

But in *New York*, after a cause had been removed by *certiorari* from the court of oyer and terminer to the supreme court, and while it was pending there, it appearing that a fair trial could not be had in the county where the indictment was found, the court at a special term ordered the trial to be had in another county. Several were jointly indicted. The objection to the trial in the county where the indictment was found justified the removal as to one defendant, and it was decreed as to all, though the defendants were entitled to a separate trial. *People v. Baker*, 3 Park. (N. Y.) Cr. 181.

5. *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *McGovern v. Keokuk Lumber Co.*, 61 Iowa, 265.

Where the moving party is a railroad company, the affidavit of an agent whose duty it is to investigate the facts connected with all claims against the com-

pany, and who is conversant therewith, is sufficient. *Jones v. Chicago, etc., R. Co.*, 36 Iowa, 68.

In an action against a corporation and its directors, a defendant director, who was also the secretary of the corporation, made an affidavit of the prejudice of the judge, and asked for a change of venue, stating in the affidavit that he made it, and asked the change, for himself and in behalf and at the request of all the other defendants; and they all by their attorney moved for the change. *Held*, sufficient. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670.

6. *McGovern v. Keokuk Lumber Co.*, 61 Iowa, 265.

7. So held where, in an action by a minor brought in the name of the State, the infant, who was upwards of fifteen years of age, made affidavit for the removal of his cause to another court. *Albert v. State*, 7 Atlantic Rep. (Md.) 697.

8. *Hudson v. Hanson*, 75 Ill. 198; *Toledo, etc., R. Co. v. Maxfield*, 72 Ill. 95; *Peoria, etc., R. Co. v. Mitchell*, 74 Ill. 394; *Haskings v. People*, 14 Ill. App. 198; *Quinn v. Van Pelt*, 12 Hun (N. Y.), 633; *Hoffman v. Sparling*, 12 Hun (N. Y.), 83; *Shackleford v. State*, 79 Ala. 26; *Cook v. Garza*, 9 Tex. 358; *Ringgenberg*

cause is on trial and until the court has intimated an opinion on the merits of the case from the evidence, and then obtain a change of venue;<sup>1</sup> or until the parties have signified their readiness for

*v. Hartman*, 102 Ind. 537; *Waldron v. St. Paul*, 33 Minn. 87.

A petition for a change of venue contained the statement that the defendant did not know of the commencement of the suit in time to have made the application at the first term of the court, but the whole record conclusively showed that the reason he did not know of it was because he had absconded from the State to avoid legal process in relation to the subject-matter of the suit. *Held*, that this did not obviate the necessity of his showing that the cause for the change asked for had arisen or come to his knowledge subsequently to that term. *White v. Muttland*, 71 Ill. 250.

An affidavit for change of venue on the ground of prejudiced public sentiment, arising from adverse newspaper articles, made after the first term, alleged as an excuse for not applying earlier that the applicant was not aware of the extent of the prejudice until a recent date named, and that since the publication of the articles referred to applicant had avoided as far as possible all intercourse with people. *Held*, that denial of the application was not error under a statute forbidding change of venue after the first term, "unless the cause shall have arisen subsequent to such term." *Roberts v. People*, 13 Pac. Rep. (Cal.) 630.

Where the issue was joined Sept. 30, 1873, and the motion was not made until Aug. 8, 1874, the case having been placed on the calendar and noticed in the county where it was brought, and two circuits having been held in the county to which removal was sought in the mean time, *held*, that the motion was too late. *Spratt v. Huntington*, 4 Thomp. & C. (N. Y.) 551.

Where, at the June term of court, a petition was filed for a change of venue, and notice given of an application to be made at that term, but no motion was made until the next term; *held*, that the fact that the court had entered an order that all causes on the common-law docket should stand continued for all purposes except defaults, assessment of damages, motions, and the settling of issues, was no excuse for not making and pressing the motion at the June term, and therefore the motion was properly denied. *Hudson v. Hanson*, 75 Ill. 198.

A plaintiff who asks for a change of venue because of the alleged undue in-

fluence of the defendant over the mind of the trial judge must make his application therefor as soon as practicable after receiving information of the undue influence complained of. Whether the application is so made within proper time, is a question resting in the sound discretion of the trial judge. *Held*, that he did not err in refusing an application made at the next term after that at which the information was received. *State v. Matlock*, 82 Mo. 455.

But where the cause could not have been tried at the first term on account of an epidemic, the motion for a change of venue may be made after the first term. *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86.

Although a suit has been pending for several terms, yet if a party applies for the removal the first term he becomes interested, and makes out a sufficient cause in other respects, he is entitled to a removal. *Knowes v. Baker*, 21 Law Repos. (N. Car.) 98. So a party who enters a voluntary appearance to an action after the day set for trial of the cause is not subject to a rule of court requiring application for a change of venue to be made before that day. *Truitt v. Truitt*, 38 Ind. 16.

The objection that an application for a change of venue was not seasonably made was supported only by the statement of the applicant's former attorney, to the effect that, some months before, he had been requested and had refused to apply for a change of venue. *Held*, that this statement could not be received in opposition to the sworn allegations of the petition; and that, the petition showing ground sufficient to support the application, the petition must be granted. *Woodhull v. Kelly*, 10 Ill. App. 455.

The regular judge of the district court having been of counsel in several cases, and therefore disqualified to sit in the trial thereof, on motion of a member of the bar a *pro tem.* judge was elected. Neither counsel nor client in this case appears by the record to have participated in such election, or to have been present or consented thereto. *Held*, that an application for a change of the place of trial to another district was not too late when made at the time the case was called for trial by the *pro tem.* judge. *Hegever v. Kiff*, 31 Kan. 636.

1. *Richards v. Green*, 78 Ill. 525; *Ickes v. Kelley*, 21 Ind. 72; *McKenney v. Hop-*

trial, and the jury are being called into court, at least without sufficient excuse for the delay;<sup>1</sup> or after a trial before a referee and report made by him.<sup>2</sup> In *South Carolina* it is held that the application must be made before the case is reached on the docket.<sup>3</sup>

**6. The Affidavit.**—In applying for a change of venue, the applicant should state the facts in his affidavit in such a manner as to enable the court to judge of the propriety of granting it;<sup>4</sup> hence an affidavit for a change of venue for prejudice of the judge should state the causes of prejudice as well as the fact.<sup>5</sup> When the venue is sought to be changed for the convenience of witnesses, it is not sufficient for the defendant to state that material witnesses reside in the county to which he wishes to remove it; he ought to add

kings, 20 Iowa, 495; *Lyne v. Hoyle*, 2 Greene (Iowa), 135; *Ten Broeck v. Middlebrook*, 4 Wend. (N. Y.) 205; *Hubbard v. National Ins. Co.*, 11 How. Pr. (N. Y.) 149; *Allis v. Meadow Springs Distilling Co.*, 29 N. W. Rep. (Wis.) 543.

But under the Iowa code,—providing for a new trial on grounds discovered after the term, etc.,—pending an application for a new trial upon the ground of newly discovered evidence, made subsequent to the trial term, a change of venue may be granted upon a proper showing therefor. *Gibbs v. Buckingham*, 48 Iowa, 96.

1. *Fugate v. Carter*, 6 Mo. 269; *Witz v. Spencer*, 51 Ind. 253. At least not after the verdicts upon the issue. *Ex parte Cox*, 16 Mo. 742. Compare *Hunnell v. State*, 86 Ind. 431.

2. *Cairns v. O'Brien*, 40 Wis. 469; *Woodrow v. Younger*, 61 Mo. 395; *Duffy v. Hickey*, 32 N. W. Rep. (Wis.) 54.

3. *Blakely v. Frazier*, 11 S. Car. 122.

**At What Stage of the Pleadings.**—A motion to change the venue on grounds disclosed by the complaint must be made before or at the time of filing demurrer or answering to the merits. *Pearkes v. Freer*, 9 Cal. 642; *Jones v. Frost*, 38 Cal. 245; *Howell v. Stetefeldt Furnace Co.*, 10 Pac. Rep. (Cal.) 390. In *Illinois* the application should be made at the first term after appearance, whether issue to the contrary is formed or not; and if it is deemed sufficient, and the pleadings are not made up, the cause should stand without an order for the change till such issue be formed. *Gilsort v. Powers*, 16 Ill. 355. If made on the common affidavit, it must be before the plea is filed; if a special ground is laid, the venue may be changed after plea. *Wildes v. Mairs*, 6 N. J. L. 320. Or if it appears that the defendant would otherwise be exposed to unnecessary difficulty, or the fair administration of justice would be interrupted.

*Bell v. Morris C. & B. Co.*, 15 N. J. L. 63. But if he moves after plea, and the effect of his delay is to throw the plaintiff over a circuit, the motion will be denied with costs. *Anon.*, 18 Wend. (N. Y.) 514. In *New York* it is held that the defendant may move to change the venue after issue joined, and at any time, where there has been no loss of trial and no delay will be produced. *Kent v. Dodge*, 3 Johns. (N. Y.) 447; *Wistar v. Johnson*, 1 N. J. L. 260; *Hubbard v. Nat'l Ins. Co.*, 11 How. Pr. (N. Y.) 149. The motion must, if the intervention of a special term will allow, be made in such season that, if it is denied, the plaintiff will not lose a trial in the county where the venue is laid; if made at a later term it will be denied for that cause. *Moreland v. Sanford*, 1 Denio (N. Y.), 660. The defendant may apply to the court for an order directing the place of trial to be changed to the proper county at any time before the plaintiff's time for serving an amended complaint has expired, for the plaintiff may make the change by amending. *Conroe v. National Protec. Ins. Co.*, 10 How. Pr. (N. Y.) 403.

4. *Sloan v. Smith*, 3 Cal. 410; *Tooms v. Randell*, 3 Cal. 468; *Kerr v. Whitaker*, 3 N. J. L. 514.

5. *Ex parte Curtis*, 3 Minn. 294; *De Walt v. Hartzell*, 7 Col. 601.

An affidavit for a change of venue, averring that "full knowledge" of the fact that the presiding judge was prejudiced, etc., did not come to the affiant until the day the petition was presented, held to be insufficient. *McCann v. People*, 88 Ill. 103.

Upon application for change of venue based upon the prejudice of the judge, while facts are to be stated, they are not to be set out beyond what are necessary where they involve the judicial acts or character of the judge. *Hughes v. People*, 5 Col. 436.



that evidence will be given of some material fact happening there.<sup>1</sup> It should also state the town, village, or particular place of residence, in addition to the county.<sup>2</sup> The oath to advice and belief as to necessity of witnesses should be stated in each case after naming witnesses.<sup>3</sup> It need not state the cause of action;<sup>4</sup> but it must be positive that the cause of action arose in another county; if belief is sworn to, it is not sufficient.<sup>5</sup> When the venue is sought to be changed in an action of tort, and especially for a newspaper libel, because the cause of action arose in another county, it must state not only that the cause of action arose there, but that it did not arise elsewhere;<sup>6</sup> when on the ground that deponent believes justice cannot be done in the county where it is pending, it must state the reasons of such belief or it will be insufficient.<sup>7</sup>

The facts sworn to in the affidavit should be stated positively, and not argumentatively<sup>8</sup> or by way of belief.<sup>9</sup> It need not be sworn to by the party himself.<sup>10</sup>

Where the motion is overruled because of the insufficiency of the affidavits supporting it, and the party is granted leave to amend the affidavits, he may properly do so by substituting new ones in their stead.<sup>11</sup>

If a party is unable to obtain affidavits from residents of a county, he may state to whom he applied for the same, the reasons given by each for refusing, and that he was unable to procure affidavits in support of his motion because of the refusal of the citizens to give the same.<sup>12</sup>

**7. Effect of Change.—On the Jurisdiction.**—An order of a court changing the venue of a cause removes it from the jurisdiction of that court.<sup>13</sup> So an agreement to change the venue gives the court

1. *Gourley v. Shoemaker*, 1 Johns. (N. Y.) Cas. 392.

It is not enough for the party to say he expects to prove "by some of them" such a fact, and "by some of them" such another fact. *Price v. Ft. Edward Water-works Co.*, 16 How. Pr. (N. Y.) 51.

But an affidavit which does not show wherein the witnesses are material, is enough if there is no affidavit of witnesses on the other side. *People v. Hays*, 7 How. Pr. (N. Y.) 248.

2. *Westbrook v. Merritt*, 1 How. Pr. (N. Y.) 195; *Cook v. Finch*, 2 How. Pr. (N. Y.) 89; *Van Auken v. Stewart*, 2 How. Pr. (N. Y.) 181.

3. *Mills v. Adsitt*, 2 How. Pr. (N. Y.) 83.

4. *Baker v. Sleight*, 2 Caines (N. Y.), 46.

5. *Franklin v. Underhill*, 2 Johns. (N. Y.) 374.

6. *Tillinghast v. King*, 6 Cow. (N. Y.) 591.

7. *State v. Twitty*, 2 Hawks. (N. C.) 248; *State v. Seaborn*, 4 Dev. L. (N. C.) 305.

8. *Manning v. Downing*, 2 Johns. (N. Y.) 453.

9. *Territory v. Kelly*, 2 N. Mex. 292.

10. *Ellsworth v. Henshall*, 4 Greene (Iowa), 417; *Nicholl v. Nicholl*, 66 Cal. 36. Compare *Huthsig v. Maus*, 36 Mo. 101; *McCauley v. People*, 88 Ill. 578. In *Heshion v. Pressley*, 80 Ind. 490, it is held that an application for change of venue on account of the prejudice of the judge must be made on the affidavit of the party to the suit, but for any other cause may be made on the affidavit of any person.

11. *Winet v. Berryhill*, 55 Iowa, 411.

12. *Simmerman v. State*, 16 Neb. 615.

13. *Frazier v. Fortenberry*, 4 Ark. 162; *Campbell v. Thompson*, 4 Greene (Iowa), 415; *Allis v. Meadow Springs Distilling Co.*, 29 N. W. Rep. 543. And an order of the court to which it is transferred to remit the papers, that they may be properly authenticated, does not restore jurisdiction to the original court. *Frazier v. Fortenberry*, 4 Ark. 162. But in *Indiana*, when the court grants an order for a

to which the change is made jurisdiction.<sup>1</sup>

On a change of venue, the clerk should send a transcript of the record, proceedings, and original papers in the cause, authenticated by his official seal, to the court to which the venue is removed; and without such authentication of the transcript, the court to which it is sent cannot take jurisdiction.<sup>2</sup>

In a real action, the court of that county where the lands sued for lie, has jurisdiction over the subject-matter; and it is competent for the parties, after change of venue has been ordered, by consent to waive process, come into court, and give jurisdiction over their persons.<sup>3</sup>

In criminal cases, where there are several joint defendants, no jurisdiction over defendants not applying for a change is acquired in the new county, and they should be tried where indicted.<sup>4</sup>

If a defendant charged with a crime, on his own motion procures a change of venue to another county, and submits to a trial in the court to which the cause is sent, without objecting to the jurisdiction of the court trying him, or of the court to award a change of venue, this is a waiver of all objection to the jurisdiction of the court.<sup>5</sup>

change, it does not divest it of jurisdiction until certain expenses are paid; and if not paid, it may be reinstated on the docket and disposed of by the court making the order. *Buchanan v. Port*, 5 Ind. 264.

But the court having once made an order changing the jurisdiction does not thereupon lose all jurisdiction over the cause, if the same has not been removed; and the court after making an order for a change in the place of trial, may, at the same term, and before the papers are transmitted, vacate such order, and direct the cause to be sent to a different county from that first named. *Servatius v. Pickel*, 30 Wis. 507; *People v. Zane*, 105 Ill. 662; *Atlantic, etc., Coal Co. v. Maryland Coal Co.*, 64 Md. 302.

Where a change of venue is granted upon payment of costs, if the change has not been perfected at the next term of court, the court may then proceed to trial. *Gower v. Howe*, 20 Ind. 396.

C. and S. being jointly indicted in Panola county for murder, the venue was changed to Shelby county on the application of S. Pending the joint indictment in Shelby county, a separate indictment for the same offence was preferred by the grand jury of Panola county against C. alone, at the trial of which C. pleaded to the jurisdiction. *Held*, the plea was properly overruled. *Cock v. State*, 8 Tex. App. 659.

1. *Judah v. Vincennes University*, 23 Ind. 273. And the court to which the

change has been made in a criminal case cannot inquire into the regularity of the order making such change, and of its own notion, without objection by the prisoner, refuse to take jurisdiction. *People v. Zane*, 105 Ill. 662.

2. *Stone v. Robinson*, 9 Ark. 469; *Stringer v. Jacobs*, 9 Ark. 497. *Compare Goodhue v. People*, 94 Ill. 37. But all objections to the jurisdiction, arising out of a defective certificate of proceedings, in cases of change of venue, will be considered as waived if the parties proceed to trial without having taken exception. *Hitt v. Allen*, 13 Ill. 592.

3. *Gager v. Doe*, 29 Ala. 341.

So a change of venue from a court of one county to that of another having jurisdiction over the subject-matter, which is consented to by all parties, amounts to a waiver, and estops all of the parties from objecting to the jurisdiction of the latter court. *Center Township v. Marion Co.*, 10 N. E. Repr. (Ind.) 291.

4. *State v. Wetherford*, 25 Mo. 439. *Compare People v. Baker*, 3 Parker C. C. (N. Y.) 181.

5. *Perteet v. People*, 70 Ill. 171.

Where a change of venue from the county has been twice taken by the same party, in the same action, and without objection to its jurisdiction over him, he appears to the action in the court to which the last change was taken, and by which it was tried, he cannot afterward question the jurisdiction over him of any

**Generally.**—It is too late to object to a change of venue after a general appearance;<sup>1</sup> or after the defendant has plead to the action;<sup>2</sup> or after the cause has been tried without objection;<sup>3</sup> or after it is pending in the court of appeals.<sup>4</sup>

Where, in a suit against several defendants, the venue of the cause is changed at the instance of some of the defendants, before process has been served upon the rest, the defendants not served with process will not be bound by the change of venue, although service from the county where the cause originated is afterwards made upon them, and no judgment can be rendered against them if they fail to appear.<sup>5</sup>

Where the venue is changed after arraignment and plea, the prisoner need not be rearraigned in the county where the trial is had;<sup>6</sup> but where a prisoner indicted in one county is arraigned and a plea entered, and the venue is afterwards changed and he is again arraigned in the new county, there is no error.<sup>7</sup>

In *Iowa* it is held that the prosecuting attorney is authorized by virtue of his office to follow and conduct a criminal prosecution, commenced within his county, into any other county or court to which the case may be taken by change of venue.<sup>8</sup>

The court to which a criminal cause is taken on change of venue may, in its discretion, appoint counsel both to defend and to assist in the prosecution of such cause.<sup>9</sup>

Upon the conviction of a prisoner in a capital case, the sentence of the court must be executed by the sheriff of the county where he was tried, and it is error for the court to order it to be carried into effect in the county whence the cause was removed, or by the sheriff of that county.<sup>10</sup>

of the courts in which the cause was pending, or of the judges presiding therein. *Yates v. State*, 58 Ind. 299.

1. *Schaeffner's Estate*, 45 Wis. 614.

2. *Burnham v. Hatfield*, 5 Blackf. (Ind.) 21.

But where the record of a certain case stated that "on motion of plaintiff, and for satisfactory reasons shown by affidavits filed in this case, it is ordered that the venue be changed," etc., and nothing else appeared on the record, *held*, that this order was sufficient to transfer the case; and that the fact that the defendant appeared at the court to which the venue was changed, and procured another transfer of the case, was no waiver of any objections to said order. *Roller v. Roller*, 8 Baxt. (Tenn.) 207.

The party resisting a motion for a change of venue does not waive an objection to the ruling granting the change by appearing in the court to which the cause is removed, and stipulating for a trial thereof at a time certain, or by moving for a new trial after verdict. *Ferguson v. Davis Co.*, 51 Iowa, 220.

3. *Prussel v. Knowles*, 5 Miss. 90; *Owens v. Owens*, Hard. (Ky.) 154. Compare *Bennett v. Carey*, 57 Iowa, 221.

4. *Waller v. Logan*, 5 B. Mon. (Ky.) 515.

5. *Albin v. Talbott*, 46 Ill. 424.

6. *Commonwealth v. Pistorius*, 12 Phila. (Pa.) 550; *Price v. State*, 8 Gill. (Md.) 295; *Davis v. State*, 39 Md. 355; *Vance v. Commonwealth*, 2 Va. Cas. 162.

7. *Gardner v. People*, 3 Scam. (Ill.) 83;

It is held to be the better practice to arraign the defendant and require him to plead to the indictment before making an order for a change of venue; but where the defendant applies for the change and has the benefit of arraignment in the county to which the cause is transferred, he has no right to complain that the change was made before his arraignment. *Hudley v. State*, 36 Ark. 237. See also *Ex parte Cox*, 12 Tex. App. 665.

8. *State v. Carothers*, 1 Greene (Iowa), 464.

9. *State v. Miller*, 107 Ind. 39.

10. *State v. Twiggs*, 1 Wins. (N. Car.) No. 1, 142.

**8. Review by Courts of Appeal.**—As a general rule, motions for a change of venue are within the sound discretion of the court to which the application is made, and a court of appeal will not reverse the decision except upon abuse of such discretion shown.<sup>1</sup> In *Texas* it has been held that the supreme court will not reverse the judgment of the district court as to a change of venue unless it appears that injustice has been done the appellant or some legal principle violated, although upon the facts presented it might originally have come to a different conclusion. Nor is an illegal change of venue on application of the defendant a ground for reversing the judgment at the instance of the defendant.<sup>3</sup>

**CHANGING WORDS.** See WILLS.

**CHANNEL.**—The place where a river flows, including the whole breadth of the river; or the deeper part of a strait, bay, or harbor where the principal current flows.<sup>4</sup>

1. *State v. Ostrander*, 18 Iowa, 435; *State v. Mewherter*, 46 Iowa, 88; *State v. Ray*, 50 Iowa, 520; *State v. Williams*, 63 Iowa, 135; *State v. Hill*, 72 N. Car. 345; *State v. Bunger*, 11 La. Ann. 607; *Hall v. Jackson*, 3 Tex. 305; *Mondragon v. State*, 33 Tex. 480; *Clampitt v. State*, 9 Tex. App. 27; *Dougherty v. State*, 7 Tex. App. 480; *Cotton v. State*, 32 Tex. 614; *Hyde v. Harkness*, 1 Idaho (N. S.), 601; *Poe v. State*, 10 Lea (Tenn.), 673; *Holcomb v. State*, 8 Lea (Tenn.), 417; *Porter v. State*, 3 Lea (Tenn.), 476; *State v. Kring*, 11 Mo. App. 92; *Railroad v. Applegate*, 21 W. Va. 172; *State v. Brownfield*, 83 Mo. 448; *State v. Perigo*, 28 N. W. Rep. (Iowa) 453.

In the case of the *State v. Whitton*, 68 Mo. 91, it was held that the trial court did not err in refusing to grant a change of venue on account of prejudice, it being observed that witnesses were examined both on the side of the State and the appellant, and the court, upon the evidence adduced, found that the alleged prejudice did not exist and that the finding was conclusive. In the case of the *State v. Guy*, 69 Mo. 430, it was held that this court would not interfere with the action of the trial court in refusing a change of venue, asked on account of prejudice of the inhabitants of the county, unless it appears that palpable injustice has been done. The case of the *State v. Burgess*, 78 Mo. 235, is to the same effect.

And if the record fails to show upon what the order for the change of venue

complained of was based, the appellate court will presume in favor of the correctness of the action of the court below. *Ramsey v. Bush*, 27 Iowa, 17.

2. *Antonio v. Jones*, 28 Texas, 19.

But where, upon a showing made by a defendant for a change of venue, it appeared that the showing of the plaintiff was as strong as that of the defendant against the county to which the change was desired, and the court after the first trial term granted such change of venue, the appellate court granted process to restrain the last court from exercising jurisdiction, and returned the case to its original court. *Innerarity v. Hitchcock*, 3 Stew. & P. (Ala.) 9.

Where a motion for a change of venue was supported by the affidavits of the accused and two others, showing facts that made out a *prima facie* cause for a change of venue, but the State filed over ninety affidavits controverting the conclusions of those of the accused, *held*, that the trial court did not err in refusing a change of venue. *State v. Bohan*, 15 Kan. 407.

3. *Porter v. State*, 5 Mo. 538.

4. In the act of Congress admitting Iowa into the Union, which defines its eastern boundary as "the middle of the main channel of the Mississippi River," "channel" means the bed in which the main stream flows, "the bed of the river from bank to bank," and not the deep water of the stream as followed in navigation. *D. & D. Bridge Co. v. Co. of Dubuque*, 55 Iowa, 558.

**CHAPEL.**—A lesser or inferior place of worship, sometimes a part of or attached to a church or subordinate to it.<sup>1</sup>

**CHAPTER.**—A division of a book or treatise.<sup>2</sup> An organized branch of some society or fraternity. A community or corporation composed of the prebends and other clergymen belonging to

1. In English ecclesiastical law, chapters are of the following kinds:

(a) **Private Chapels** are such as noblemen and other religious and worthy persons have at their own private charge, built in or near their own houses for them and their families, to perform religious duties in. These private chapels are maintained at those persons' charge to whom they belong, and the chaplains provided for them by themselves with pensions; anciently they were all consecrated by the bishop of the diocese.

(b) **Free Chapels**—those free or exempt from all ordinary jurisdiction. The king may erect a free chapel and exempt it from the jurisdiction of the ordinary, or he may license a subject so to do. The incumbents, however, were generally instituted by the bishop, and instructed by the archdeacon of the place. Most of these chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and his retinue when he came to reside there.

(c) **Chapels Subject to a Mother Church.**

—1. A *chapel of ease* is one not allowed a font at its institution, and which is used only for the ease of parishioners in prayers and preaching (sacraments and burials being received and performed at the mother church). Commonly the curate is removable at the pleasure of the parochial minister.

2. A *parochial chapel* is that which has the parochial rights of christening and burying, and differs in nothing from a church but in the want of a rectory and endowment. The privileges of administering the sacraments (especially that of baptism) and the office of burial are the proper rites and jurisdiction that make it a separate parochial chapel, and not a depending chapel of ease. Phil. in. Eccl. L., 1821–1830.

Acts of Parliament in aid of the scheme of church extension, known as the Church Building Acts, have provided for the building and endowment of other chapels—(1) By the division, by the church building commissioners with the consent of the bishop and patron, and by order of the Queen in council, of a parish into

district parishes; (2) By creating with the consent of the bishop and order of the Queen in council, "district parishes;"

(3) By division into "district chapelries," which may be formed out of former district chapelries or out of such district chapelries and other parts of the original parish, or any extra parochial place. The curate is a perpetual curate, with perpetual succession and capacity to hold lands and tithes, with exclusive care of souls, and not subject to the incumbent of the old parish; but the commissioners may, with the consent of the bishop, determine the proportion of the fees for marriages, or that shall be assigned to the curate; (4) By the creation of "consolidated chapelries," which differ from "district chapelries" in their origin only, being formed out of portions of many parishes "when a population is collected together at the extremities of and locally situate in parishes or extra parochial places contiguous to each other;" (5) By the support of chapels without districts. The commissioners make grants to chapels to be served by curates to the incumbent of the parish; these chapels are not to become perpetual curacies; and the commissioners, with the consent of the bishop and patron, may apportion the emoluments "for the benefit of a person serving any such chapel." Id. 2167. By recent acts, chapels are allowed to public schools, hospitals, asylums, and other public institutions. The clergyman who serves such chapels may in general perform the offices and services of the Church of England, except marriage. 34 and 35 Vict., c. 66.

2. **Chapter Headings.**—Chapter headings are entitled to more consideration in explaining the intention of the different sections in an act or code than the title of the entire act. *Barnes v. Jones*, 51 Cal. 303; *Huff v. Alsop*, 64 Mo. 51; *Griffith v. Carter*, 8 Kan. 565; *Barth v. Shivers*, 39 Ga. 405; *State v. Popp*, 45 Md. 432; *U. S. v. Fehrenback*, 2 Woods, 175; *Nicholson v. Mobile & Mont. R. Co.*, 49 Ala. 205; *Bishop on Statutory Crimes*, §46. They are not titles of acts, but are parts of the statute limiting and defining their effect. *People v. Molyneux*, 40 N. Y. 119.

a cathedral or collegiate church, and presided over by the dean.<sup>1</sup> (Webster.)

**CHARACTER (in Evidence).** (See also EVIDENCE; WITNESS; and Crimes and Criminal titles generally.)

*Definition, 110.*

*In Criminal Proceedings, 110.*

*In Civil Proceedings, 112.*

*How Proved, 114.*

*Of Witnesses, 116.*

**1. Definition.**—The opinion generally entertained of a person derived from the common report of the people who are acquainted with him.<sup>2</sup>

Evidence of a person's character is irrelevant to any inquiry concerning his conduct, except in the cases mentioned in this article.<sup>3</sup>

**2. In Criminal Proceedings,** the fact that the person accused has a good character is relevant;<sup>4</sup> but the fact that he has a bad character is irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character.<sup>5</sup> The character sought to be proved must not be general, but such as would make it likely or unlikely that the party would do the controverted act.

**1. Dean and Chapter** are the council of the bishop to assist him with their advice in affairs of religion, and also in the temporal concerns of the see. The bishop is the immediate superior and ordinary of the dean and chapter, and exercises over them the power of visitation. Chapter, as distinct from the dean, consist of certain dignitaries called canons, sometimes appointed by the crown, sometimes by the bishop, and sometimes by each other. 1 Black. Comm. 382; Coke Litt. 95 a. 2 Steph. Comm. 674.

**2. Bouv. L. Dict.** "The reputation or general credit which a man has obtained in public opinion." Taylor on Evidence (8th Ed.), § 350.

**3. Humphrey v. Humphrey,** 7 Conn. 118; *Bennett v. Hyde,* 6 Conn. 26; *Church v. Drummond,* 7 Ind. 17; *Gebhart v. Burkett,* 57 Ind. 378; *Gutzwiller v. Lackman,* 23 Mo. 168; *Rogers v. Troost,* 51 Mo. 470; *Dudley v. McCluer,* 62 Mo. 241; *Anderson v. Long,* 10 S. & R. (Pa.) 55; *Porter v. Seiler,* 23 Pa. St. 424; *Battles v. Landenslager,* 84 Pa. 446; *Smets v. Plunket,* 1 Strob. (S. Car.) 372; *Wright v. McKee,* 37 Vt. 161; *Atty.-Gen. v. Bowman,* 2 B. & P. 532.

Evidence of the character of one under whom the plaintiff in ejectment claims is inadmissible. *Blackburn v. Lessee of Holliday,* 12 S. & R. (Pa.) 140.

**4. Felix v. State,** 18 Ala. 720; *Hall v. State,* 40 Ala. 698; *Kee v. State,* 28 Ark. 155; *People v. Ashe,* 44 Cal. 288; *State v. Turner,* 19 Iowa, 144; *People v. Garbett,* 17 Mich. 9; *Wesley's Case,* 8 Geo. (Miss.) 383; *Schaller v. State,* 14 Mo. 502;

*State v. O'Connor,* 31 Mo. 389; *Griffin v. State,* 14 Ohio St. 55; *Cathcart v. Commonwealth,* 37 Pa. St. 108; *Lockart v. State,* 3 Tex. App. 567; *State v. Wells, Cox* (N. J.), 424; *People v. Moett,* 23 Hun (N. Y.), 60; *Hopps v. People,* 31 Ill. 388; *State v. Donohoo,* 22 W. Va. 761.

In *Mathews v. State,* 32 Tex. 117, evidence of character was rejected as irrelevant to the issue in a trial for assault and battery, the admission of such evidence being held to be in the discretion of the court, and it being invariably admissible only in cases where the life of the prisoner is involved.

**5. Steph. Dig. Ed. art. 56;** *People v. Fair,* 43 Cal. 137; *Fletcher v. State,* 49 Ind. 124; *State v. Kabrick,* 39 Iowa, 432; *State v. Cresson,* 38 Mo. 372; *People v. White,* 14 Wend. (N. Y.) 111; *Commonwealth v. Hardy,* 2 Mass. 303; *Pauli v. Commonwealth,* 89 Pa. St. 432; *Hartless v. State,* 32 Tex. 88; *State v. Thurtell,* 29 Kan. 148; *Reg. v. Rowton,* 10 Cox C. C. 25; *Reg. v. Hodgkiss,* 7 C. & P. 298.

If the prisoner's counsel brings out evidence of his good character on cross-examination, the prosecution may then give evidence of his bad character. *Reg. v. Gadbury,* 8 C. & P. 676; *Reg. v. Shrimpton,* 3 C. & K. 373; s. c., 5 Cox C. C. 387.

In an indictment for assaulting a peace officer he cannot testify to his knowledge of the prisoner's bad character for the purpose of showing that he had reasonable cause to suspect him of the crime for which he was arrested. *Reg. v. Tuberfield,* 10 Cox C. C. 1.

**6. The kind of character proved must**

The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant would not have committed the offence. In homicide it has also been held admissible to aid the jury in ascertaining the grade of the crime.<sup>1</sup> No legal inference can arise from a failure to offer evidence of good character.

Evidence of good character must be considered in all cases where it is offered, as well where the other evidence is direct as where it is circumstantial. Its weight is not confined to doubtful cases; but it may of itself create a doubt. The degree of its force is to be determined by the attending circumstances, and not by the grade of the offence.<sup>3</sup>

In homicide the violent character of the deceased may be proved, but only where the evidence shows that there was an assault committed or threatened by him upon the prisoner, and a doubt was

relate to the particular charge, e.g., in murder, the prisoner's general reputation for peace and good order is admissible. *People v. Stewart*, 28 Cal. 395; *Kee v. State*, 28 Ark. 155; *State v. Kiley*, 43 Iowa, 294; *State v. King*, 78 Mo. 555; *State v. Pearce*, 15 Nev. 188; *State v. Emery*, 7 At. Rep. (Vt.) 129.

In homicide the prisoner's reputation as a good soldier is inadmissible. *People v. Garbutt*, 17 Mich. 9.

1. *Carroll v. State*, 3 Humph. (Tenn.) 315.

2. A failure to prove his good character raises no presumption against the prisoner. *People v. Bodie*, 1 Dana (Ky.), 282; *People v. White*, 24 Wend. (N. Y.) 520; *State v. Kabrich*, 39 Iowa, 277; *State v. Dockstader*, 42 Iowa, 432; *State v. Oikill*, 7 Ire. (N. Car.) 251.

3. *Cancemi v. People*, 16 N. Y. 501; *Stevens v. People*, 4 Park. (N. Y.) 396; *Harrington v. State*, 19 Ohio Stat. 264. It is error to charge that good character only steps in in cases of doubt. It will itself sometimes create a doubt where none without it would exist. *Felix v. State*, 18 Ala. 720; *Rosenbaum v. State*, 33 Ala. 354; *Dupree v. State*, 33 Ala. 380; *Harrison v. State*, 37 Ala. 154; *Hall v. State*, 40 Ala. 698; *People v. Ashe*, 46 Cal. 288; *People v. Kalkman* (Cal.), 13 Pac. Rep. 500; *U. S. v. Jackson*, 29 Fed. Rep. 503; *Kistler v. State*, 54 Ind. 400; *McQueen v. State*, 82 Ind. 72; *State v. Kinley*, 43 Iowa, 294; *State v. Beebe*, 17 Minn. 241; *Coleman v. State*, 59 Miss. 484; *Remsen v. People*, 43 N. Y. 6; *People v. Lamb*, 2 Keyes (N. Y.), 360; *Kilpatrick v. Commonwealth*, 31 Pa. St., 198; *Heine v. Commonwealth*, 91 Pa. St., 145; *State v. Edwards*, 13 S. Car. 30; *Lee v. State*, 2 Tex. App. 339; *State v. Daley*, 53 Vt. 442. "A weak case on the part

of the prosecution is a doubtful case, and without evidence of any kind on the part of the defence the jury ought to acquit. To say, therefore, that proof of character is only available under such circumstances is to say that it is of no substantial account at all. *Hanney v. Commonwealth*, 19 W. N. C. (Pa.) 437. Character should be submitted to the jury like any other fact, whether the other evidence in the case is direct or circumstantial, and should be considered by them. If the evidence of guilt is direct, it goes to its credibility. *Stover v. People*, 56 N. Y. 315; *People v. Raina*, 45 Cal. 292; *People v. Shepardson*, 49 Cal. 629; *People v. Bell*, 49 Cal. 485; *State v. McMurphy*, 52 Mo. 251; *State v. Alexander*, 66 Mo. 148. But against facts positively and strongly proven it cannot avail. *State v. Turner*, 19 Iowa, 149; *State v. McMurphy*, 52 Mo. 251; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295; *State v. Levigne*, 17 Nev. 435; *U. S. v. Jackson*, 29 Fed. Rep. 583. It is not itself a defence, but may turn the scale in defendant's favor. *State v. Donovan*, 61 Iowa, 278.

In some States it is held that such evidence can only be taken into consideration when a reasonable doubt already exists in the minds of the jury. *People v. Gleason*, 1 Nev. 173; *State v. McGinnis*, 6 Nev. 109; *State v. Wells, Cox* (N. J.), 424; *Rex v. Turner*, 6 How. St. Tr. 613. In Massachusetts its force is dependent upon the nature of the offence. "Where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon



created whether the homicide was perpetrated from malice or to repel such assault, and in self-defence.<sup>1</sup> On a similar principle the character of the prosecutrix in rape is in issue.<sup>2</sup> Such evidence may be rebutted by evidence of good character, which is not admissible until attacked.<sup>3</sup>

**3. In Civil Proceedings.—Of Parties.**—Evidence of the character of a party is relevant whenever the nature of the proceedings is such as to put it in issue.<sup>4</sup> But as the law assumes all characters to be good, they must be first assailed before they can be

the human mind—the evidence of character and of a man's habitual conduct under common circumstances must be considered far inferior to what it is in the instance of accusations of a lower grade." *Commonwealth v. Webster*, 5 Cush. (Mass.) 295; *Commonwealth v. Hardy*, 2 Mass. 303.

1. *People v. Lamb*, 2 Keyes (N. Y.), 360; *Reynolds v. People*, 17 Ab. Pr. (N. Y.) 413; *Abbott v. People*, 86 N. Y. 460; *State v. Field*, 14 Me. 248; s. c., 31 Am. Dec. 52; *Ripley v. State*, 2 Head (Tenn.), 217; *Abernethy v. Commonwealth*, 101 Pa. St. 322; *Franklin v. State*, 29 Ala. 19; *State v. Chandler*, 5 La. Ann. 489; s. c., 52 Am. Dec. 599; *State v. Robertson*, 30 La. Ann. 340; *Cotton v. State*, 31 Miss. 504; *State v. Keene*, 50 Mo. 357; *State v. Bryant*, 55 Mo. 75; *State v. Elkins*, 63 Mo. 159; *State v. Freeman*, 3 Mo. App. 591; *Franklin v. State*, 29 Ala. 14.

"When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and the question of its effect left to the determination of the jury." *Franklin v. State*, 29 Ala. 14.

But such evidence is inadmissible unless it is shown that the prisoner was, by the violent character of the deceased, impelled to kill him. The mere bad character of the deceased cannot affect the guilt of the accused. *Quesenberry v. State*, 3 S. & P. (Ala.) 308; *Chase v. State*, 46 Miss. 683; *State v. Keene*, 50 Mo. 357; *Commonwealth v. Ferrigan*, 44 Pa. 386; *Prickett v. State*, 22 Ala. 39; s. c., 58 Am. Dec. 250; *State v. Hogue*, 6 Jones (N. Car.), 383; *State v. Thawley*, 4 Harr. (Del.) 562.

2. *State v. Forshner*, 43 N. H. 89; *State v. Knapp*, 45 N. H. 148; *Turney's Cas.*, 8 S. & M. (Miss.) 104. Likewise in bastardy proceedings. *Walker v. State*, 6 Blf. (Ind.) 1. *Contra* in *Rawles v. State*, 56 Ind. 433. By bringing such proceedings the prosecutrix acknowledges her want of chastity.

Character of prosecutor is inadmissible

in indictments for assault and battery. *Pratt v. State*, 56 Ind. 179. So is that of defendant's wife in an indictment for attempt to levy blackmail by accusing prosecutor of seducing his wife. *McMillan v. State*, 60 Ind. 216.

3. The peaceable character of the deceased cannot be shown until it is attacked. *Ben v. State*, 37 Ala. 103; *People v. Hulse*, 3 Hill (N. Y.), 309. *Contra* in rape in *Turney's Cas.*, 8 S. & M. (Miss.) 104.

4. "Putting character in issue is a technical expression and confined to certain actions, from the notice of which the character of the parties, or some of them, is of particular importance." *Anderson v. Long*, 10 S. & R. (Pa.) 55.

Character is put in issue in the following actions:

**Breach of Promise of Marriage.**—The bad character of the plaintiff for chastity is admissible in mitigation of damages. *Van Storch v. Greffen*, 71 Pa. St. 240; *Foulkes v. Sellway*, 3 Esp. 236; *Baddeley v. Mortlock*, 1 Holt, 151; *Irving v. Greenwood*, 1 C. & P. 350; *Burnett v. Simpkins*, 24 Ill. 264. *Bench v. Merrick*, 1 Jns. Cas. (N. Y.) 116; *Willard v. Stone*, 7 Cow. (N. Y.) 22; *Palmer v. Andrews*, 7 Wend. (N. Y.) 142; *Kniffen v. McConnell*, 30 N. Y. 285. This action does not necessarily involve the character of the parties. *Leckey v. Bloser*, 24 Pa. St. 401. But when the plaintiff claims that his character has been damaged it is competent to show that he had no character to damage. *Wharton on Evidence*, § 52, and cases *supra*. Where seduction is joined with the breach, the plaintiff's character before the seduction is equally in issue. *Boynton v. Kellogg*, 3 Mass. 189; *Green v. Spencer*, 3 Mo. 318.

**Libel and Slander.**—Under the general issue the plaintiff's bad character may be shown in mitigation of damages. *Paddock v. Salisbury*, 2 Cow. (N. Y.) 811; *Foot v. Tracy*, 1 Jns. R. (N. Y.) 46; *Hal-lowell v. Guntle*, 82 Ind. 554; *Armstrong v. Pierson*, 8 Iowa, 29; *Dewitt v. Greenfield*, 5 Ohio, 225; *Duval v. Davey*, 32 Ohio Stat. 604; *Anthony v. Stephens*, 1.

Mo. 254; *Henry v. Norwood*, 4 W. (Pa.) 347; *Steinman v. McWilliams*, 6 Pa. 170; *Buford v. McLuney*, 1 N. & McC. (S. Car.) 268; *Sawyer v. Eifert*, 2 N. & McC. (S. Car.) 511; *Richards v. Richards*, 2 M. & R. 557; *Leicester v. Walter*, 2 Camp. 251. *Contra*, *Scott v. Sampson*, L. R. 8 Q. B. D. 491; *Jones v. Stevens*, 11 Price, 235. It is likewise admissible under pleas of the general issue and justification, but not under a plea of justification alone. *Steinman v. McWilliams*, 6 Pa. St. 170; *Drown v. Allen*, 91 Pa. St. 393; *Paddock v. Salisbury*, 2 Cow. (N.Y.) 811; *Stow v. Converse*, 3 Conn. 345. *Contra*, *Stone v. Varney*, 7 Metc. (Mass.) 86; *Downey v. Dillon*, 52 Ind. 442; *Bell v. Park*, 11 Ir. C. L. R. 413. Where the plea denies the libel character is inadmissible. *Forshee v. Abrams*, 2 Iowa, 571.

**Malicious Prosecution.**—Evidence of general bad character of the plaintiff is admissible in mitigation of damages, and also in connection with other evidence to establish probable cause. *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Pullen v. Glidden*, 68 Me. 559; *Miller v. Brown*, 3 Mo. 127; s. c., 23 Am. Dec. 693; *Gregory v. Chambers*, 78 Mo. 294; *Winebidle v. Porterfield*, 9 Pa. St. 137; *Rodriguez v. Tadmire*, 2 Esp. 271. *Contra*, *Newsam v. Carr*, 2 Starkie, 69; *Downing v. Butcher*, 2 M. & R. 374.

Where the arrest of plaintiff was made on complaint made by defendant on his own knowledge, the character of plaintiff is inadmissible; otherwise where the complaint is made on information and belief. *Skidmore v. Bricker*, 77 Ill. 164. Character is also inadmissible in trespass for false arrest against a constable. *Russell v. Shuster*, 8 W. & S. (Pa.) 308.

**Seduction.**—The character of the plaintiff is not in issue. *Dain v. Wyckoff*, 18 N. Y. 45. But that of the seduced is. *Stowell v. Beagle*, 79 Ill. 257; *Wilson v. Sprowl*, 3 Pa. 49; *Haines v. Sinclair*, 23 Vt. 108; *White v. Murland*, 71 Ill. 250; *Hoffman v. Kemerer*, 44 Pa. St. 452; *Dodd v. Norris*, 3 Campb. 520; *Hedges v. Tagg*, 7 L. R. Ex. 283.

The character of plaintiff's family is admissible in increase of damages, for the seduction lowers the social standing of all its members. *Wilson v. Sproul*, 3 P. & W. 49; *McAulay v. Birkhead*, 13 Ire. (N. Car.) 28; *Thompson v. Clendenning*, 1 Head (Tenn.), 287; *Parker v. Monteith*, 7 Oreg. 277; *Andrews v. Askey*, 8 C. & P. 7; *Kendrick v. McCrory*, 11 Ga. 603. *Contra*, *Haines v. Sinclair*, 23 Vt. 108.

Evidence of defendant's character for chastity is admissible. *McKern v. Cal-*

*vert*, 59 Mo. 243; *Devlee v. Boardman*, 20 Iowa. But his family's character may be proved to show that the plaintiff was not derelict in allowing his daughter to associate with the defendant. *Parker v. Monteith*, 7 Oreg. 277.

**Divorce.**—Character is not in issue in divorce. *Humphrey v. Humphrey*, 7 Conn. 116; *Ward v. Thompson*, 5 Port. (Ala.) 382; *Washburn v. Washburn*, 5 N. H. 195; *Berdell v. Berdell*, 80 Ill. 604; *Dwyer v. Dwyer*, 2 Mo. App. 17. *Contra* in *Bryan v. O'Bryan*, 13 Mo. 16; s. c., 53 Am. Dec. 128, where the charge was adultery.

**Fraud.**—A mere charge of fraud does not put character in evidence either in actions *ex contractu*—*Atkinson v. Graham*, 5 W. (Pa.) 411; *Nash v. Gilkeson*, 5 S. & R. (Pa.) 352; *Anderson v. Long*, 10 S. & R. (Pa.) 55; *Fowler v. Ins. Co.*, 6 Cow. (N. Y.) 673; *Smets v. Plunket*, 1 Strob. (S. Car.) 372—nor in actions *ex delicto*. *Gough v. St. John*, 16 Wend. (N. Y.) 647; *Woodruff v. Whittlesey*, Kirby (Conn.), 62. *Contra*, *Ruan v. Perry*, 3 Cai. (N. Y.) 120; *State v. Beebe*, 17 Minn. 241; *Walker v. Stephenson*, 3 Esp. 284.

Nor is such evidence admissible where a will is impeached on the ground of fraud. *Potter v. Webb*, 6 Greenl. (Me.) 6; *Rogers v. Troost*, 51 Mo. 470; *Thomas v. Stump*, 62 Mo. 275.

**Other Actions.**—Evidence of character is also inadmissible in actions for assault. *Corning v. Corning*, 6 N. Y. 97; *Willis v. Forrest*, 2 Duer (N. Y.), 310; *Porter v. Seiler*, 23 Pa. St. 424; *Thompson v. Church*, 1 Root (Conn.), 312; *Givens v. Bradley*, 3 Bibb (Ky.), 195; *Reed v. Kelly*, 4 Bibb (Ky.), 401. And in trespass. *Cummings v. Crawford*, 88 Ill. 312. And in trover, where the defendant is virtually charged with embezzlement. *Wright v. McKee*, 37 Vt. 161. On indictment for breach of an ordinance against fast driving, or for negligence, the character of the defendant as a careful driver cannot be shown. *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462; *Boggs v. Lynch*, 22 Mo. 563. In an action for damages for an injury occurring through the negligence of an employee, the character of the employee is in issue, as showing negligence on the part of his employer. *Frazier v. Railroad Co.*, 38 Pa. St. 104; *Cook v. Parham*, 24 Ala. 21. But in such a suit the plaintiff's character is irrelevant. *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224. In an action for malpractice the defendant's character as a physician is in issue. *Carpenter v. Blake*, 10 Hun (N. Y.), 358. So is plaintiff's character in an action of *crim. con.* *Pratt v. Andrews*,

proved to be good.<sup>1</sup> The kind of character to be proved must be determined by the nature of the question in issue.<sup>2</sup>

**4. How Proved.**—Character is a fact which is proved by another fact, general reputation. It cannot be shown by evidence of particular and specific facts,<sup>3</sup> but may be proved by negative testi-

4 N. Y. 493. But not in bastardy process. *Sidelinger v. Bucklin*, 64 Me. 371.

1. This is the general rule, and the attack may be made either by plea or by evidence. *Dame v. Kenney*, 25 N. H. 318; *Severence v. Hilton*, 24 N. H. 147; *Cornwall v. Richardson, R. & M.* 305; *Shurtleff v. Stevens*, 51 Vt. 501; *Hann v. Wilson*, 28 Ind. 296; *Rhodes v. James*, 42 Am. Dec. 604; *Inman v. Foster*, 8 Wend. (N. Y.) 602; *McCabe v. Platter*, 6 Blackf. (Ind.) 405; *Miles v. Vanhorn*, 17 Ind. 245; *Houghtaling v. Kilderhouse*, 1 N. Y. 530; *Tibbs v. Brown*, 2 Gr. Ca. (Pa.) 39; *Leckey v. Bloser*, 24 Pa. St. 401. In libel evidence of the truth of the libelous words is such an attack on the plaintiff's character as will make proof of good character admissible. *Mathews v. Huntley*, 9 N. H. 146; *Houghtaling v. Kilderhouse*, 1 N. Y. 530. General character is not admissible in reply to testimony of specific acts (e.g., of lewdness). *Zitzer v. Merkle*, 24 Pa. St. 410; *Leckey v. Bloser*, 24 Pa. St. 401.

The rule is sometimes confined to cases in which character is not put in issue. *Dudley v. McCluer*, 65 Mo. 241; *Gregory v. Thomas*, 2 Bibb (Ky.), 286. This does not really conflict with the cases above, the difference being in the meaning ascribed to "put in issue." But it has been held that where character is put in issue evidence may be given in support of it, although it has not been attacked. *Williams v. Haig*, 3 Rich. L. (S. Car.) 362; s. c., 45 Am. Dec. 774.

2. See *supra*, n. 6, p. 87; *Church v. Prummond*, 7 Ind. 17. In slander, reference must be had to the offence charged in the slander. *Paddock v. Salisbury*, 2 Cow. (N. Y.) 811; *Leonard v. Allen*, 11 Cush. (Mass.) 241; *Duval v. Davey*, 32 Ohio St. 604; *Smith v. Buckecker*, 4 R. (Pa.) 295; *Conroe v. Conroe*, 47 Pa. St. 118; *Moyer v. Moyer*, 49 Pa. St. 210; *Drown v. Allen*, 91 Pa. St. 393. In slander, for calling plaintiff a thief, it is incompetent to prove her character as a prostitute. *Douglass v. Tousey*, 2 Wend. (N. Y.) 352. So of character as an atheist in slander for calling him a perjurer. *Ross v. Lapham*, 14 Mass. 279. In slander for calling plaintiff a thief it is proper to ask for his character as a thief, and it was held error to rule out such a question and direct that the inquiry should be as to his character

for honesty. *Drown v. Allen*, 91 Pa. St. 393. The rule does not let in reputation that the plaintiff was guilty of the offence charged, but reputation of a vicious habit tending to the commission of the offence. *Bell v. Parke*, 11 Ir. C. L. R. 413; *Scott v. Sampson*, 8 Q. B. D. 491. *Contra*, *Vanderveer v. Sutphin*, 5 Ohio St. 293. In seduction the chastity of the seduced is the subject of the character evidence. *Wilson v. Sprowl*, 3 Pa. 49; *Stowell v. Beagle*, 79 Ill. 525; *Haines v. Sinclair*, 23 Vt. 108.

3. General reputation is the opinion of a man's character held generally by those who are acquainted with him. The question then is what people in general say, not what others, or certain others, say of him. *Sorrelle v. Craig*, 9 Ala. 534; *Vernon v. Tucker*, 30 Md. 456; *Engleman v. State*, 2 Ind. 91; *Commonwealth v. Rogers*, 136 Mass. 158; *Pickens v. State*, 61 Miss. 563; *Weaver v. Hendrick*, 30 Mo. 502; *Matthewson v. Burr*, 6 Neb. 311; *Taylor v. Ryan*, 15 Neb. 573; *Sawyer v. People*, 1 N. Y. Cr. 249; *Gulerette v. McKinley*, 27 Hun (N. Y.), 320; *Dance v. McBride*, 43 Iowa, 624; *Wike v. Lightner*, 11 S. & R. (Pa.) 198; *Frazier v. Railroad Co.*, 38 Pa. St. 104; *Snyder v. Commonwealth*, 85 Pa. St. 519. Nor what is said of him by a majority of his neighbors. *Adams v. Hannon*, 3 Mo. 222; *Emory v. Phillips*, 22 Mo. 499. Rumor is not reputation. *Campbell v. State*, 23 Ala. 44; *Haley v. State*, 63 Ala. 83. In this State a distinction is made between a man's character and reputation, and a witness who says that he is not acquainted with the latter, but knows the former, is allowed to testify. *Sullivan v. State*, 66 Ala. 48. The rule is applicable to the proof of the character of the deceased in homicide. *State v. Elkins*, 63 Mo. 159; *State v. Abarr*, 39 Iowa, 185; *Nichols v. People*, 86 N. Y. 641.

Specific facts showing character cannot be proved. Every man is supposed to be capable of supporting his general character, but is not likely to be prepared to answer particular facts without notice. *Teese v. Huntingdon*, 23 How. (U. S.) 2; *Janson v. Stuart*, 1 T. R. 754; *Hirshman v. People*, 101 Ill. 568; *Walker v. State*, 6 Blf. (Ind.) 1; *Long v. Morrison*, 14 Ind. 595; *Wilson v. State*, 16 Ind. 392; *Hallowell v. Guntle*, 82 Ind. 554; *Taylor v. Com-*

mony.<sup>1</sup> It must, therefore, be proved by witnesses who are acquainted with the general reputation of the person whose character is in issue, and this acquaintance must be shown before the evidence will be admitted.<sup>2</sup> The individual opinion of the witness is inadmissible.<sup>3</sup> The evidence in rebuttal must be of the same

monwealth, 3 Bush (Ky.), 508; Thurman v. Virgin, 18 B. Mon. (Ky.) 785; Hume v. Scott, 3 A. K. M. (Ky.) 261; Macdonald v. Garrison, 2 Hilt. (N. Y.) 510; Corning v. Corning, 6 N. Y. 97; Conley v. Meeker, 85 N. Y. 618; Seymour v. Farrell, 51 Mo. 95; Sawyer v. Eifert, 2 N. & Mc.C. (S. Car.) 511; Johnson v. Brown, 51 Tex. 65. There is an exception where character for chastity is in issue. In this case particular acts may be proved, but here it has been said the fact of chastity itself is in issue. Ford v. Jones, 62 Barb. (N. Y.) 484; Gulerette v. McKinley, 27 Hun (N. Y.), 320; White v. Murtland, 71 Ill. 258; West v. Druff, 55 Iowa, 335. But see Hoffman v. Kemmerer, 44 Pa. St. 452. An exception is also made in case of *crimen falsi* in Betts v. Lockwood, 8 Conn. 488.

1. As good characters are generally little talked about, a witness may testify that he has never heard a person's character spoken of, or that he has never heard anything against it. Hadjo v. State, 13 Ala. 718; Dave v. State, 22 Ala. 23; Ward v. State, 28 Ala. 53; Childs v. State, 55 Ala. 28; State v. Nelson, 58 Iowa, 208; State v. Lee, 22 Minn. 407; Davis v. Foster, 68 Ind. 238; Craig v. Craig, 5 R. (Pa.) 91; Johnson v. Brown, 51 Tex. 65; Davis v. Franke, 33 Gratt. (Va.) 413; Rex v. Rowton, 10 Cox C. C. 25. One who testifies that he does not know a witness's character for truth may be asked if he ever heard it questioned. Lenox v. Fuller, 39 Mich. 268.

2. The witness to character should ordinarily be of the same community as the one whose character is inquired into; and he should speak from a knowledge of his reputation, acquired by time and the general speech of the people who know and have the opportunity of forming an opinion from their knowledge. Cheritree v. Roggen, 67 Barb. (N. Y.) 124; Martin v. Martin, 25 Ala. 201; State v. Cox, 67 Mo. 392; Kelly v. Proctor, 41 N. H. 137; Dupree v. State, 33 Ala. 380; Davis v. Franke, 33 Gratt. (Va.) 413; Reg. v. Rowton, 10 Cox C. C. 25. It is essential that the witness should know the reputation rather than the person himself who bears it. Martin v. Martin, 25 Ala. 201.

A stranger who has gone to a particular locality and made inquiries for the

purpose of ascertaining the character of an individual is incompetent to testify to it. Douglass v. Tousey, 2 Wend. (N. Y.) 352; Sorrelle v. Craig, 9 Ala. 534; Reid v. Reid, 2 C. E. Gr. (N. J.) 101; Curtis v. Fay, 37 Barb. (N. Y.) 64; Kelley v. Proctor, 41 N. H. 586; Dave v. State, 22 Ala. 23.

It was held not to be necessary to first inquire of witness whether he knew the plaintiff's general character for chastity in Senter v. Carr, 15 N. H. 351.

One's neighborhood extends as far as one is well known. Kelley v. Proctor, 41 N. H. 139; Dupree v. State, 33 Ala. 380; Griffin v. State, 14 Ohio St. 55. And see State v. Henderson 1 S. E. Rep. (W. Va.) 225; People v. Lyons, 51 Mich. 215.

It is not necessary that impeaching witness should live in the same neighborhood. Wallis v. White, 58 Wis. 26; Chess v. Chess, 1 Pa. 32.

The number of character witnesses allowed rests in the discretion of the court. Cox v. Priutt, 25 Ind. 90. Ordinarily one will not be satisfactory. Waford v. State, 44 Tex. 439.

3. Ayres v. Duprey, 27 Tex. 523; Commonwealth v. Rogers, 136 Mass. 158; Reg. v. Rowton, 10 Cox C. C. 25; State v. King, 78 Mo. 555; Kitteringham v. Dana, 58 Iowa, 632; Sargent v. Wilson, 59 N. H. 396; Best on Evidence, 260. But an impeaching witness may, after testifying to general character for truth and veracity, be asked and testify whether he would believe the impeached witness on oath. Bogle v. Kreitzer, 46 Pa. St. 465; Taylor v. Taylor, 16 Ga. 465; Stokes v. State, 18 Ga. 17; State v. Howard, 9 N. H. 485; Knight v. House, 29 Md. 194; Marshall v. State, 5 Tex. App. 273; Pleasant v. State, 15 Ark. 624; Stevens v. Irwin, 12 Cal. 306; State v. Meadows, 18 W. Va. 658; Mawson v. Hartsink, 4 Esp. 104; Carlos v. Brook, 10 Ves. 50; Rex v. Brown, 1 L. R. C. C. 70; s. c., 10 Cox C. C. 453. But he must show his knowledge of general reputation of the impeached witness before he will be allowed to say whether he would believe him on oath. Lyman v. Philadelphia, 56 Pa. St. 488. *Contra*, Willard v. Goodenough, 30 Vt. 393; Railroad Co. v. Anthony, 43 Ind. 183; King v. Ruckman, 5 C. E. Gr. (N. J.) 317; State v.

kind, whether by cross-examination or by independent testimony.<sup>1</sup> The character proved must be *ante litem motam*,<sup>2</sup> and in the case of the impeachment of a witness must be that enjoyed within a reasonable time, i.e., it must be recent enough to show his character at the time when he testifies.<sup>3</sup>

**5. Of Witnesses.**—Evidence of a witness's bad character for veracity is admissible<sup>4</sup> for the purpose of impeaching his credibility;<sup>5</sup> and

Mairs, Coxe (N. J.), 453; State v. Rush, 77 Mo. 519; Walton v. State, 88 Ind. 9.

It is not necessary that the witness be asked whether he would believe the impeached witness on oath. Bank v. Keeler, 109 Ill. 385.

After testimony as to general reputation, it is admissible to ask him whether he is worthy of belief: this is not the same as asking him if he would believe him on oath. Bluit v. State, 12 Tex. App. 39; Holbert v. State, 9 Tex. App. 219; s. c., 35 Am. Rep. 728.

1. Commonwealth v. O'Brien, 119 Mass. 342; Rodman v. State, 1 Blackf. (Ind.) 90; Engleman v. State, 2 Ind. 91; s. c., 52 Am. Dec. 494; Snyder v. Commonwealth, 85 Pa. St. 519; State v. Elkins, 63 Mo. 159; McCarty v. People, 51 Ill. 231; Keener v. State, 18 Ga. 194. *Contra*, State v. Jerome, 33 Conn. 265; and *cf.* Abenethy v. Commonwealth, 101 Pa. St. 322.

Particulars were held admissible on cross-examination in State v. Arnold, 12 Iowa, 480; People v. Clark, 1 Wh. C. C. (N. Y.) 292; Leonard v. Allen, 11 Cush. (Mass.) 241; Reg. v. Hodgkiss, 7 C. & P. 298.

On cross-examination a witness may be asked if he has not heard certain reports which tend to contradict his testimony as to character. Carpenter v. Blake, 10 Hun (N. Y.), 358; Oliver v. Pate, 43 Ind. 132.

Where particulars are brought out on cross-examination, they cannot be gone into on re-examination. Gulerette v. McKinley, 27 Hun (N. Y.), 320.

Where on cross-examination a witness gives the name of one whom he has heard speak against the person whose character is being investigated, he may be asked what he said. People v. Annis, 13 Mich. 511.

2. Reid v. Reid, 2 C. E. Gr. (N. J.) 101.

In slander the character proved must be that which the plaintiff enjoyed before, and not after, the slander, for the slander itself might have affected his character. Douglass v. Tousey, 2 Wend. (N. Y.) 352. So in seduction and breach of promise. Stowell v. Beagle, 79 Ill. 525; White v. Murtland, 71 Ill. 250; Boynton v. Kellogg,

3 Mass. 189; Green v. Spencer, 3 Mo. 318; Capeheart v. Carradine, 4 Strob. (S. Car.) 42; Elsam v. Fawcett, 2 Esp. 562. And in malicious prosecution. Winebiddle v. Porterfield, 9 Pa. St. 137. In criminal cases the prosecution cannot show character subsequent to the indictment. State v. Kinley, 43 Iowa, 294; Commonwealth v. Sackett, 22 Pick. (Mass.) 394. Or the discovery of the offence. White v. Commonwealth, 80 Ky. 480; Wroe v. State, 20 Ohio St. 461.

3. What is a reasonable time is generally within the discretion of the court to decide. Holliday v. Cohen, 34 Ark. 707; Manion v. Lambert, 10 Bush (Ky.), 298; Rucker v. Beatty, 3 Ind. 70; Stratton v. State, 45 Ind. 458; Aurora v. Cobb, 21 Ind. 492; State v. Howard, 9 N. H. 485; Willard v. Goodenough, 30 Vt. 393; Buse v. Page, 32 Minn. 111; Packet Co. v. McCool, 83 Ind. 392; Wood v. Matthews, 73 Mo. 477; Kelly v. State, 61 Ala. 19; Railroad Co. v. Richardson, 66 Ind. 43. But where later character has been shown to be bad, previous good character may be proved. Bank v. Hobbs, 11 Gray (Mass.), 250.

4. See cases in note 2, p. 94.

The bad character of a subscribing witness may be shown to repel the presumption arising from his signature. Boylan v. Meeker, 4 Dutch. (N. J.) 274. And evidence may then be given of his good character. Black v. Ellis, Riley (S. Car.), 73. So where book entries are offered in evidence, the character for honesty of the person who made them may be attacked. Crouse v. Miller, 10 S. & R. (Pa.) 155; Barber v. Bull, 7 W. & S. (Pa.) 391; Tomlinson v. Borst, 30 Barb. (N. Y.) 42. *Contra*, Long v. Taylor, 29 Hun (N. Y.), 127.

5. After a witness's character has been impeached, his evidence should still be considered by the jury and given such weight as under the circumstances it is entitled to. Fuller v. Rounceville, 29 N. H. 555; Johnson v. Brown, 51 Tex. 65; Sharp v. State, 16 Ohio St. 218; Belcher v. Conner, 1 S. Car. 88; Jernigan v. Wainer, 12 Tex. 189. But his testimony to be believed should be corroborated, if the impeachment of his character is success-

when his character has been attacked evidence may then, and not before, be given in support of it.<sup>1</sup> The inquiry must be confined to his character for truth and veracity.<sup>2</sup>

ful. *Smyth v. Oliver*, 31 Ala. 39; *Adams v. Adams*, 2 C. E. Gr. (N. J.) 324.

1. *State v. Cooper*, 71 Mo. 436; *Stamper v. Griffin*, 12 Ga. 450; *Harrington v. Lincoln*, 4 Gray (Mass.), 563; *Heywood v. Reed*, 4 Gray (Mass.), 571; *Atwood v. Dearborn*, 1 Allen (Mass.), 483; *Clark v. Bond*, 29 Ind. 555; *Brand v. Campbell*, 86 Ind. 516; *Fitzgerald v. Goff*, 99 Ind. 28; *People v. Gay*, 7 N. Y. 378; *Vance v. Vance*, 2 Metc. (Ky.) 583; *Fletcher v. State*, 49 Ind. 124; *Vernon v. Tucker*, 30 Md. 456; *People v. Bush*, 65 Cal. 129; *Turner v. Commonwealth*, 86 Pa. 54; *State v. Thomas*, 78 Mo. 327; *Braddle v. Brownfield*, 9 W. (Pa.) 124; *Wertz v. May*, 21 Pa. St. 274.

Evidence of good character is admissible where the attack is made, though unsuccessfully, as where the impeaching witness unexpectedly testified to good character. *Commonwealth v. Ingraham*, 7 Gray (Mass.), 46; *Wilson v. State*, 17 Tex. App. 525.

The attack on witness's character may be made in cross-examination. *Vernon v. Tucker*, 30 Md. 456. *Noel v. Dickey*, 3 Bibb (Ky.), 268; *Russell v. Coffin*, 8 Pick. (Mass.) 143. By proving his former conviction of a crime. *People v. Amaacus*, 50 Cal. 233; *Gertz v. Railroad Co.*, 137 Mass. 77. By evidence tending to prove his subornation. *People v. Ah Fat*, 48 Cal. 61. Or by proof of conflicting statements previously made by him. *Dixon v. State*, 15 Tex. App. 271; *Railway Co. v. Frawley* (Ind.), 9 N. E. Rep. 594; *Haley v. State*, 63 Ala. 83. Mere contradiction among witnesses is not ground for proving good character. *Pruitt v. Cox*, 21 Ind. 15; *Russell v. Coffin*, 8 Pick. (Mass.) 143. Nor is evidence that he has made material false statements. *Brown v. Mooers*, 6 Gray (Mass.), 451.

Where a prisoner takes the stand in his own behalf, his character as a witness may be impeached, but such impeaching evidence goes to his credibility only. *Adams v. People*, 9 Hun (N. Y.), 89; *State v. Robertson*, 1 S. E. Rep. (S. Car.) 443; *People v. Beck*, 58 Cal. 212; *State v. Beal*, 68 Ind. 345. And in *England* in such a case his previous conviction of certain crimes is admissible in rebuttal by 7 and 8 G. IV. c. 28, s. 11; 6 and 7 W. IV. c. 111; 24 and 25 Vict. c. 96, s. 116. and c. 99, s. 37; *Steph. Dig. Ev. art. 56*.

Where the attesting witnesses to a will are dead, and it is impeached on the ground of fraud in procuring it, and that fraud is imputed to the witnesses, evidence of their good character may be given. *Stephenson v. Walker*, 4 Esp. 50; *Provis v. Reed*, 5 Bing. 435.

2. *Rapalje's Law of Witnesses*, § 197; *U. S. v. Vansickle*, 2 McLean C. C., 219; *Bank v. Cooté*, 3 Cr. C. 169; *Gass v. Stinson*, 4 Cr. C. C. 605; *U. S. v. Masters*, 4 Cr. C. C. 479; *Nugent v. State*, 18 Ala. 521; *State v. Randolph*, 24 Conn. 363; *Boswell v. Blackman*, 12 Ga. 591; *Frye v. Bank*, 11 Ill. 367; *Crabtree v. Kile*, 21 Ill. 180; *Fletcher v. State*, 49 Ind. 124; *Farley v. State*, 57 Ind. 331; *Carter v. Cavanaugh*, 1 Gr. (Iowa) 171; *Herzman v. Oberfelder*, 54 Iowa, 83; *Taylor v. Clendinning*, 4 Kan. 524; *Phillips v. Kingsfield*, 19 Me. 375; *State v. Bruce*, 24 Me. 71; *Shaw v. Emery*, 42 Me. 59; *State v. Morse*, 67 Me. 428; *Commonwealth v. Moore*, 3 Pick. (Mass.) 194; *Bank v. Hobbs*, 11 Gray (Mass.), 250; *Webber v. Hanke*, 4 Mich. 198; *Rudsdill v. Slingerland*, 18 Minn. 380; *Newman v. Mackin*, 13 S. & M. (Miss.) 383; *Smith v. State*, 58 Miss. 867; *Hoitt v. Moulton*, 21 N. H. 586; *Atwood v. Impson*, 5 C. E. G. (N. J.) 150; *Craig v. State*, 5 Ohio St. 605; *State v. Alexander*, 2 Mill (S. Car.), 171; *Clark v. Bailey*, 2 Strobel (S. Car.) 143; *Boon v. Wethered*, 23 Tex. 675; *Ayres v. Duprey*, 27 Tex. 593; *Powers v. Leach*, 26 Vt. 270; *Willard v. Goodenough*, 30 Vt. 393; *Rixey v. Bayse*, 4 Leigh (Va.), 330; *Uhl v. Commonwealth*, 6 Gratt. (Va.) 706. Accordingly evidence of a witness's bad character for chastity is inadmissible. *Bolles v. State*, 46 Ala. 204; *People v. Yslas*, 27 Cal. 630; *Weathers v. Barksdale*, 30 Ga. 888; *Kilburn v. Mullen*, 22 Iowa, 498; *Bakeman v. Rose*, 14 Wend. (N. Y.) 105; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Commonwealth v. Churchill*, 11 Metc. (Mass.) 538; *Gilchrist v. McKee*, 4 W. (Pa.) 380; *Spears v. Forest*, 15 Vt. 435; *Merriman v. State*, 3 Lea (Tenn.), 393; *Ketchingman v. State*, 6 Wis. 426. Or for intemperance. *Thayer v. Boyle*, 30 Me. 475; *Hoitt v. Moulton*, 21 N. H. 586; *Brindle v. McIlvaine*, 10 S. & R. (Pa.) 282. Evidence as to truth and integrity was held properly admitted in *Heath v. Scott*, 65 Cal. 548.

On the other hand, it is held that the inquiry is not confined to the witness's

**CHARCOAL.**—Coal made by charring wood under turf, or in other circumstances to exclude air; wood coal.<sup>1</sup>

**CHARGE.**<sup>2</sup>—The burden, obligation, or duty laid or imposed upon a person or thing.<sup>3</sup> The person or thing committed or in-

character for veracity, but should extend to his general moral character. *Majors v. State*, 29 Ark. 112; *Ward v. State*, 28 Ala. 53; *People v. Beck*, 58 Cal. 212; *State v. Kirkpatrick* (Iowa), 19 N. W. R. 660; *State v. Hart* (Iowa), 25 N. W. R. 99; *Hume v. Scott*, 3 A. K. M. (Ky.) 260; *Blue v. Kibby*, 1 T. B. M. (Ky.) 195; *Tacket v. May*, 3 Dana (Ky.) 79; *Hutchings v. Cavilier*, 3 H. & McH. (Md.) 389; *State v. Shields*, 13 Mo. 236; *State v. Hamilton*, 55 Mo. 523; *State v. Miller*, 71 Mo. 89; *Day v. State*, 71 Mo. 422; *State v. Breeden*, 58 Mo. 507; *State v. Grant*, 76 Mo. 239; *State v. Rugan*, 5 Mo. App. 592; *People v. Mather*, 4 Wend. (N. Y.) 229; *State v. Stallings*, 2 Hay. (N. Car.) 30; *State v. Boswell*, 2 Dev. (N. Car.) 209; *Commonwealth v. McClain*, 4 Clark (Pa.) 462; *Gilliam v. State*, 1 Head (Tenn.) 38; and see *Teese v. Huntingdon*, 23 How. (U. S.) 2. But it is not error to ask the impeaching witness if he knows the witness's general reputation for truth and veracity. *Knode v. Williamson*, 17 Wall. (U. S.) 586. Bad character for chastity was admitted to impeach a witness in *Sword v. Nestor*, 3 Dana (Ky.) 453; *Evans v. Smith*, 5 T. B. Mon (Ky.) 363; *Railroad Co. v. Anthony*, 43 Ind. 183; *State v. Shields*, 13 Mo. 236; s. c., 53 Am. Dec. 147. And see *James v. State*, 13 Tex. 168.

It is provided in *Indiana* by statute that "in all questions affecting the credibility of a witness, his general moral character may be given in evidence." R. S. of 1881, secs. 505 and 1803; *Farley v. State*, 57 Ind. 333. So in *Iowa* by Code, § 3694; *State v. Egan*, 59 Iowa, 636.

1. Neither in the popular use of the word nor in commercial contracts and legal phraseology, does the simple term "charcoal," without the word "animal" before it, include bone-black or animal charcoal. Animal charcoal or bone-black produced by the process of burning bone, or exposing it to the action of fire, in the same manner that wood is exposed to the action of fire to produce vegetable charcoal, and bone-dust produced by the process of pulverizing or grinding bones or pieces of bone, whereby they are reduced to small fragments of no regular or uniform shape or size, are "manufactures of bone" within the description of an Internal Revenue Act, taxing "manufac-

tures of bone," and the exemption of "charcoal" by such an act from taxation does not exempt animal charcoal or bone-black produced in the manner above stated. *Schreifer v. Wood*, 5 Blatch. (U. S. C. C.) 215.

2. **Distinctive Significance of the Term** rests in the idea of obligation, directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. Thus charging an estate with the payment of a debt is appropriating a definite portion to the particular purpose; charging a person with the commission of a crime is pointing out the individual who is bound to answer for the wrong committed; charging a jury is stating the precise principles of law applicable to the case immediately in question. In this view, a charge will in general terms denote a responsibility peculiar to the person or thing affected and authoritatively imposed, or the act fixing such responsibility. *Bouvier*.

3. **As Applied to Property**, charge signifies that it is a security for the payment of a debt or performance of an obligation. There is a distinction between a covenant that all the estates of a covenantor are charged with a sum of money, and that he will charge his estates; the former is a charge upon all covenantor's lands, the latter is not. *Falkner v. O'Brien*, 2 Ball. & B. 223.

A simple covenant or agreement to charge land will not create a charge upon the debtor's real estate when no particular land is mentioned, or the agreement is only for a personal, with power to call for a real security, or where it otherwise appears to be intended to rely only upon the covenant. *Collins v. Plummer*, 1 P. W. 104.

It is a general term applying as well to mortgages, liens, incumbrances, writs of execution, etc., or as to securities which have no special name, and where there is not necessarily a personal debt.

Where a complaint set forth a series of loans and advances, and of renewals of notes given therefor, and alleged that at the time of each loan and of each renewal a charge of one per cent upon the amount of the debt was made in addition to lawful interest, and that thereafter a balance was claimed by defendant (the



lender) as due to it on all previous transactions, and that it granted a renewal of the loan upon the borrower, giving his note for the amount claimed, *held*. . . . that the word "charge" in the association in which it was found in the complaint implied not only a demand made, but an obligation imposed and taken. *Merchants Ex. N. Bk. v. Com. Warehouse Co.*, 49 N. J. 635.

**In a Mortgage—When not Synonymous with Lien.**—In an indenture of mortgage executed by a railroad corporation to trustees, to secure bonds issued to raise money to pay off its existing indebtedness, and to complete and equip its road, the corporation covenanted with the trustees that the expenditure of all sums of money realized from the sale of the bonds should be made with the approval of at least one of the trustees, and that his assent in writing should be necessary to all contracts made by the company before the same should be a *charge* upon any of the sums received from such sales; *held*, that a contractor, agreeing with the corporation to construct a portion of the road, and obtaining the assent of two of the trustees to his contract, and subsequently doing the work, did not acquire any lien for the payment of his work, under this covenant of the indenture, upon the funds received by the corporation from the bonds. *Dillon v. Barnard*, 21 Wall. 430.

The term "charge" was here held not to be synonymous with lien; that such a meaning was not in harmony with its immediate context or the object of the indenture. The term "charge" is not used in any technical sense, as importing a lien upon the funds, but in the general acceptation of a claim that may be payable out of them.

**Duty of Trustee having a Charge on Fund.**—There is no duty on a trustee of a fund who has himself a charge upon it to communicate that charge to a person who gives him notice of a subsequent charge. *Ex parte Wilkes*, L. R. 4 Chancery Div. 104.

**Created by Will.**—The testator may create a charge upon the *devisee* personally in respect of the estate devised, as, if he devises lands to B. on condition, of his paying such a legacy, the devisee takes the estate on that condition; and he will take a fee by implication, though there be no words of limitation, on the principle that he might otherwise be a loser. 4 Kent's Comm. 540.

But where the *charge is upon the estate*, and there are no words of limitation or other words denoting an intention to

pass the fee, but only a devise to A. of his lands, after the debts and legacies are paid, the devisee takes only an estate for life. *Johnson v. Bull*, 10 Johns. 148; *Jackson v. Martin*, 18 Johns. 35; *Speaker v. Van Alstyne*, 18 Wend. 200; *McLellan v. Turner*, 15 Me. 436; *Lithgow v. Kavenagh*, 9 Mass. 161; *Gibson v. Horton*, 5 Harr. & J. 177; *Beall v. Holmes*, 6 Harr. & J. 208. But where the will directs an act to be done which cannot be accomplished, unless a greater estate than one for life be taken, it becomes necessary that the devise be enlarged to a fee; where by the devise the devisee is to pay "thereout" or out of the "estate" certain legacies, it is a *charge* on the estate. Such a charge is no interest in, but a lien upon, the lands. *Gardner v. Gardner*, 3 Mason, 178; *Taft v. Morse*, 4 Met. (Mass.) 523; *Thayer v. Finnegan*, 134 Mass. 62; *Walters' App.*, 95 Pa. St. 305; 4 Kent's Com. 541; *Denison v. King*, 1 Ves. & B. 260.

**Charging Part of a Bill.**—In equity, pleading consists of some allegation which sets forth the matters of defence or excuse which it is supposed the defendant intends or pretends to set up, to justify his non-compliance with the plaintiff's claim, and then charges other matters which disprove or avoid the supposed defence or excuse. Sometimes used for the purpose of obtaining a discovery of the nature of defendant's case. *Story's Eq. Plead.* § 31; *Mitt. Eq. Plead.* 140.

**Charge and Discharge.**—The mode formerly employed in taking an account before a master in chancery. The complainant exhibited the items of his claim in a form called a "charge;" the defendant then submitted his "discharge," which set forth any counter claim. *Dan. Ch. Pr.* 1173.

**Power to Charge.**—A power to charge includes a power to sell. *Kenworthy v. Bate*, 6 Ves. 797.

**In Statutes—Bankruptcy.**—The word "charge" has a wider meaning than the words "mortgage" or "lien," and an execution creditor who has obtained, served, and made absolute his garnishee order before the bankruptcy, is a creditor holding a charge on a part of the bankrupt's estate, as a security for a debt due to him within the bankruptcy act, 1869, s. 16, subs. 5, and is therefore a creditor holding a security on the property of the bankrupt under s. 12. *Emanuel v. Bridges*, L. R. 9 Q. B. 286.

**Lawful Charge in Redemption Act.**—The word "charge" is of very large signification, and in the statute its proper

signification is, every lien or incumbrance or claim the purchaser may have upon the premises, and for which at law or in equity he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them. *Grigg v. Banks*, 59 Ala. 319.

The interest of a mortgage debt is a "charge" upon the estate, though not in terms charged upon the land by the mortgage deed. *Lee v. Hutchinson*, 8 M. G. & S. 23.

A memorandum in lead pencil is sufficient charge within Statute of Frauds. *Clasm v. Bailey*, 14 Johns. 484.

**Attorney's Charge at Law.**—A charge in an attorney's bill for attending at a lock-up house and obtaining defendant's release and filing up the bail bond, is a charge at law under st. 2. G. II. c. 25, s. 25, and subject to taxation. *Fearne v. Wilson*, 6 B. & C. 86.

**Charges.**—The expenses incurred in relation to a transaction or suit.

The word "charges" in an agreement *held* not to include commissions or other compensation. *Green v. Jones*, 78 N. C. 268.

In a Receipt "in full for freight and charges," the term "charges" does not apply to an unsettled claim for damages. *Huntley v. Dows*, 55 Barb. (N. Y.) 310.

**Parliamentary Charges** include land tax. 2 Atk. 542.

In a Letter, the expression "charged and assigned" property, does not necessarily mean that it had been conveyed absolutely and unconditionally. *Hanby v. James*, 5 Paige, 450.

In an Answer, the allegation that defendant "charged twenty-five dollars for his commissions" will not avail as a counter-claim in the absence of an allegation that the services were worth that sum. *Farrington v. Wright*, 1 Minn. 241.

To render a man liable to the payment of rates, he must be "charged" with them. *Reg. v. St. Marylebone*, 15 Ad. & El. 403.

**Debts and Charges** in a statute does not include a legacy. The latter word has from familiar use the precision of a technical term, and merely comprises the expenses incurred in the settlement of an estate. *Goodwin v. Chaffee*, 4 Conn. 166.

**Free of Charge.**—Where, in consideration of a conveyance, a railroad company agreed to carry G., his wife, and any of their children "free of charge" in the passenger cars run upon its road, and the plaintiff was one of the children mentioned, it was held that the effect of the agreement was to entitle plaintiff to be

carried free of charge; that his right was as complete as though he had paid for it himself; and its infringement, whether tortious or otherwise, is a wrong to him for which he has an action. *Grimes v. Minn. L. & M. R. Co.*, 33 N. W. Rep. 34.

**Priority of Charge.**—By a turnpike act, tolls were made subject to the payment of moneys borrowed and to be borrowed thereupon, mortgages of such tolls being given, conveying to each creditor such proportion of the tolls, toll-gates, etc., as the money by him advanced bore or should bear to the whole sum due or to become due on that security. By a subsequent act the former act was continued, and certain tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls; and it was enacted that all moneys due on such credit should be entitled to "a preference and priority of charge and payment" before any moneys advanced under this act for making the new branch. On an ejectment for the tolls and toll-house by the holder of a mortgage (framed like the former ones) for moneys lent to complete the branch road, *held*, that the words "priority of charge" did not prevent this mortgagee from acquiring a legal estate in the subjects mortgaged, and that he might receive the tolls, houses, etc., in ejectment, only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances. *Thompson v. Lediard*, 4 B. & Ad. 137.

**Declaration of Charge.**—Under statute in England, the court may make a declaration that the solicitor employed in a proceeding is entitled to a "charge" upon the property recovered or pursued. *Pilcher v. Arden*, 7 Ch. D. 318.

**Registered Charge.**—By a statutory form under Land Transfer Act of 1875 the proprietor of freehold or leasehold may charge it with payment of money.

**Charge on Holding.**—A charge secured by the Agricultural Holdings Act, 1875, to the landlord who has made compensation to a tenant for improvements to the land; so that when the landlord is merely a limited owner (e.g., tenant for life) the amount will be paid to him or his representatives, if his estate comes to an end before the time when the improvement in respect of which the compensation was paid is taken to be exhausted. 38 & 39 Vict. c. 92, s. 42.

**Charge to Enter Heir—Scotch Law.**—A writ commanding a person to enter heir to his predecessor within forty days,

trusted to the care, custody, or management of another.<sup>1</sup> To lay on or impose, as a task, duty, or trust. To accuse; impeach; arraign. An accusation or imputation of wrong and crime. An earnest or impressive command, direction, exhortation, or injunction; as the charge of a judge to a jury.<sup>2</sup>

otherwise an action to be raised against him as if he had entered.

**Charging Order.**—In English practice, an order allowed by statute to be granted to a judgment creditor, that the property of the judgment debtor in government stock, or in the stock of any public company in England, corporate or otherwise, shall stand charged with the payment of the amount for which judgment shall have been recovered with interest. 1 & 2 Vict. ch. 110, § 14; 3 & 4 Vict. ch. 82; 3 Steph. Com. 587.

**1. Person in Charge.**—Where a person selects the course of a ship, and takes the management of her for the purpose of directing her in that course, he is in charge or conduct of the vessel within the meaning of the General Pilot Act. *Beilby v. Scott*, 7 M. & W. 100.

A medical man sent a patient suffering from scarlet-fever to a fever hospital, directing him to walk in the middle of the road and not to talk with any one; upon his being refused admission, the doctor walked with him through the streets of the town to the residence of the chairman of the local board, and then to the police station to procure an ambulance; *held*, that the finding of the justices that it was not proved the medical man "had charge of" the patient, was right. *Tunbridge Wells Local Board v. Bisshopp*, L. R. 2 C. P. Div. 187.

At the time of a collision, the master of a steamer was below and the mate on deck. Soon after the collision the master came on deck. *Held*, that the mate before and the master after he came on deck were "in charge" of the ship within the meaning of the Merchants' Ship-pings Act. *Ex parte Ferguson*, L. R. 6 Q. B. 280.

**Charged with Crime—Accused of Crime**—are phrases implying certain legal steps. Therefore a statute against the concealment or carrying away of any slave "charged with a capital crime" could be violated only after legal proceedings were commenced against the slave. *State v. Duncan*, 9 Port. (Ala.) 260.

Where an indictment charged that the defendants did "falsely charge and accuse him of the crime of adultery, and thereby to extort," etc., the term "charge and accuse" thus used and in this connection does not mean actually charge

before a grand jury or magistrate, but to impute to him these offences falsely as a means of inducing him to pay money to avoid such actual prosecution. *Comm. v. O'Brien*, 12 Cush. 90. *Cf. Rex v. Abgood*, 2 C. & P. 436.

"Charges" implies an original complaint made in the first instance, preliminary to a formal trial for a crime—*Ryan v. People*, 79 N. Y. 598,—and signifies an accusation made in a legal manner of illegal conduct by the person charged. *Tempest v. Lithgood*, 1 Bush (Ky.), 180.

And under a statute authorizing selectmen of a town to offer a reward to secure any person "charged" with a capital crime, . . . no authority is given to offer such a reward unless the person has been charged with the crime by complaint or indictment. *Day v. Inhabitants of Otis*, 8 Allen (Mass.), 477. And so of a person in custody, "charged with crime" embraces only such cases as have been passed upon by a grand jury. *Mary v. State*, 5 Mo. 71.

Use of word "charged" in an indictment instead of "charge," is not such a defect as will justify a reversal. *Brazin v. State*, 44 Ala. 387.

"Charged" is said by Holt, C. J., to be a vulgar expression, but not a legal one, and a man is not "charged in custody" until a writ has been delivered to the sheriff and he has been arrested. *Jackson v. Humphreys*, 11 Mod. 69.

**Charging the Hundred.**—In the ancient law, amercing the hundred for every murder committed within it. 2 Bishop Crim. L. § 623.

**Jury—When Charged—In Tennessee.**—By the word "charged" is meant after the prisoner has been placed in the hands of the jury for trial. It means charged with the fate of the prisoner, and not with the testimony or law of the case. *Ward v. State*, 1 Hemps. (Tenn.) 253; *State v. Conner*, 5 Coldw. (Tenn.) 313.

**2 Charge to Jury.**—A series of instructions given to a jury by the judge as to their duty, as in case of grand jury, or as to principles or rules of law which they are to apply to the facts in a case in determining their verdict, given to a petit jury after the case has been closed. See JURY TRIALS.

**Statute requiring Judge's Charges to be in Writing.**—After the jury had been

**Definition. CHARGEABLE—CHARIOT—CHARITIES. Definition.**

**CHARGEABLE.**—Capable of being charged, laid, imposed, or imputed; as, a duty *chargeable* on iron; a fault *chargeable* on man. Subject to be charged or accused; as, revenues *chargeable* with a claim; a man *chargeable* with murder. Serving to create expense; costly; burdensome.<sup>1</sup>

**CHARIOT.**—I. A war car or vehicle. II. A four-wheeled pleasure or state carriage having one seat.<sup>2</sup> (See also CARRIAGE.)

**CHARITIES—TRUSTS FOR CHARITABLE USES.** (See also ALMS; CORPORATIONS; DEVISE; LEGACY; TAXES; TRUSTS; WILLS.)

*Definitions, 122.*

*Origin and Application of the Law Relating to Charitable Uses, 123.*

*The Purposes of Charitable Gifts, 126.*

*Trusts for the Poor, 127.*

*Trusts for Education, 128.*

*Trusts for Religious Purposes, 130.*

*Trusts for Public Purposes, 131.*

*Trusts for Other Charitable Purposes, 132.*

*Trusts Held not to be Charitable, 132.*

*Cy Pres Doctrine, 133.*

*Incidents of Charitable Uses, 135.*

*Restraints upon Donors, 137.*

**1. Definitions.**—"A gift to a general public use which extends to the poor as well as the rich."<sup>3</sup> The purposes which are enumerated in the statute of 43 Elizabeth, c. 4, or which, by analogy, are deemed within its spirit and intendment.<sup>4</sup>

charged, a juror asked a question as to the rights of the parties to which a negative answer was given, without being reduced to writing; *held*, that the answer was no part of the "charge" under the statute. *Millard v. Lyons*, 25 Wis. 516. Remarks to the jury which were substantially a mere direction to find for the plaintiff *held* not to be a "charge" within the meaning of the same statute. *Grant v. Conn. Mut. Life Ins. Co.*, 29 Wis. 126.

In the absence of a statute or constitutional provision, no charge need be given to a jury—a civil case. *Drury v. White*, 10 Mo. 354; *Coates v. Sangston*, 5 Md. 121. And under the code of Mississippi the judge is not at liberty to charge the jury unless requested so to do. *Miss. Code*, 1871, § 643. See *Thompson Charging Juries*.

1. Webster.

**In Statute.**—A notice sent by selectmen of one town to selectmen of another town stating that "W. and E., paupers of your town, are here poor and unable to support themselves," was insufficient, as not showing the paupers were in fact "chargeable" to the town sending the notice, the statute prescribing that the notice should state the name of the pauper and that he is "chargeable." *Beacon Falls v. Seymour*, 44 Conn. 210.

Where a statute gave the general rule that no person shall be removed till actually chargeable, and then states that an unmarried woman with child shall be

deemed to be chargeable within the intent of the act, an order of removal adjudging the person removed was with child and unmarried, without drawing the conclusion that she was "chargeable," is bad; the fact of pregnancy is *prima facie* evidence of her chargeability, but open to be rebutted by evidence of substance. *King v. Holm*, 11 East. 381.

"Chargeable" is not equivalent to "not able to work" used in a statute. *In re Morten*, 5 Ad. & El. (N. S.) 590.

**Chargeable Thereby.**—When to bar the Statute of Limitations an acknowledgment in writing must be signed by the party chargeable thereby, a letter stating that funds have been appointed for the purpose of paying the debt of which a third party is trustee, and referring the plaintiff to A. for further information, does not charge the writer, the defendant. *Whippy v. Hilary*, 3 Barn. & Ad. 399.

**Actually Chargeable.**—In an action to recover for work done by an apprentice to the plaintiff, a recital in the instrument executed by the overseer of the poor under the Massachusetts statute that the boy's father is "actually chargeable" to the town, etc., is *prima facie* evidence of the fact recited. *Bardwell v. Purring-ton*, 107 Mass. 419.

2. Webster.

3. *Jones v. Williams*, Amb. 652; *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 294; *Perin v. Carey*, 24 How. (U. S.) 465.

4. Sir William Grant in *Morice v. Bishop of Durham*, 9 Vesey, 405.

"Whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish," is a gift for charitable uses.<sup>1</sup>

"A charity in a legal sense may be more fully defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons—either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."<sup>2</sup>

"Good will, benevolence, desire to add to the happiness or improvement of our fellow-beings."<sup>3</sup>

## 2. Origin and Application of the Law Relating to Charitable Uses.—

It was at one time supposed that these trusts arose from the provisions of the statute of 43 Eliz., c. 4, known as the Statute of Charitable Uses. This act enumerates many classes of charitable uses which were directed to be enforced, but the design of this and several prior statutes was merely the restoration and encouragement of the charitable institutions which had been abolished by earlier statutes.<sup>4</sup> It has been shown that the court of chancery, at a time earlier than the enactment of the Statute of Charitable Uses, had often exercised jurisdiction over these trusts, and it seems clear that the jurisdiction now so common arose not from that statute, but independently of it.<sup>5</sup> It is now generally settled that courts of equity have an original and inherent jurisdiction over charities, though the English statute is not in force, and independently of it.<sup>6</sup> Thus courts of equity in the several States, where they are not restricted by statute in their powers in this respect, exercise an original power over charities according to the rules and practice of equity, irrespective of the adoption by the

1 *Vidal v. Girard's Executors*, 2 How. (U. S.) 127; *Price v. Maxwell*, 28 Pa. St. 23.

But a condition that the donor's name shall be attached to the gift does not invalidate it as a legal charity. *Miller v. Porter*, 53 Pa. St. 292.

2 *Gray, J., in Jackson v. Phillips*, 14 Allen (Mass.), 556.

3 *Mitchell, J., in Donohugh's Appeal*, 86 Pa. St. 312.

4 *Bispham's Equity*, sec. 118. See the statute reprinted in *Duke Char. Uses*, 1 Boyle Char. 461; Abstract in *Perry on Trusts*, sec. 692, note.

5 *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, and see schedule of cases from chancery proceedings in time of

*Elizabeth*, in notes to that case, pp. 155-161.

6 *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, distinguishing *Baptist Association v. Hart's Executors*, 4 Wheat. (U. S.) 1, in which the earlier view had been taken; *Carter v. Balfour*, 19 Ala. 814; *Wright v. Trustees of M. E. Church*, 1 Hoffm. Ch. (N. Y.) 202; *Dutch Church v. Mott*, 7 Paige (N. Y.) 77; *Witman v. Lex*, 17 S. & R. (Pa.) 88; *Burr v. Smith*, 7 Vt. 241; *Ould v. Washington Hospital*, 95 U. S. 303. "It is believed that such is the settled doctrine in all the States of the Union except Virginia, Maryland, and North Carolina." *Kain v. Gibbony*, 101 U. S. 362; *Russell v. Allen*, 107 U. S. 182.

law of the State of the statute of 43 Eliz., c. 4.<sup>1</sup> This statute affords a definition or test of many of the common classes of charities, though many other purposes have been admitted as the subjects of charitable uses by the courts from analogy to those pointed out by the statute; it also authorized a commission to inquire into the abuses and employment of the estates given to charity, and repealed, so far as was necessary, the statutes of mortmain then in force. "It has now become an established principle of American law that courts of chancery will sustain and protect such a gift, devise, or bequest, or dedication of property to public charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift is a dedication specific and capable of being carried into effect according to the intentions of the donor."<sup>3</sup>

1. Perry on Trusts, sec. 694.

2. "The opinion prevailed extensively in this country for a considerable period that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. . . . The former idea was exploded, and has since nearly disappeared from the jurisprudence of the country. Upon reading the statute carefully, one cannot but feel surprised that the doubts thus indicated ever existed. The statute is purely remedial and ancillary. It provided for a commission to examine into the abuses of charities already existing, and to correct such abuses. An appeal lay to the lord chancellor. The statute was silent as to the creation or inhibition of any new charity, and it neither increased nor diminished the pre-existing jurisdiction in equity touching the subject. The object of the statute was to create a cheaper and a speedier remedy for existing abuses. The *Morpeth Corporation*, *Duke on Charitable Uses*, 242. In the course of time, the new remedy fell into entire disuse, and the control of the chancellor became again practically sole and exclusive. . . . The learning developed in the three cases mentioned [*Magill v. Brown*, *Brightly* (Pa.), 346, in which an elaborate review of the law was delivered by Baldwin, J., in the U. S. C. C.; *Burr's Executors v. Smith*, 7 Vt. 241; and *Vidal v. Girard's Executors*, 2 How. (U. S.) 128] shows clearly that the law as to such uses, and the jurisdiction of the chancellor, and the extent to which it was exercised, before and after the enactment of the statute, were just the same." *Swayne, J., in Ould v. Washington Hospital*, 95 U. S. 309.

3. *Wayne, J., in Perin v. Carey*, 24 How. (U. S.) 465.

#### Jurisdiction over Charities in the Various States.

—Without a particular enactment the statute of 43 Eliz., c. 4, could not be in force in this country. *Perin v. Carey*, 24 How. (U. S.) 465, citing *Atty. Gen. v. Stewart*, 2 Merivale, 143, in which it was held that the English mortmain acts were not in force in the colonies.

In *Alabama*, the court of chancery has jurisdiction by virtue of its original common-law powers, without claiming prerogative powers or invoking the aid of the statute. *Carter v. Balfour*, 19 Ala. 814. *Williams v. Pearson*, 38 Ala. 299.

In *California*, the general chancery jurisdiction is recognized irrespective of the statute. *Hinckley's Estate*, 58 Cal. 457.

In *Connecticut*, the spirit of the statute was re-enacted in 1702. *American Bible Society v. Wetmore*, 17 Conn. 181.

In *Delaware*, there is in its court of chancery the general equitable jurisdiction independent of the statute. *Griffith v. State*, 2 Del. Ch. 421; *State v. Griffith*, 2 Del. Ch. 392.

In *Georgia*, the principles of the statute have been adopted, and constitute part of the law of the State. *Beall v. Fox*, 4 Ga. 404.

The Code of 1873 contains general provisions, which, it is said, show "that the law of charities is fully adopted in Georgia, as far as is compatible with a free government, where no royal prerogative is exercised." *Jones v. Habersham*, 107 U. S. 174.

In *Illinois*, the principles of the statute are in force. *Heuser v. Harris*, 42 Ill. 425.

In *Indiana*, the principles of the statute have been adopted, and constitute a part of the law of the State. *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Commissioners of Lagrange Co. v. Rogers*, 55 Ind. 299.

In *Iowa*, the inherent jurisdiction of the courts of equity is recognized. *Miller v. Chittenden*, 4 Iowa, 252.

In *Kentucky*, the statute and the equitable jurisdiction are fully adopted. *Church v. Church*, 18 B. Mon. (Ken.) 635. See also *Atty.-Gen. v. Wallace*, 7 B. Mon. (Ken.) 611.

In *Louisiana*, the jurisdiction is derived solely from the civil law, but under its code a liberal jurisdiction is exercised. *Fink v. Fink*, 12 La. Ann. 301.

In *Maine*, the general provisions of the statute are held to be in force, but the courts are not restricted by it. *Tappan v. Deblois*, 45 Me. 122; *Howard v. Amer. Peace Soc.*, 49 Me. 288; *Swasey v. Amer. Bible Soc.*, 57 Me. 526.

In *Maryland*, the statute was held to have been repealed, and, in the view that the jurisdiction over charitable uses arose from the statute, it is held that the court cannot sustain a trust for charity which would otherwise be void. *Dashiell v. Atty.-Gen.*, 5 Har. & J. (Md.) 392; *Barnum's Case*, 62 Md. 275; *Crisp v. Crisp*, 3 Cent. Rep. 870. The bill of rights, however, recognizes the doctrines of the statute by giving validity to gifts, etc., of restricted amounts of land for churches and burying-grounds. *Beatty v. Kurtz*, 3 Peters (U. S.), 566. There is no jurisdiction to set up a charity for the relief of the poor. *Wilderman v. Baltimore*, 8 Md. 551. But a trust for educational purposes reposed in a municipal corporation will be enforced as charitable. *Barnum v. Baltimore*, 6 Am. & Eng. Corp. Cas. 203.

In *Massachusetts* the statute is in full force as a test of the law of charitable uses, and such gifts will be most liberally construed in order to accomplish the intent of the donor. *Earle v. Wood*, 8 Cush. (Mass.) 437; *Jackson v. Phillips*, 14 Allen (Mass.), 539 (opinion by Gray, J.), reviews the law on this subject.

In *Michigan* it has been held that the statute is not in force, and that trusts for charitable uses are not distinguished from others, and their validity depends on the same rules. *Meth. Church v. Clark*, 41 Mich. 730 (1879).

In *Minnesota* the rule of the New York cases (*infra*) is followed. *Little v. Willford*, 31 Minn. 173.

In *Mississippi* the courts exercise the inherent powers of courts of equity over these trusts. *Wade v. Colonization Soc.*, 7 Sm. & M. (Miss.) 663; *State v. Prewitt*, 20 Miss. 165.

In *Missouri* the principles of the statute are liberally administered. *Chambers v. St. Louis*, 29 Mo. 543.

In *New Hampshire* the general principles of the law of charitable uses have been recognized. *Chapin v. School District*, 35 N. H. 445.

In *New Jersey* the court of chancery has exercised full jurisdiction over charities. *Norris v. Thomson*, 4 C. E. Green (N. J.), 307; *Atty.-Gen. v. Moore*, 4 C. E. Green (N. J.), 445.

In *New York* the law was applied liberally in the earlier cases on the principle of general chancery jurisdiction. *Wright v. Trustees*, 1 Hoff. Ch. 202; *Ayres v. Trustees*, 3 Sand. (N. Y.) 351; *King v. Woodhull*, 3 Edw. Ch. (N. Y.) 79. But it was then held that the Statute of Charitable Uses was repealed by statute in 1788, and with it the whole system of charitable uses, and that the present law is a peculiar system which has arisen in that State under which trusts for charities must be as definite as private trusts. *Bascomb v. Albertson*, 34 N. Y. 584.

In *North Carolina* the principles of the statute were adopted in the earlier cases, but the later cases hold that trusts for charities are to be sustained only by the rules applicable to other trusts. *Griffin v. Graham*, 1 Hawks (N. Car.), 96; *White v. University*, 4 Ired. Eq. (N. Car.) 19; *Bridges v. Pleasants*, 4 Ired. Eq. (N. Car.) 26.

In *Ohio* the statute of 43 Eliz. c. 4, if it was ever in force, was repealed in 1806, but its principles have been applied to all cases as a part of the chancery jurisdiction. *Perin v. Carey*, 24 How. (U. S.) 465; *Amer. Bible Soc. v. Marshall*, 15 Ohio St. 537.

In *Pennsylvania* the statute of 43 Eliz. c. 4 was not reported by the judges in their Report of British Statutes in force in the State, but it has been held that its principles as applied by chancery in England obtained in that State by force of its own common law, and that relief would be given so far as the power of the courts would enable them. *Witman v. Lex*, 17 Serg. & R. (Pa.) 88; *Zimmerman v. Anders*, 6 W. & S. (Pa.) 218; *Wright v. Linn*, 9 Pa. St. 433; *Vidal v. Girard's Executors*, 2 How. (U. S.) 127.

In *Rhode Island*, a statute was enacted in 1721, which was evidently taken from the statute of Elizabeth; it is in substance and effect like it, and it gives the same power, for the same purpose, to be exercised in substantially the same way, though by a different jurisdiction. This statute is substantially re enacted in the Revised Statutes. *Derby v. Derby*, 4 R. I. 414.

In *South Carolina*, the general jurisdic-



3. **The Purposes of Charitable Gifts.**<sup>1</sup>—These are very numerous and do not admit of an exact classification. The definitions already given show how difficult it is to classify the objects which may be selected by donors and sustained as charitable uses. The main distinction between an ordinary trust and one for a charitable use is, that the former is for a definite ascertained object, while the latter is favored and supported in equity by reason of the uncertainty of its objects. A trust for beneficiaries who are named or defined is a trust which the ordinary doctrines of equity are fully able to support.<sup>2</sup> The uncertainty of the objects is thus a distinguishing feature of trusts for charitable uses, and owing to it they may be upheld under circumstances under which private trusts would fail. "They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are

tion of chancery is exercised. *Atty.-Gen. v. Jolly*, 1 Rich. Eq. (S. Car.) 99.

In *Tennessee*, the statute is not in force, but its provisions which were the law before its enactment, and which are applicable to the institutions, are applied. *Dickson v. Montgomery*, 1 Swan (Tenn.), 348; *Franklin v. Armfield*, 2 Sneed. (Tenn.) 305.

In *Texas*, the general principles of the statute are applied. *Paschal v. Acklin*, 27 Tex. 173.

In *Vermont*, the chancery jurisdiction is exercised irrespective of the statute. *Burr's Executors v. Smith*, 7 Vt. 241.

In *Virginia*, the statute was repealed, and trusts for charities were held subject to the same rules as private trusts. *Gallego v. Atty.-Gen.*, 3 Leigh (Va.), 451; *Baptist Association v. Hart*, 4 Wheat. (U. S.) 1; *Wheeler v. Smith*, 9 How. (U. S.) 55; *Kain v. Gibbony*, 101 U. S. 362; *Carpenter v. Miller*, 3 W. Va. 174. This doctrine has recently been repudiated, and a more liberal rule has been introduced by statute. *P. E. Education Soc. v. Churchman's Rep.*, 80 Va. 718.

In *Wisconsin*, the statute is held not to be in force, and the doctrine of charitable uses is not recognized. *Dodge v. Williams*, 46 Wis. 70.

**The Forum in which the Validity of the Trust is Determined.**—According to the uniform course of the decisions of the Supreme Court of the United States, the validity of a devise for charitable uses, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the State in which the testator had his domicile. *Vidal v. Girard's Executors*, 2 How. (U. S.) 127; *Wheeler v. Smith*, 9 How. (U. S.) 55; *McDonough v. Murdoch*, 15 How. (U. S.) 367; *Fountain v.*

*Raduel*, 17 How. (U. S.) 369; *Perin v. Carey*, 24 How. (U. S.) 465; *Lorings v. Marsh*, 6 Wall. (U. S.) 337; *U. S. v. Fox*, 94 U. S. 315; *Kain v. Gibbony*, 101 U. S. 362; *Russell v. Allen*, 107 U. S. 182; *Jones v. Habersham*, 107 U. S. 174; *Fellows v. Miner*, 119 Mass. 541. But a devise to a charitable corporation which, in the State of its domicile, cannot take land, is void in the State of the testator's domicile, though the land be situated in the latter State. *Starkweather v. Amer. Bible Soc.*, 72 Ill. 50; *Crombie's Heirs v. Louisville Orphans' Home Soc.*, 3 Bush (Ky.), 365. A corporation for educational purposes, however, created by another State, with power to acquire and real estate, may take by devise in Illinois. *St. Clara Fem. Acad. v. Sullivan*, 4 West. Rep. (Ill.) 114. And in *Pennsylvania* a charitable corporation of a sister State may take land by gift or devise. A restriction in the statute of wills of the State of incorporation does not affect its capacity in Pennsylvania. *Thompson v. Swope*, 24 Pa. St. 474.

1. The object and purposes named in the Stat. 43, Eliz. c. 4. are: Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; repair of bridges, ports, havens, causways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance of houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens setting out of soldiers, and other taxes.

2. *Bispham's Equity*, sec. 116.

personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity.<sup>1</sup>

4. **Trusts for the Poor—Almsgiving and General Relief.**—Almsgiving is perhaps the earliest and primary signification of the term "charity." Among the instances of this class of gifts in the English cases are the following which have been sustained: To the poor of a parish, to poor housekeepers,<sup>3</sup> to the widows and orphans of the parish of L.,<sup>4</sup> to twenty aged widows and spinsters of a certain parish (the word "poor" being implied);<sup>5</sup> "among poor pious persons, male or female, old or infirm, as the executors see fit, not omitting large and sick families, if of good character;"<sup>6</sup> "to the widows and children of seamen belonging to the town of Liverpool;"<sup>7</sup> to the poor on testator's estate;<sup>8</sup> "to the inhabitants of Tawleaven Row" (who at testator's death were seven poor families);<sup>9</sup> for the poor relations of testator;<sup>10</sup> to pay the interest of a fund to such of the lineal descendants of W. as they might severally need;<sup>11</sup> to sixty ejected ministers.<sup>12</sup> The American cases are equally broad in sustaining this class of trusts. The following have been upheld: "In trust for the benefit of the poor;"<sup>13</sup> to the suffering poor of the town of A.;<sup>14</sup> to the poor of a particular parish or church;<sup>15</sup> for the relief of the destitute in such a manner as charity is usually distributed by the minister at large in the city of Boston;<sup>16</sup> to societies whose objects are the "relief of distressed widows and the schooling and maintaining of poor chil-

1. Gray, J., in *Russell v. Allen*, 107 U. S. 182, reviewing prior decisions of U. S. Sup. Ct. upon charitable uses. *Jones v. Habersham*, 107 U. S. 174.

2. *Atty.-Gen. v. Pearce*, 2 Atk. 87.

3. *Atty.-Gen. v. Pearce*, 2 Atk. 87.

4. *Atty.-Gen. v. Comber*, 2 Sim. & S. 93; *Salter v. Farey*, 7 Jur. 831.

5. *Thompson v. Corby*, 27 Beav. 649.

6. *Nash v. Morey*, 5 Beav. 177.

7. *Powell v. Atty.-Gen.*, 3 Meriv. 48.

8. *Bristow v. Bristow*, 5 Beav. 289.

9. *Rogers v. Thomas*, 2 Keen. 8.

10. *Atty.-Gen. v. Sidney Sussex College*, 31 Beav. 654; *Atty.-Gen. v. Price*, 17 Ves. 371; *White v. White*, 7 Ves. 423.

A gift "for the relief and use of the poorest of my kindred" must, to be a charitable gift, be construed as a gift for the benefit of those who are really poor, and not of those who are the least wealthy. *Atty.-Gen. v. Northumberland*, 7 L. R. Ch. D. 745.

**Friendly Societies.**—A friendly society, i.e., for paying benefits to sick members irrespective of their poverty, is not a charitable institution, and on its dissolution a fund bequeathed to it will not be applied *cy pres*, but will fall into the testator's residuary estate. *In re Clark's Trust*, 1 L. R. Ch. D. 497.

11. *Gillam v. Taylor*, 16 L. H. Eq. 581.

12. *Atty.-Gen. v. Baxter*, 1 Vern. 248.

**Protection of Animals.**—A bequest for founding and supporting an animal sanitary institution for investigating and curing maladies, distempers, and injuries of quadrupeds or birds useful to man is a good charitable bequest. *University of London v. Yarrow*, 1 De G. & J. 72.

It seems that the prevention of cruelty to the lower order of animals is a good charitable purpose, though unaccompanied by any reference to the utility or improvement of man. *Marsh v. Means*, 3 Jur. N. S. 790.

13. *Lorings v. Marsh*, 6 Wall. (U.S.) 337.

14. *Howard v. American Peace Soc.*, 49 Me. 288; *Heuser v. Harris*, 42 Ill. 425.

But under the peculiar construction of the law of charities in *Maryland* gifts to the poor children of a parish, or to the poor children attending a charity school, are void for uncertainty. *Dashiell v. Atty.-Gen.*, 5 Har. & J. (Md.) 392; or to the indigent and necessitous poor residing in a certain ward. *Wilderman v. Baltimore*, 8 Md. 551.

15. *Atty.-Gen. v. Old South Society*, 13 Allen (Mass.), 474.

16. *Derby v. Derby*, 4 R. I. 414.

dren," and the "relief of indigent widows and orphans in the city of S.;"<sup>1</sup> for a hospital for foundlings;<sup>2</sup> for bread for the poor of a congregation;<sup>3</sup> for a hospital, named after the donor, for the relief of the indigent blind and lame;<sup>4</sup> for the relief of poor members of a Friends' meeting, and for the relief and civilization of the Indians;<sup>5</sup> for poor relations;<sup>6</sup> and "for the special benefit of the worthy, deserving, poor, white American Protestant democratic widows and orphans residing in the town of B."<sup>7</sup>

5. **Trusts for Education.**—"Schools of learning, free schools, and scholars in universities" are objects enumerated in the statute. No trusts have been more constantly and uniformly upheld as charitable than those for the support of schools and colleges.<sup>8</sup> Donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities in the sense of the common law.<sup>9</sup> A gift designed to promote the public good by

1. *Jones v. Habersham*, 107 U. S. 174.

2. "The objection of uncertainty in this case as to the particular foundlings to be received is without force. The endowment of hospitals for the afflicted and destitute of particular classes, or without any specification of class, is one of the commonest forms of such uses. The hospital being incorporated, nothing beyond its designation as the donee is necessary. Who shall be received, with all other details of management, may well be committed to those to whom its administration is intrusted." *Ould v. Washington Hospital*, 95 U. S. 303.

3. *Witman v. Lex*, 17 S. & R. (Pa.) 88, citing as an instance of a charitable use the bequest of money in the will of Benjamin Franklin to be loaned for five years to young mechanics.

4. *Philadelphia v. Elliott*, 3 Rawle (Pa.), 170. So also devise to build a hospital for aged, decrepid, and worn-out sailors. *Inglis v. Sailors' Snug Harbor*, 3 Pet. (U. S.) 99.

It is immaterial if the institution is a corporation which receives pay for the admission or care of the patient, if no profit is derived. *Gooch v. Assoc.*, 109 Mass. 558; *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432.

5. *Magill v. Brown*, Brightly (Pa.), 347. Opinion by Baldwin, J., in circuit court of U. S. for E. D. of Pa., reviewing the history of charitable uses.

6. *Swasey v. American Bible Soc.*, 57 Me. 527; *Smith v. Harrington*, 4 Allen (Mass.), 566. But not for testator's children and their descendants who may be destitute and in the opinion of trustees may need such aid. *Kent v. Dunham* (Mass.), 2 N. Eng. Rep. 655.

7. *Beardsley v. Bridgeport* (Conn.) 1 N. Eng. Rep. 639; *Camp v. Crocker's Adm.* (Conn.) 2 N. Eng. Rep. 134.

**Gifts in Aid of Poor Rates.**—A distinction has been drawn in the class of gifts for the poor by holding that such gifts were applicable only to the poor not receiving public aid as paupers, on the ground that otherwise the gift would relieve the wealthy tax-payers from their taxes, and not materially aid the poor. *Atty.-Gen. v. Clarke*, Amb. 422; *Rogers v. Rogers*, 2 Keen. 8; *Atty.-Gen. v. Wilkinson*, 1 Beav. 373; *Atty.-Gen. v. Bovill*, 1 Phil. 768; *Atty.-Gen. v. Exeter*, 2 Russ. 53, 359; *Hereford v. Adams*, 7 Ves. 324. But this must rest upon the intentions of the donor. *Webb v. Neal*, 5 Allen (Mass.), 575; *Perry on Trusts*, sec. 698.

8. *Russell v. Allen*, 107 U. S. 163.

9. *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, 192. In this case the validity of the gifts under Girard's will to the city of Philadelphia was sustained. The principal contentions were as to the capacity of the city to act as trustee and the validity of a trust for a college; the testator gave general directions for the course of study, that the beneficiaries were to be "poor, white male orphans between the ages of six and ten years," preference being given "first, to orphans born in the city of Philadelphia; second, to those born in any other part of Pennsylvania; third, to those born in the city of New York; and last, to those born in the city of New Orleans;" and that scholars who shall merit it shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age." He also required that

the encouragement of learning, science, and the useful arts, without any particular reference to the poor, is a charity.<sup>1</sup> A gift to promote education is a charity;<sup>2</sup> and so also to support a "school for the use of poor children,"<sup>3</sup> for the "schooling" of the children of a district,<sup>4</sup> to establish a professorship of the fine arts in a university, and to found an agricultural college,<sup>5</sup> to establish a school or college not necessarily free,<sup>6</sup> for "an establishment for the increase and diffusion of knowledge among men,"<sup>7</sup> "for the purpose of founding an institution for the education of youth" in a county,<sup>8</sup> and instruction in the mechanical arts.<sup>9</sup>

"no ecclesiastic, missionary, or minister of any sect whatever shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college." It was held by the court in the elaborate opinion by Story, J., that "there is nothing in the devise establishing the college or in the regulations and restrictions contained therein which are inconsistent with the Christian religion, or are opposed to any known policy of the State of Pennsylvania."

A devise to the cities of New Orleans and Baltimore for the education of the poor inhabitants of those cities is valid. *McDonogh v. Murdoch*, 15 How. (U. S.) 367.

1. *American Academy v. Harvard College*, 12 Gray (Mass.) 582.

2. *Chapin v. School District*, 35 N. H. 445.

3. But such a trust cannot be applied to a public school where rich and poor are alike admitted, but the fund may be applied to other means of education, to furnishing books, and perhaps even clothes and food, to poor children. *McIntire v. Zanesville*, 17 Ohio St. 352.

A devise to a school under the auspices and control of a religious denomination or sect, and confined to the youth of its members, both rich and poor, and in which the peculiar views of Christianity, as entertained by that denomination, constituted a part of the instruction imparted in the school, is a charitable use. *Price v. Maxwell*, 28 Pa. St. 23. But a bequest for the education of testator's nephew for the ministry is not a charitable or religious use. *McMillan's Appeal*, 11 Weekly Notes Cas. (Pa.) 440.

Where an owner of land devoted it by parol to the purpose of a public school, and permitted it to be improved by the erection of a schoolhouse, he was held to be a trustee for a public charity, and not within the Statute of Frauds. *McLain v. School Directors*, 51 Pa. St. 196.

4. *Heuser v. Harris*, 42 Ill. 425; *Boxford Religious Soc. v. Harriman*, 125 Mass. 321. So also for a school "wherein no book of instruction is to be used to teach except spelling-books and the Bible." *Taintor v. Clark*, 5 Allen (Mass.), 66.

5. *Cresson's Appeal*, 30 Pa. St. 437.

6. *Price v. Maxwell*, 28 Pa. St. 23; *Taylor's Executors v. Trustees*, 34 N. J. Eq. 101.

7. "The Smithsonian Institution owes its existence to a bequest of James Smithson, an Englishman, to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men." See Acts of Congress of 1st July, 1836, ch. 252; 10th August, 1846, ch. 178. This was held by Lord Langdale, Master of the Rolls, in *U. S. v. Drummond*, decided in 1838, to be a good charitable bequest. The decision on this point is not contained in the regular reports, but appears by the letters of Mr. Rush, then Minister to England (printed in the documents relating to the Origin and History of the Smithsonian Institution, published by the Institution in 1879), to have been made after full argument in behalf of the United States by Mr. Pemberton (afterwards Mr. Pemberton Leigh and Lord Kingsdown), and on deliberate consideration by the Master of the Rolls. History of the Smithsonian Institution, 15, 19, 20, 56, 58, 62. And it was cited as authoritative in *Whicher v. Hume*, 7 H. L. Cas. 124, 141, 155, in which the House of Lords held that a bequest in trust to be applied, in the discretion of the trustees, 'for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit,' was a valid charitable bequest, and not void for uncertainty." Gray, J., in *Russell v. Allen*, 107 U. S. 182.

8. *Russell v. Allen*, 107 U. S. 182.

9. *Barnum v. Baltimore (Md.)*, 6 Am. & Eng. Corp. Cas. 203.

**6. Trusts for Religious Purposes.**—The only reference to this class in the statute is "repairs of churches."<sup>1</sup> But gifts for the advancement, spread, and teaching of religion, or for the convenience and support of worship, or of the ministry, have been held charitable.<sup>2</sup> A distinction, however, has been made where the gift is for the restricted use of a definite number of persons or for a body clearly pointed out as the object of the gift: such a gift has not the elements of a public charity, and will not be sustained as such.<sup>3</sup> In this country there are no "superstitious uses," in the sense in which such gifts are held void in England, i.e., trusts for religious purposes which are illegal by law.<sup>4</sup> The following are instances

1. "No kind of charitable trust finds less support in the words of the st. of 43 Eliz. than the large class of pious and religious uses to which the statute contains no more distinct reference than in the words 'repairs of churches.' Such uses had indeed been previously recognized as charitable and entitled to peculiar favor by many acts of parliament, as well as in the courts of justice. . . . Sir Francis Moore, who drew the st. of 43 Eliz., indeed says that a gift to maintain a chaplain or minister to celebrate divine service could not be the subject of a commission under the statute, but 'was of purpose omitted in the penning of the act,' lest in the changes of opinion in matters of religion such gifts might be confiscated in a succeeding reign as superstitious. Yet he also says that such a gift might be enforced by 'the chancellor by his chancery authority;' and cites a case in which it was so decreed. Duke (Bridgman's Ed.), 125, 154. And from very soon after the passage of the statute, gifts for the support of a minister, the preaching of an annual sermon, or other uses connected with public worship and the advancement of religion have been constantly upheld and carried out as charities in the English courts of chancery. Anon. Cary, 39; Nash's Charity; Dwight's Charity Cases, 114; Pember v. Inhabitants of Knighton; Herne on Charitable Uses, 101; s. c., Tothill (2d Ed.), 34; Duke, 354, 356, 381, 570, 614; Boyle on Charities, 39-41; Tudor, 10, 11. So in this commonwealth [Massachusetts] trusts for the support of public worship and religious instruction, or the spreading of religion at home or abroad, have always been deemed charitable uses. 4 Dane Ab. 237; Bartlet v. King, 12 Mass. 536; Going v. Emery, 16 Pick. (Mass.) 107; Sobier v. St. Paul's Church, 12 Met. (Mass.) 250; Brown v. Kelsey, 2 Cush. (Mass.), 243; Earle v. Wood, 8 Cush. (Mass.), 445. It is not necessary in this connection to speculate whether the ad-

mission of pious uses into the rank of legal charities in modern times is to be attributed to the influence of the civil law, to their having been mentioned in the earlier English statutes, to a more liberal interpretation, after religion had become settled in England, of the words 'repair of churches,' or, possibly, of the clauses relating to gifts for the benefit of education, in the st. of 43 Eliz., or to the support given by the court of chancery to public charitable trusts, independently of any statute. It is sufficient for our present purpose to observe that pious and religious uses are clearly not within the strict words of the statute, and can only be brought within its purview by the largest extension of its spirit." Gray, J., in Jackson v. Phillips, 14 Allen (Mass.), 539, 552.

2. Att.-Gen. v. Bishop of Chester, 1 Bro. Ch. 444; Soc. for Prop. of Gospel v. Att.-Gen., 3 Russell, 142; Sennett v. Herbert, L. R. 7 Ch. 232; Cumming v. Reid Mem. Church, 64 Ga. 105; Beatty v. Kurtz, 2 Pet. (U. S.) 566; Jones v. Habersham, 107 U. S. 174.

3. Old South Church v. Crocker, 119 Mass. 1, citing Att.-Gen. v. Meeting House, 3 Gray, 1, 49; Parker v. May, 5 Cush. (Mass.) 336. See, however, McKissick v. Pickle, 16 Pa. St. 140.

4. **Superstitious Uses.**—The law of England relating to superstitious uses is that arising from the statutes or policy of the law which forbid the having of obits perpetual, or the continual service of a priest or other like uses. Duke Char. Uses, 106; Jarman on Wills, § 205. This has been much relaxed by statute in favor of Protestant dissenters, Roman Catholics, and Jews. The rigor of the acts was relaxed, however, when charity and not a benefit to the testator himself was intended. In this country it has been said of superstitious uses, that "it is not easy to see how there could be such a thing here, at least in the acceptance of the word by the British courts, who seem to

of trusts for religious purposes which have been sustained: for the advancement of Christianity among infidels;<sup>1</sup> for foreign missions; for establishing a bishopric in America;<sup>2</sup> for preaching a sermon on Ascension Day;<sup>3</sup> to "the cause of Christ;"<sup>4</sup> to the "first Christian church erected or to be erected in the village of T.;"<sup>5</sup> for building a convent.<sup>6</sup>

**7. Trusts for Public Purposes.**—The statute makes various public objects charitable, notably the repair of bridges or highways, and the ease of the poor in the payment of taxes. In this class the following gifts have been held to be charitable uses: for supplying water to a town;<sup>8</sup> for the improvement of a town;<sup>9</sup> for the reduction of the national debt;<sup>10</sup> for various public institutions;<sup>11</sup> for municipal purposes;<sup>12</sup> for a fire-engine or hose;<sup>13</sup> for providing shade-trees;<sup>14</sup> for a town house;<sup>15</sup> for the suppression of the manufacture, sale, and use of intoxicating liquors.<sup>16</sup> But a gift to change existing laws is not valid as a charitable use.<sup>17</sup>

have extended it to all uses which are not subordinate to the interests and will of the established church." *Methodist Church v. Remington*, 1 Watts (Pa.), 218. "It is neither for the legislature nor the judiciary, in this State, to discriminate and say what is a pious and what a superstitious use. To do so would necessarily infringe upon the great constitutional guarantee of perfect freedom and equality in all religions." *Gass v. Wilhite*, 2 Dana (Ky.), 170. "As in this country, from the very nature of its institutions, what was at one time known in England as superstitious uses have no recognition in our laws, and as all the various dogmas of the several Christian sects are to be treated with equal reverence and respect, a religious or charitable bequest, whether for the founding of a church or to purchase masses for the dead, must be regarded as valid, and is to be interpreted and enforced in such a manner as may best accord with the will of the testator." Hence a bequest to the pastor of a church for masses for the repose of testator's soul is valid, and it is the duty of the executors to pay it to the legatee, who has full discretion as to the number of the masses, etc. *Seibert's Appeal*, 18 Weekly Notes Cas. (Phila.) 276. See also *In re Hagenmyer's Will*, 12 Abb. N. Cas. (N. Y.) 432. *In re Petition of James Schouler*, 134 Mass. 427.

1. *Att.-Gen. v. London*, 1 Ves. Jr. 243.

2. *Soc. for Prop. the Gospel v. Att.-Gen.*, 3 Russ. 142; *Bartlett v. King*, 12 Mass. 537; *Fairbanks v. Lamson*, 99 Mass. 533; *Hinckley v. Thatcher*, 139 Mass. 477.

3. *Att.-Gen. v. Bishop of Chester*, 1 Bro. Ch. 444.

4. *Turner v. Ogden*, 1 Cox, 316.

5. *Going v. Emery*, 16 Pick. (Mass.) 107.

6. *Jones v. Habersham*, 107 U. S. 174; *Fidelity Ins., etc., Co.'s Appeal*, 99 Pa. St. 443.

7. *Hughes v. Daly*, 49 Conn. 34.

8. *Jones v. Williams*, Amb. 651.

9. *Att.-Gen. v. Heelis*, 2 Sim. & S. 67; *Howse v. Chapman*, 4 Ves. 542.

10. *Ashton v. Langdale*, 4 Eng. L. & Eq. 139; *Newland v. Att.-Gen.*, 3 Mer. 684; *Dickson v. U. S.*, 125 Mass. 311. See *U. S. v. Fox*, 94 U. S. 315.

11. To the British Museum, *British Museum v. White*, 2 Sim. & S. 594. To the Royal Geographical Society and the Royal Humane Society, *Beaumont v. Oliveira*, L. R. 6 Eq. 534; L. R. 4 Ch. App. 309.

12. *Vidal v. Girard's Executors*, 2 How. (U. S.) 124; *Town of Hamden v. Rice*, 24 Conn. 357.

13. *Magill v. Brown*, — Bright (Pa.), 411; *Thomas v. Ellmaker*, 1 Pars. (Pa.) Sel. Cases, 98.

The property of a company formed for extinguishment of fires, etc., is held upon a public trust, and cannot be divided among the members. *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445; *Humane Fire Co.'s Appeal*, 88 Pa. St. 389.

14. *Cresson's Appeal*, 30 Pa. St. 437.

15. *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 492.

16. *Haines v. Allen*, 78 Ind. 100.

17. A bequest in trust to be expended "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage, and devise property, and all

**8. Trusts for Other Charitable Purposes.**—There are many trusts which cannot be said to fall within the above classes, but which have been sustained, e.g., gifts to a lodge of Freemasons;<sup>1</sup> to the American Peace Society;<sup>2</sup> to aid in the antislavery movement in the United States;<sup>3</sup> and to maintain a Shaker community.<sup>4</sup> A trust to erect and maintain monuments or tombs of the donors or others is now generally upheld in this country, though not in England.<sup>5</sup> In England trusts "for private charity," and "for benevolent, charitable, and religious purposes," will not be sustained.<sup>6</sup> But in this country a trust "in aid of objects and purposes of benevolence or charity, public or private," has been sustained.<sup>7</sup>

**9. Trusts Held not to be Charitable.**—A direct appropriation by the legislature for the support of a school or for public improvements does not constitute a charity which will be regulated by a court of equity.<sup>8</sup> So also, where the subject of the trust is the re-

other civil rights enjoyed by men," cannot be sustained as a charity. *Jackson v. Phillips*, 14 Allen (Mass.), 539, 571.

1. *Cruse v. Axtell*, 50 Ind. 49. So also to a Young Men's Christian Association. *Goodell v. Union Assoc.*, 29 N. J. Eq. 32. And to an order of Sisters of Charity. *Quinn v. Shields*, 62 Iowa, 129; s. c., 1 Am. & Eng. Corp. Cas. 498. But a society for purposes of mutual benevolence only is not an association for charitable uses; as to third parties its members are considered as partners. *Babb v. Reed*, 5 Rawle (Pa.), 151; *Swift's Exec. v. Benef. Soc.*, 73 Pa. St. 362.

2. *Tappan v. Deblois*, 45 Me. 122.

3. "For the preparation and circulation of books, newspapers, the delivery of speeches and lectures, and such other means as in the judgment of the trustees will create a public sentiment that will put an end to negro slavery in this country," and "for the benefit of fugitive slaves who may escape from the slaveholding States of this infamous Union from time to time." *Jackson v. Phillips*, 14 Allen (Mass.), 558.

4. *Gass v. Wilhite*, 2 Dana (Ky.), 170.

5. "In England there has been a difference of opinion upon the question whether the maintenance and repair of the tomb or monument of the donor is a good charitable use. Down to the time of the American Revolution, as by the civil law, it appears to have been held that it was. . . . According to the later English cases, it is not" (citing cases). *Gray, J.*, in *Jones v. Habersham*, 107 U. S. 174, in which it was held that under the Code of Georgia such a gift was clearly valid. In the same case, in the circuit court, 3 Woods, 443, *Bradley, J.*, said: "It is somewhat singular that it

should ever have been doubted, since the sanctity of tombs and other places of rest for the dead has always been an object of cherished regard since the establishment of Christianity, and received the peculiar care of the Roman law." The bequest to a Friends' meeting, which would become applicable to the maintenance of its burying-ground, is undoubtedly a charitable use, for such support is regarded as a religious duty. *Dexter v. Gardner*, 7 Allen (Mass.), 243. A bequest to keep testator's family burying-ground in suitable repair is valid. *Swasey v. Amer. Bible Soc.*, 57 Me. 523.

6. *Ommaney v. Butcher*, 1 Turn. & Russ. 260; *Williams v. Kershaw*, 5 Law Jur. (N. S.) Ch. 84.

7. *Saltonstall v. Sanders*, 11 Allen (Mass.), 462.

So a power to trustees to distribute a bequest among institutions for the benefit of the poor is valid under the law of Massachusetts. *Lorings v. Marsh*, 6 Wall. (U. S.) 337.

A devise to the executor "to be disposed of by him for such charitable purposes as he shall think proper" is a devise in trust, in which the devisee takes no beneficial interest; it is not essential that the words in trust should be expressed; the sureties of the executor are responsible for such a fund unadministered. *White v. Ditson* (Mass.), 1 N. Eng. Rep. 485.

In *New Jersey*, however, a gift in trust, to be distributed to "benevolent, religious, and charitable institutions" at the discretion of the wife of the testator, was held not to be a charitable use. *Norris v. Thomson*, 4 C. E. Greene (N. J.), 308.

8. *Perry Trusts*, sec. 707.



sult of a contract and not of a gift, the use will not be charitable.<sup>1</sup> Where the gift is for the benefit of particular individuals and not for an indefinite number it is not charitable.<sup>2</sup> While the tendency is to uphold charitable gifts, yet there are many which are too indefinite to be administered as trusts, and in such cases the gift is held void and distribution made to the heirs or next of kin of the testator.<sup>3</sup>

**10. Cy Pres Doctrine.**—When a gift for charitable uses cannot be applied according to the exact intention of the donor, the courts of equity will apply the gift as nearly as possible (*cy pres*) in conformity with the presumed general intention of the donor.<sup>4</sup> In England this doctrine has been exercised by the chancellor both by virtue of the royal prerogative committed to him, and by the ordinary equitable jurisdiction of the court.<sup>5</sup> But in this country the power has been exercised only through the judicial power of the courts.<sup>6</sup> This doctrine has been defined as follows: When a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application; and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund

1. *Brendle v. German Ref. Congreg.*, 33 Pa. St. 419; *Atty.-Gen. v. Heelis*, 2 Sim. & S. 77; *Bisp. Eq. sec. 123*.

2. *McMillen's Appeal*, 11 Weekly Notes Cas. (Phila.) 440, in which the gift was in trust for the education of testatrix's nephew for the ministry. "The object of the trust was neither charitable nor religious within the technical meaning of those terms, but to carry out the intention of the testatrix in the education of her nephew, and in conferring upon him the means of future support." *Perry Trusts*, sec. 710. "They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity." *Gray, J.*, in *Russell v. Allen*, 107 U. S. 182.

3. A gift to a trustee to dispose of "for any and all benevolent purposes that he may see fit" is void for uncertainty. *Adye v. Smith*, 44 Conn. 60; *Bristol v. Bristol* (Conn.). 2 N. Eng. Rep. 759. But a bequest is not void because given simply to an association, and not upon any defined charity, or for any specified charitable use. *Soc. for Prop. of Gospel v. Atty.-Gen.*, 3 Russ. 142; *Well Beloved v. Jones*, 1 Sim. & S. 43; *Magill v. Brown*, *Brightly* (Pa.), 347; *Evan. Association's Appeal*, 35 Pa. St. 316; *Beall v. Fox*, 4

Ga. 404; *Burr's Executors v. Smith*, 7 Vt. 243. When, however, the objects of the association are too vague, e.g., "to diffuse more generally the benefits of education, civilization, and Christianity throughout the United States and elsewhere," the gift is void. *Owens v. Missionary Soc.*, 14 N. Y. 380.

4. *Bisp. Eq. sec. 126*. The object of all the rules on this subject is to ascertain and carry out, as nearly as may be, the true intention of the donor. The doctrine of *cy pres* is thus only a liberal rule of construction to ascertain intention. *Perry Trusts*, sec. 727.

5. The cases in which the prerogative power under the royal sign manual is exercised in England are of two classes; first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and, second, of gifts of property to charity generally without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it. *Jackson v. Phillips*, 14 Allen (Mass.), 574. But the doctrine of *cy pres*, formerly pushed to a most extravagant length, is now much restrained. *Atty.-Gen. v. Minshull*, 4 Ves. 14.

6. *Bisp. Eq., sec. 126; Perry Trusts*, sec. 727.

having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent.<sup>1</sup> The *cy pres* doctrine, thus restricted, has been approved in many of the States, but it has been entirely repudiated in others.<sup>2</sup>

1. Gray, J., in *Jackson v. Phillips*, 14 Allen (Mass.), 580. The same judge also says of charitable trusts: "The instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed." *Russell v. Allen*, 107 U. S. 182. The doctrine is fully discussed in *Philadelphia v. Girard's Heirs*, 45 Pa. St. 9, in which Lowrie, C. J., says: "The meaning of the doctrine of *cy pres* as received by us is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced. It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence." Of the rule stated in the text a high authority says: "This doctrine seems to be free from objection; for it will be observed that thus stated it avoids both of the extravagant conclusions to which the prerogative *cy pres* doctrine led. The gift, if for a charity generally, must be made to trustees, thus avoiding the mischief of turning the court into a trustee for a general charity; while, on the other hand, there must be no intention to limit the gift to a particular institution or mode of application, which avoids the obnoxious *cy pres* doctrine in those cases in which bequests were made to particular charitable uses, but which were applied by the exercise of the prerogative to different objects, because the use designated was illegal." Bisp. Eq. sec. 129.

2. "There seems, indeed, to be no valid reason why the judicial *cy pres* doctrine, as explained in *Jackson v. Phillips*, should not be approved in all those States wherein the statute of Elizabeth has been decided to be in force, or where its principles have been adopted by the law of the State; in other words, in those States where the doctrine that indefinite-

ness of the object is no objection to a trust, provided it is for a charity, is recognized." Bisp. Eq. sec. 130.

In the following cases the judicial doctrine of *cy pres* has been favorably considered: *Burr v. Smith*, 7 Vt. 241; *Howard v. Amer. Peace Soc.*, 49 Me. 302; *Derby v. Derby*, 4 R. I. 439; *Winslow v. Cummings*, 3 Cush. (Mass.) 358; *Bliss v. Amer. Bible Soc.*, 2 Allen (Mass.) 334; *Amer. Acad. v. Harvard Coll.*, 12 Gray (Mass.), 582; *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Academy v. Clemens*, 50 Mo. 167; *Kiefer v. German-Amer. Seminary*, 46 Mich. 636; *Gilman v. Hamilton*, 16 Ill. 225; *Moore v. Moore*, 4 Dana (Ky.) 354; *Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165.

In the following cases the doctrine has been repudiated or criticised: *Fontain v. Ravenel*, 17 How. (U. S.) 369; *Carter v. Balfour*, 19 Ala. 814; *White v. Fisk*, 22 Conn. 31; *Grimes v. Harmon*, 35 Ind. 198; *Lepage v. McNamara*, 5 Clarke (Iowa), 124; *McAuley v. Wilson*, 1 Dev. Eq. (N. Car.) 276; *Venable v. Coffman*, 2 W. Va. 310; *Thomson's Exec. v. Norris*, 5 C. E. Green (N. J.), 522; *Beekman v. Bonsor*, 23 N. Y. 298; *Bascom v. Albertson*, 34 N. Y. 584; *Pringle v. Dorsey*, 3 S. Car. (N.S.) 509. See also, for statutes on the subject in Pennsylvania, Act of April 26, 1855, sec. 10, P. L. 331; and in Georgia, Code, sec. 2468.

**Examples of the Application of the Cy Pres Doctrine.**—A bequest to A., his executors and administrators, desiring him to dispose of it in such charities as he sees fit, recommending poor clergymen with large families and good characters, upon the death of the testator nine years after A.'s death, was executed by the court, having particular regard to the recommendation. *Moggridge v. Thackwell*, 1 Ves. J. 464; 3 Bro. C. C. 517. A testator in 1627 bequeathed £1000, the income of which was to be distributed for the relief and ransom of poor captives taken by the Turkish pirates, and £1000, the income of which was to be applied to the poorest of his kindred; both sums were so invested in land as to increase enormously in value; under authority of an act of Parliament the moiety

**11. Incidents of Charitable Uses.**—If the trust is a valid one, and the directions for its management are plain, the trust will not be allowed to fail for want of a trustee.<sup>1</sup> The heirs or other persons interested may bring a bill to test the legality of the trust; after the trust has been established, the remedy for the redress of abuse or mismanagement is by bill or information of the attorney-general, representing the public interests, and in such a case the trust estate does not revert to the heirs of the donor.<sup>2</sup> If the trust is not for a general public charity, but for a corporation or persons having vested rights, the suit cannot be brought by the attorney-general, but must be brought by those whose rights are infringed.<sup>3</sup> A charitable gift must be accepted and held upon the same terms upon which it was given; the donees cannot change the uses at will or for mere convenience.<sup>4</sup> This, however, does not forbid a religious society after altering its faith from using funds given it for general purposes.<sup>5</sup> The rules against perpetuities do not apply

for the first object was devoted to the second. *Atty.-Gen. v. Northumberland (Duke)*, 38 L. T. N. S. 245. A bequest for the redemption of British slaves in Turkey and Barbary having ceased to be applicable for that purpose, was directed to be applied to kindred charities as nearly like the original purpose as possible. *Atty.-Gen. v. Ironmongers Co.*, 2 Beav. 313. Bequests made to be expended in the circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in the judgment of the trustees would create a public sentiment that would put an end to negro slavery in the United States, and for the benefit of slaves escaping from the slaveholding States, became inapplicable to those objects by reason of the abolition of slavery, and it was held that the funds should be applied to the nearest similar use. *Jackson v. Phillips*, 14 Allen (Mass.), 539.

1. "If the founder describes the general nature of a charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead." *Russell v. Allen*, 107 U. S. 182; *Moore v. Moore*, 2 Dana (Ky.), 354; *Byers v. McCartney*, 62 Iowa, 339; *Fuller v. Griffin*, 3 Vt. 400; *McGirr v. Aaron*, 1 P. & W. (Pa.) 49. And see *Cincinnati v. White*, 6 Peters (U. S.), 433. But if the gift can be applied by the trustee to other than charitable purposes, the gift will be void. *Morice v. Bishop of Durham*, 9 Ves. 404. Where a discretion is to be

exercised by the trustees, and they die during the pendency of a prior life estate, the court will not exercise the discretion and the gift will fail. *Fountain v. Ravelnel*, 17 How. (U. S.) 369; *Zeissweiss v. James*, 63 Pa. St. 465. A formal rejection by a town as trustee for a charitable use will not cause the gift to fail, but a new trustee will be appointed. *Trustees v. Whitney*, 3 N. Eng. Rep. (Conn.) 573.

2. *Wellbeloved v. Jones*, 1 Sim. & S. 40; *Ludlow v. Greenhouse*, 1 Bligh (N. S.), 17; *Atty.-Gen. v. Gainson*, 101 Mass. 223; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566; *Russell v. Allen*, 107 U. S. 182.

3. *Atty.-Gen. v. Meeting House*, 3 Gray (Mass.), 1; *Atty.-Gen. v. Merrimack Mfg. Co.*, 14 Gray (Mass.), 586; *Perry Trusts*, sec. 732.

4. *Gilman v. Hamilton*, 16 Ill. 225; *Perry Trusts*, sec. 733.

5. *Perry Trusts*, sec. 733, 734, 735. Where a religious body becomes divided and the right to the corporate property is in conflict, the civil courts will consider and determine which of the divisions submits to the regular order of the church, local and general. This division is entitled to the property. In determining which of the divisions has maintained the correct doctrine, the findings of the supreme ecclesiastical tribunal of the denomination in question are binding upon the civil courts. *McGinnis v. Watson*, 41 Pa. St. 9; *Ramsey's Appeal*, 88 Pa. St. 60; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Second Eccl. Soc. v. First Eccl. Soc.*, 23 Conn. 255; *Kniskern v. Lutheran Churches*, 1 Sand. Ch. (N. Y.) 439; *Baker v. Fales*, 16 Mass. 488; *First Presb. Soc. v. Fales*, 25 Ohio St. 128; *Bellport v.*

to trusts for charities, and such trusts may be created for the payment of the income forever for the charitable purposes of the donor.<sup>1</sup> Property vested for such purposes, however, does not become inalienable, for it may be sold by decree of the court.<sup>2</sup> In the absence of statutory regulations, there is no limit beyond which accumulations may not be permitted in favor of a charity.<sup>3</sup> When an estate for charitable uses has vested in the trustees, all illegal conditions and restraints which are incidental to the trust and not of the essence of the gift will be void, leaving the estate to be

Tooker, 29 Barb. (N. Y.) 256; Robertson v. Bullions, 1 Kern. (N. Y.) 256; Den v. Bolton, 12 N. J. L. 206; Smith v. Swormstedt, 16 How. (U. S.) 288; Watson v. Jones, 13 Wall. (U. S.) 680; Bouldin v. Alexander, 15 Wall. (U. S.) 131; White Lick Q. M. of Friends v. Alexander, 89 Ind. 136; s. c., 4 Am. & Eng. Corp. Cas. 87. See also note, 4 Am. & Eng. Corp. Cas. 112. Where a bequest is made for a church, to take effect whenever a congregation should be formed, the proper ecclesiastical authorities are the judges of the formation of such congregation. Fidelity Ins., etc., Co.'s Appeal, 99 Pa. St. 443.

1. "Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities." Russell v. Allen, 107 U. S. 182. A gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being and twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person. Inglis v. Sailors' Snug Harbor, 3 Pet. (U. S.) 99; McDonogh v. Murdoch, 15 How. (U. S.) 367; Ould v. Hospital, 95 U. S. 303; Russell v. Allen, 107 U. S. 182. These cases are in accord with English decisions of the highest authority: Atty.-Gen. v. Downing, 1 Dick. 414, 2 Amb. 550; Atty.-Gen. v. Bowyer, 3 Ves. 714, 5 Ves. 300, 8 Ves. 256; Chamberlayne v. Bockett, L. R. 8 Ch. App. 206. See also Sanderson v. White, 18 Pick. (Mass.) 328; Odell v. Odell, 10 Allen (Mass.), 1. A direction that real estate devised for charitable uses should not be alienated makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts. Perin v. Carey, 24 How. (U. S.) 465. An estate is no more perpetual in two successive charities than in one charity, and, as the rule

against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good. Christ's Hospital v. Grainger, 16 Sim. 84, 100; McDonogh v. Murdoch, 15 How. (U. S.) 367; Jones v. Habersham, 107 U. S. 174; Trustees v. Whitney, 3 N. Eng. Rep. (Conn.) 573. But see exceptions to the rule in Wetmore v. Parker, 52 N. Y. 450; Phelps's Exec. v. Pond, 23 N. Y. 69; Jocelyn v. Nott, 44 Conn. 55; DeWolf v. Lawson, 61 Wis. 469. See also, generally, Gray on Rule against Perpetuities.

2. If "lapse of time, or changes as to the condition of the property and of the circumstances attending it, have made it prudent and beneficial to the charity to alien the lands, and vest the proceeds in other funds or in a different manner, it is competent for this court to direct such sale and investment, taking care that no diversion of the gift be permitted. Lord Langdale, the Master of the Rolls, observed in Attorney-General v. South Sea Company, 4 Bevan, 458: 'It is plain that in ordinary cases a most important part of this duty is to preserve the property, but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this court, upon various occasions, with a view to promote interests of charities, has not thought it necessary to preserve the property *in specie*, but has sanctioned its alienation.' " Stanley v. Colt, 5 Wall. (U. S.) 169. In this case a proviso against sale of the property devised to an ecclesiastical society was held a limitation in trust and not a common-law condition, and that the legislature of Connecticut could exercise the power of the court of chancery of England in directing the alienation of the property.

3. Bisp. Eq. sec. 133; Perry Trusts, secs. 393-400, 738.

managed legally for the purposes of the trust.<sup>1</sup> The statute of limitations does not ordinarily run against a trust for charitable uses.<sup>2</sup>

**12. Restraints upon Donors.**—Under the English statutes of mortmain gifts for religious or charitable purposes are void unless executed by deed in the presence of two witnesses twelve months before the donor's death, and enrolled.<sup>3</sup> These statutes are not in force in this country,<sup>4</sup> but in several States there have been restraints imposed as to the time prior to decease, and the amount which a donor may give to charitable objects.<sup>5</sup>

1. *Perry Trusts*, sec. 739; *Philadelphia v. Girard's Heirs*, 45 Pa. St. 9.

2. *Perry Trusts*, sec. 745.

3. 9 Geo. II. c. 36 (1736). The statute of 43 Eliz. c. 4 had repealed the earlier mortmain acts.

4. *Perin v. Carey*, 24 How. (U. S.) 465.

5. In *California* by the provisions of the code a bequest or devise can be made only by a will executed thirty days prior to the testator's death, and cannot exceed one-third of his estate. Code, sec. 1313.

In *Georgia* the code provides: "No person leaving a wife or child or descendants of a child shall by will devise more than one third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void." Code, sec. 2419. This does not invalidate a charitable devise contained in a will executed within ninety days before the testator's death, unless he leaves a wife or child or descendants of a child. *Jones v. Habersham*, 107 U. S. 174.

In *Kentucky* no church or society of Christians can acquire more than fifty acres of land.

In *Maryland* all gifts, sales, and devises of land or personalty to religious sects or for religious uses, without the prior sanction of the legislature, are void, except of land not exceeding five acres, for a church, parsonage, or cemetery, and actually so used. Decl. of Rights, sec. 38.

In *Missouri* gifts, sales, or devises of land for religious purposes are prohibited, except one acre for a church. Const. art. i. sec. 13.

In *New York* no devise to a corporation is valid unless expressly authorized by its charter or by statute to take by devise. Hence a devise of lands in this State to the United States for the national debt is void. *U. S. v. Fox*, 94 U. S. 315; s. c., 52 N. Y. 530.

Corporations created under the act of 1848, c. 319, are restricted to \$10,000 yearly income, and all gifts to be valid must have been made or devised two months before the donor's death. *Stephenson v. Short*, 92 N. Y. 433; s. c., 1 Am. & Eng. Corp. Cas. 607.

There is also a general provision by the Act of 1860, c. 360, that no person having a husband, wife, child, or parent shall by his or her last will or testament devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, more than one half part of his or her estate after the payment of his or her debts.

In *Ohio* a devise or bequest to a charitable, religious, or educational purpose by a testator leaving issue or adopted children is void unless made at least one year before the testator's death. Rev. Stat., sec. 5915.

In *Pennsylvania* a devise, bequest, or conveyance for religious or charitable uses is void unless done by deed or will attested by two credible and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor. Act of 1855, Purd. Dig. 252. Under this statute a testator may provide that a subsequent will shall only act as a revocation of a former will making charitable bequests in case he shall live beyond the month. *Hamilton's Estate*, 74 Pa. St. 69. It does not apply to an executed gift made to a charity within the month. *McGlade's Appeal*, 99 Pa. St. 338.

A bequest for masses for the repose of testator's soul is a religious use within this act. *Rhymer's Appeal*, 93 Pa. St. 142.

**Who may be Trustee.**—A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not by its charter or by general laws have authority itself to establish or to spend its corpo-

**CHART** refers ordinarily to maps for seamen or boatmen; but for twenty-five years it has been further used to signify sheets on which information is exhibited—as historical charts. Charts of the latter sort, at least when of a literary rather than of an art nature, are not contemplated by the word “chart” in American copyright law.<sup>1</sup>

rate laws for. A city, for instance, may take a devise in trust to maintain a college, an orphan asylum, or an asylum. *Vidal v. Girard's Executors*, 2 How. (U. S.) 127; *McDonogh v. Murdoch*, 15 How. (U. S.) 367; *Perin v. Carey*, 24 How. (U. S.) 465; *Barnum v. Baltimore*, 62 Md. 275; s. c., 6 Am. & Eng. Corp. Cas. 203 (see note); *Philadelphia v. Elliott*, 3 Rawle (Pa.), 170; 2 Dill. Mun. Corp. (3d Ed.) secs. 567, 909.

It seems that the purposes of the trust should be “germane to the objects of the incorporation,” and “relate to matters which will promote and aid and perfect those objects.” *Vidal v. Girard's Executors*, 2 How. (U. S.) 189; *Jones v. Hathersham*, 107 U. S. 174.

A county may be trustee of a fund to aid the poor of a township. *Lawrence Co. v. Leonard*, 34 Leg. Int. (Pa.) 104. But it has been held that townships are not proper trustees of a charity for educating poor orphan children. *Mason v. Church*, 27 N. J. Eq. 47.

A gift to a charity may be good, although it requires a future incorporation to carry it into effect. *Ould v. Hospital*, 95 U. S. 303; *Inglis v. Sailors' Snug Harbor*, 3 Pet. (U. S.) 99.

**Exemption of Charities from Taxation.**—An exemption of the property of religious, charitable, and educational institutions will be construed to extend only to the property actually used for the religious, charitable, or educational purpose, and not to other property held by it as a source of revenue or capable of being applied to such use. *Baltimore v. Grand Lodge*, 3 Am. & Eng. Corp. Cas. 415; *Lima v. Lima Cemetery Assoc.*, 5 Am. & Eng. Corp. Cas. 547; *Pittsburg v. Mechanics' Assoc.*, 8 Am. & Eng. Corp. Cas. 484, and notes to each case.

**Liability of Charitable Funds for Torts.**—“It seems to have been thought that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason and justice and common-sense. Such a perversion of the intention of the donor would lead to the most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct,

and the real object of the charity would be defeated. . . . Damages are to be paid from the pocket of the wrongdoer, not from a trust fund.” *Lord Campbell, in Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507. See also *Russell v. Men of Devon*, 2 T. R. 672-3; *Riddle v. Proprietors, etc.*, 7 Mass. 187.

In *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432, the principle was applied to an action for injuries sustained by negligent and unskilful surgical treatment; and in *Perry v. House of Refuge*, 63 Md. 20; s. c., 6 Am. & Eng. Corp. Cas. 291, to an action for injuries sustained by a malicious assault by teachers of the institution. It has been held that the provisions of the charter of a defendant corporation do not alone establish its right to exemption from liability for negligence; the facts regarding the actual objects of the corporation should appear by proofs. *Boyd v. Insurance Patrol*, 113 Pa. St. 269.

**Authorities on Charities.**—The English text-books are: *Boyle's Practical Treatise on Charities*, 1837; *Duke on Charitable Uses* (Bridgeman's Edition), 1805; *Finlason on Charitable Trusts*, 1860; *Francis on Charities*, 1855; *Herne on Charitable Uses*, 1663; *Tudor*, 1871; *Cook & Hawwood on Charitable Trust Acts*, 1867; *Whiteford*, 1878; *Kenny on Endowed Charities*, 1880.

In this country the only single treatise is by T. W. Dwight (1863), being his argument in the *Rose* will case. 4 Abb. App. Dec. (N. Y.) 108. But the subject is fully treated in *Perry on Trusts*, ch. 23, and more briefly in *Bispham's Principles of Equity*, part i., chap. 5; *Story's Equity*, chap. 32.

A summary of American cases is appended to the reprint of *Vidal v. Girard's Executor* in 3 *Sharswood & Budd's Leading Cases, in the American Law of Real Property* (Phila. 1887), 332. The opinion by *Story, J.*, in that case, and in *Jackson v. Phillips*, 4 Allen (Mass.), 539, by *Gray, J.* (now of the Supreme Court of the United States), are especially comprehensive and valuable.

1. *Taylor v. Gilman*, 24 Fed. Rep. 632.

**Insurance of Ship.**—Insurance under the word “ship” covers charts, in some ports at least, as Boston; not so, it seems, in Hamburg. 1 *Phillips on Insurance*,

§ 468; 2 Parsons on Maritime Law, 203, 204. But if the master were accustomed to buy the charts, compasses, sextants, etc., on his own account, it would be doubtful whether the word "ship" would cover them, in the absence of a usage to that effect. 2 Parsons on Maritime Law, 203, 204.

**Copyright** in charts exists, to a limited degree, *at common law*. Though the author has not obtained the statutory copyright, yet by the common law, so long as the charts are unpublished, he has the same right of exclusive enjoyment of them as of any other species of personal property, for by his possession they have proprietary marks, and are distinguishable property. *Rees v. Peltzer*, 75 Ill. 475; *Prince Albert v. Strange*, 2 De G. & Sm. 652. In the last case, it was held that *distribution, to private friends*, of a few copies of etchings did not amount to a publication.

**Deposit in Navy Department**, upon the express understanding that the chart was not to be published except by the plaintiff, was held not to amount to publication. *Blunt v. Patten*, 2 Paine's C. C. Rep. 397.

**Sale to City—Estoppel—Partners.**—Where one of several owners sold a copy of a map of the city of Chicago to that city, after the great fire had consumed all other maps except one, also held by his firm, and obtained a very high price by representing to the councils and to the finance committee, of which bodies he was a member, that the sale would cause his firm to lose their monopoly, it was held that all the owners were estopped from restraining the sale, by any person, of lithographic copies. *Rees v. Peltzer*, 75 Ill. 476.

**Statutory Copyright.**—In Great Britain, maps were considered formerly as artistic works, but by 5 & 6 Vict. c. 45, s. 2, the protection afforded to literary works is extended to charts. "And rightly so," says Sir W. M. James, L. J., in *Stannard v. Lee*, 6 Chanc. Appeal, 349; "for maps are intended to give information in the same way as a book does. A chart, for instance, gives similar information as to sailing rules; maps give instruction as to the statistics and history of the country portrayed."

**In the United States**, however, charts continue to be classed with works of art. *Taylor v. Gilman*, 24 Fed. Rep. 632. But doubtless the American courts will protect as a "book" any chart containing work of a literary character. A "book" may be on one sheet. *Drone on Copyright*, 142.

**Objects of Copyright.**—Maps and charts are distinctly named in the copyright laws as objects of copyright.

**Original Work.**—Difficulty respecting this is necessarily felt in the case of charts, "where there is not, and cannot be, any originality in the facts or materials of which they are composed, and which facts and materials are equally open to all."

As to purely original work, it is very clear that the copyright of one chart does not prevent another author from designing another chart by independent labor of his own, since the material is open to all. But where one has gone to pains and expense in executing and copyrighting a chart, that chart itself cannot be the object of servile imitation. *Sayre v. Moore*, 1 East, 361; *Blunt v. Patten*, 2 Paine, 397; *Johnson v. Donaldson*, 3 Fed. Rep. 22.

The following rule is laid down in Copinger's Law of Copyright, in the first edition, page 90: "The rule appears now to be settled that the compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he 'bestows such mental labor upon what he has taken, and subjects it to such revision and correction as to produce an original result'; provided that he does not deny the use made of such preceding works, and the alterations are not merely colorable." Lord Mansfield said: "In all these cases the question of fact to come before a jury is, whether the alteration be colorable or not? There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints: no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here any more than in the other instances; but upon any question of this nature *the jury will decide* whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby become more serviceable." *Sayre v. Moore*, 1 East, 361, note.

**Adapting Old Map to Correct Principles** cannot be considered as "servile imitation." Thus, in the last case, a sea chart made as a plain map was altered according to the Mercatorian projection. As-



the old chart, except in low latitudes, could not give information with the accuracy necessary to navigators, the alteration was an essential one, and not a piracy.

**Reducing Chart to Smaller Scale** is not "original" work; it is piracy. *Farmer v. Calvert, etc., Co.*, 5 Am. L. T. Rep. 174. See also *Lawrence v. Dana*, 2 Am. L. T. Rep. N. S. 426.

**Township Boundaries**, chart of, when of irregular shape, may be copyrighted. *Farmer v. Calvert, etc., Co.*, 5 Am. L. T. Rep. 174.

**Cards or Tables** exhibiting methodically arranged information are not "charts" within the copyright law. *Taylor v. Gilman*, 24 Fed. Rep. 632.

**Card Exhibiting Colors** of paints sold by a dealer is neither a chart, work of art, nor book, and cannot be copyrighted. *Ehret v. Pierce*, 18 Blatchf. (U. S. C. C.) 302.

**Advertising Cards, etc.**, may be copyrighted, when they contain matter useful to the general public, but not when mere advertisements. *Ehret v. Pierce*, 18 Blatchf. (U. S. C. C.) 302; *Grace v. Newman*, L. R. 19 Eq. 623; *Hatten v. Arthur*, 1 H. & M. 603.

**Who is Entitled to Copyright.**—*Employer's* right to copyright chart made for him is governed by the general copyright law, as to which see *infra*. See also *Copinger's Copyright*, 2d Ed. 126; *Sweet v. Benning*, 24 L. J. C. P. 175; *Cox v. Cox*, 11 Hare, 118; *Grace v. Newman*, 19 Eq. Ca. 623; *Drone on Copyright*, 243, 255. U. S. Rev. St. § 4952, enables the "proprietor" of any chart to obtain copyright. "There can be no reasonable doubt that an employer may become such proprietor by virtue of the contract of employment." *Drone*, 257. But the employer "cannot be considered as the owner of what is written by an author independently of the duties for which the latter is employed and paid." See *Shepherd v. Conquest*, 17 C. B. 427, as to the effect of *suggestion* of the work by employer. Also *Copinger*, 127; *Drone*, 259. *Agreement* as to who shall own may be implied from circumstances and conduct.

**Designer and Drawer.**—Where one person designed a map, and furnished his own rough sketches, newspaper maps, official reports, etc., to another, and fixed the proportion and contents of the design, it was held that though the other person made the drawing, yet the designer was the author within the copyright law. *Stannard v. Harrison*, 24 Law Times Rep. 570; *Drone*, 254.

**Donee** of chart may obtain copyright.

*Lawrence v. Dana*, 1 Am. L. T. R. N. S. 402.

**Judicial Sale.**—Sale of the plates, on execution, does not pass the copyright. *Stephens v. Cady*, 14 How. 528; *Stevens v. Gladding*, 17 How. 447.

According to a *dictum* of the United States Supreme Court, the copyright is not subject to seizure and sale on execution; it is mere "property in notion;" nor does it exist in any particular State or district. *Stephens v. Cady*, 14 How. (U. S.) 528. And see *Stevens v. Gladding*, 17 How. 447.

**Creditor's Bill.**—It was intimated in *Stephens v. Cady* that the copyright might be reached by creditor's bill, but that the court would probably have to decree a transfer in the mode pointed out in the act of Congress. See *Murray v. Ager*, 105 U. S. 126.

**New Edition of Old Chart** may be protected by the original copyright; nor will this protection be lost by slight additions and improvements. But if the improvements are material it is a new chart, and will not have the benefit of statutory copyright unless a new copyright be obtained. *Drone*, 145.

**Pleading**, in equity suit for infringement, must not contain voluminous references to similarities. These are matters of evidence, to be shown by affidavits or exhibits. *Farmer v. Calvert*, 5 Am. L. T. Rep. 172; *Story's Eq. Pl.* § 266.

**Evidence.**—Discovery will not be compelled by a court of equity, where it will subject defendant to penalties under U. S. Rev. St. § 4965, unless these are waived expressly by the plaintiff. *Johnson v. Donaldson*, 3 Fed. Rep. 22; *Sto. Eq. Pl.* § 575; *Daniell's Chancery*, 626.

**Damages under U. S. Rev. St. § 4965** are penal. *Johnson v. Donaldson*, 3 Fed. Rep. 22; *Taylor v. Gilman*, 24 Fed. Rep. 632; *Farmer v. Calvert*, 5 Am. L. T. Rep. 168.

**Infringement by Agent**, without principal's knowledge or consent, cannot subject principal to penalty or forfeiture, but the burden may be on him to show his innocence. *Taylor v. Gilman*, 24 Fed. Rep. 632. See *Com. v. Nichols*, 10 Metc. 259; *Att.-Gen. v. Sidden*, 1 Crompt. & T. 219; *Rex v. Gutch*, 1 Moody & M. 433; *Rex v. Almon*, 5 Burr. 2686.

§ 4965 U. S. R. S., imposing penalties, must be *strictly construed*. *Taylor v. Gilman*, 24 Fed. Rep. 632.

**Statutory Requisites** must be strictly complied with. *Parkinson v. Laselle*, 3 Sawyer, 333.

**Title of Chart.**—The name of the pub-

**CHARTER.** (See FRANCHISE.)—Originally the word seems to have been used as including all sealed instruments, or solemn acts in writing. It is not unfrequently met in old English books, in a sense equivalent to deed. But this broad and general use of the word is now practically obsolete. It is retained to denote writings emanating from government, chiefly the following:

1. A written instrument setting forth privileges or an assurance of rights, granted by the sovereign power to the people, or to some large class of them; such as *magna charta*. A charter is granted by the sovereign, a constitution established by the people.

2. An act of Parliament, of Congress, or of a State legislature, creating a corporation, is called the charter of the corporation.<sup>1</sup>

blishers, and the date and place of publication, were held not to be a part of the title in *American* law. *Farmer v. Calvert*, 5 Am. L. T. Rep. 168.

1. Quoting Abbott's Law Dictionary.

In *Pennsylvania*, under the constitution of 1874, and act of 29th April, 1874, the courts may create social and religious corporations; while the State government (not the legislature) grants charters for manufacturing, mining, railroad, and other trading corporations.

**Municipal Corporations** are created, in England, by act of Parliament or by the king's charter, usually the latter; in this country, by statute only. Their charters are at the will of the legislature, which can alter or repeal at pleasure.

**By-laws.**—Power in the municipality to make reasonable by-laws would exist at common law, but the limit is usually fixed by the charter or by general statutes.

**Interpretation of Municipal Charter** is according to general doctrines. Thus power to prohibit sale without license implies power of enforcement by imposition of penalty, so that it is certain and reasonable. Bishop on Statutory Crimes, § 25. But power to cause forfeiture of property will not be implied, it must be given in express words.

**Proof of Charter.**—(a) *Judicial Notice.*

—Charter of municipality will be taken notice of judicially (1) when it is declared to be a public statute; (2) when it is declared to be public or general in its nature or purposes, though there be no express provision to that effect. 1 Dillon's Munic. Corp. § 83. *Supplements or Amendments.* Such declaration in the charter extends likewise to *supplements*. *Newark Bank v. Assessors*, 30 N. J. Law, 22; *State v. Bergen*, 34 N. J. Law, 439; *New Jersey v. Yard*, 95 U. S. 112.

(b) Primary evidence of special charter of municipality is (1) the original, or an authenticated copy; or (2) parol evidence

of acts, reputation, etc. 1 Dillon's Munic. Corp., § 84.

**Repeal** of charter does not take place, where both may stand together. 1 Dillon's Munic. Corp., § 87; Bishop on Statutory Crimes, § 156; and see § 151.

**Dissolution** may be, in England, (1) by act of Parliament; (2) by loss of integral part; (3) by surrender; (4) by forfeiture. In the *United States* it may only be by act of the legislature. See 1 Dillon's Munic. Corp., § 166 (110).

**Outline of Ordinary Municipal Charter.**

—See 1 Dillon's Munic. Corp., § 39.

**Acceptance** of the charter is unnecessary, unless the statute requires it. 1 Dillon, § 44; *Berlin v. Gorham*, 34 N. H. 266.

**Delegation of Power** is illegal. Mayor and aldermen, empowered to issue licenses, cannot delegate that authority. 1 Dillon, § 96.

**Special Powers** as to wharves, ferries, etc. See 1 Dillon, title Charter in index; also *infra*.

**Private Corporations**—The charter is an *irrevocable contract* between such a corporation and the State. *Dartmouth College v. Wood, & Wheat* (U. S.) 663. In *Pennsylvania*, however, under constitutional and statute law, the legislature has power to alter, revoke, or annul any charter of incorporation now existing and revocable, or any that may hereafter be created, in such manner that no injustice shall be done to the corporators.

**Eminent Domain.**—A charter may be taken under the power of eminent domain. *Phila., etc., Co.'s Appeal*, 102 Pa. St. 123; *Hare on Const. Law*, Lecture xvii.

**Delegation of Power to Charter Corporations** is illegal; but its charter may be made to depend on certain *preliminary conditions*, the performance of which is to be ascertained by some public officer. 1 Morawetz on Private Corporations, § 15.

**Acceptance** is essential. *Rex v. Vice-Chancellor*, 3 Burr. 1661; *King v. Passmore*, 3 T. R. 240; *Bailey v. The Mayor*, 3 Hill (N. Y.), 531; *Short v. Unangst*, 2 Watts & Serg. (Pa.) 45; *Ellis v. Marshall*, 2 Mass. 279.

Independently of legislative provision, no particular form of acceptance is necessary; any act clearly showing intent is sufficient. *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64, 71; *Covington v. Covington, etc., Co.*, 10 Bush (Ky.), 69. But where a stockholder's assent is necessary, if he dissent he must actively make his dissent known, and restrain every attempt to act under the charter. *Owen v. Purdy*, 12 Ohio St. 79.

**Conditions Precedent** do not delay the existence of the corporation, unless such seems to be the legislative intent. See *Cincinnati, etc., R. v. Cole*, 29 Ohio St. 126; *Crocker v. Crane*, 21 Wend. 211; 1 Morawetz on Private Corporations, § 26.

**Fact of Existence** is for the jury. *Hammond v. Straus*, 53 Md. 1.

**Prescription.**—Corporations may exist by prescription. 2 Kent Com. 277 (a). It is said in *Angell & Ames on Corporations*, § 70: "It may, indeed, be safely relied on as a sound imposition, that, when an association of persons have for a long time acted as a private corporation, have been uniformly recognized as such, and rights have been acquired under them as a corporation, the law will countenance every presumption in favor of their legal corporate existence; at least, unless against the sovereign."

**Corporate existence cannot be denied** by one who deals with an association as a corporation. *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161, 169, 170; *Oregonian R. Co. v. Oregonian Nav. Co.*, 22 Fed. Rep. 245. The existence can only be attacked by the State. 2 Morawetz on Pri. Cor., § 750. See Id. § 692, where the last case cited—*Oregonian R. Co. v. Oregonian Nav. Co.*—is disapproved so far as it acts on the idea that the rule just stated rests on estoppel.

**Expiration of Separate Franchise.**—But in *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, it was held that where a bridge corporation was created by the State, but its franchise of taking tolls depended on the assent of county supervisors, the right to take toll was separate from the corporate existence; and the period allowed to the corporation by the supervisors having expired, it was competent for one sued for tolls to show the fact. See also *City of London v. Vanaere*, 12 Mod. 270; *Rex v. Gregory*, 4 T. R. 240, 242, note a.

**Dissolution** may not be here, as in England, by act of the legislature, except under peculiar laws, as in Pennsylvania. It may, however, take place (1) by the loss of an integral part; (2) by surrender; (3) by forfeiture; (4) by expiration of the term of its duration.

1. **BY THE LOSS OF AN INTEGRAL PART.**—The old rule that loss of integral parts, where restoration is impossible, dissolves the corporation, still has force, but it has no effect upon most corporations of the present day, with their transferable shares.

*Death of all the members* cannot dissolve such a company, for the shares must descend to next of kin or legatees. *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. (Mass.) 52; *Russell v. McLellan*, 14 Pick. (Mass.) 69.

*Failure to hold elections* does not cause a dissolution. Usually the charter or general law provides that old officers shall hold over till their successors be chosen, and that when there are no officers the corporators may elect others. *State v. Barron*, 58 N. H. 370; *Commonwealth v. Cullen*, 13 Pa. St. 133; *Harris v. Miss. Valley R.*, 51 Miss. 603.

**Insolvency.**—Nor is failure to hold property, or sufficient property, a dissolution. The State, by suit for forfeiture, or the members through surrender, can alone terminate the corporate existence. *Coburn v. Boston, etc., Co.*, 10 Gray (Mass.), 245.

2. **SURRENDER.**—*Acceptance by the State* is essential, and ordinarily this must be by act of the legislature. *Town v. Bank*, 2 Doug. (Mich.) 538; *Wilson v. Central Bridge*, 9 R. I. 590; *Enfield Bridge Co. v. Connecticut River Co.*, 7 Conn. 45, 46.

**Surrender by Majority Vote.**—This may be done, for such is the implied condition in the charter of every pecuniary corporation. *Lanman v. Lebanon Valley R.*, 30 Pa. St. 42; *Treadwell v. Salisbury*, 7 Gray (Mass.), 393; *Angell & Ames on Corporations*, § 772; Morawetz on Private Corporations, § 413. The surrender, however, must be in good faith; and the dissenting members cannot be compelled to take shares in a newly formed company as compensation for their old interests. Nor can directors or trustees, with a view to their individual emolument and in disregard of the interests of the corporators, sell the property to a new corporation with the intent to shut out members. *Abbott v. Rubber Co.*, 33 Barbour (N. Y.), 579. And the power of the majority to surrender does not authorize a continuance of the old company with fundamental changes in its purposes; does not, e.g., warrant the extension of a railroad line, alteration

**CHARTER-PARTY.** (See also BILL OF LADING; DEMURRAGE; FREIGHT; MARITIME LIEN; SHIPPING.)

*Definition*, 143.

*Who May Make*, 143.

*General Nature*, 144.

*Usual Contents*, 145.

*Special Terms Construed*, 148.

*Implied Engagements*, 149.

*Construction of Contract*, 150.

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*Obligation of Parties*, 152.

*Vessel Let on Shares*, 153.

*Charter to Government*, 153.

*Dissolution of Contract*, 154.

*Damages for Breach of Contract*, 154.

*Jurisdiction Remedy*, 155.

**1. Definition.**—A charter-party is a contract whereby the owner of a ship or other vessel lets the whole or a part of her to another for the conveyance of goods in consideration for the payment of freight.<sup>1</sup> It is usually in writing,<sup>2</sup> not under seal,<sup>3</sup> but may be made by word of mouth.<sup>4</sup>

**2. Who May Make.**—In a foreign port the master<sup>5</sup> of the vessel may make a charter-party provided that no agent of the owner be present;<sup>6</sup> but in the home port, or the place of residence of the

of route, or consolidation with another company. There are authorities upholding such action by the majority of the corporators, but the weight of authority is the other way. See Morawetz on Priv. Corp. § 402.

**3. FORFEITURE.**—Non-user or misuser does not dissolve. The corporate existence continues until the State, through legal proceedings, ascertains the forfeiture and takes away the charter. *Elevated R.*, 70 N. Y. 337, 338; *Irvine v. Lumberman's Bank*, 2 W. & S. (Pa.) 204.

*Fraud against the State*, in obtaining the charter, will not vitiate the charter so long as the State does not elect to set it aside. *Bridge Co. v. Bridge Co.*, 7 Pick. (Mass.) 344; *Centre, etc., Co. v. McConaby*, 10 S. & R. (Pa.) 140. For fraud does not make grants or contracts void, but only voidable.

**4. EXPIRATION** of the term of its existence dissolves the corporation; but those who continue to act with the society as a corporation cannot deny its corporate character. See *supra*. See also above for expiration of a separate franchise of a corporation.

**Charter of Foreign Corporation** cannot be altered. This is not because of any contract between it and the State, which granted it no charter. It is because to do so would be to violate the contract between the corporators. Morawetz on Private Corporations, § 1059.

**Proof of Charter.**—This is unnecessary in a federal court within the State granting it, when the charter is a public law. *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227. In *England* and some *American States*, the plea of the general issue does not acknowledge the fact of

incorporation; in other States it does. Angell & Ames, § 632. But which are public charters, needing no proof, and which are private, cannot be ascertained by any certain, general rule, as the decisions are at variance. Morawetz on Prin. Corp. § 38.

**Accepting New Charter from Another State** does not relieve from the obligations to the State granting the first charter. *Comm. v. Pittsburg & Connellsville R.*, 58 Pa. St. 26.

**General Statutes** apply to a charter, unless they are expressly repealed by the charter. *Pratt v. Atlantic R.*, 42 Me. 579.

**1.** Bouv. Dict. 259; 3 Kent, 301.

The term is derived from the old custom of writing contracts on a card and cutting it into two parts from top to bottom, one part being delivered to each party, the card so cut being called *charta partita*.

**2.** *Hurry v. Hurry*, 2 Wash. C. C. 145.

**3.** *Brown v. Ralston*, 4 Rand. (Va.) 504.

**4.** *Taggard v. Loring*, 16 Mass. 336.

**5.** But the master of a vessel has no right to make a charter-party in a foreign port for the purpose of giving a creditor security for a debt. *Hurry v. Hurry*, 2 Wash. C. C. 145.

Nor have the agents, even when part owners, the right to charter a vessel to a creditor of their own as a means of enabling him to repay himself out of the earnings. *The A. M. Bliss*, 2 Low (D. C.), 103.

A charter-party, when so made, will be void, as against the other owners, and as against the vessel. *The A. M. Bliss*, 2 Low (D. C.), 103.

**6.** *Freeman v. Buckingham*, 18 How.

owners, their assent or that of the managing owner is requisite.<sup>1</sup>

Charter-parties are usually effected by the agency of brokers, who are employed by the ship-owner, and are paid a commission.<sup>2</sup>

**3. General Nature.**—A charter-party is not a conveyance within the recording acts of Congress,<sup>3</sup> and need not therefore be recorded.<sup>4</sup>

A personal agreement between the owners to embark in a common enterprise is not a charter-party.<sup>5</sup> The owner may either let the capacity or burden of the ship, continuing the master and crew in their employment,<sup>6</sup> or he may surrender the entire ship to the charterer, who then assumes possession and control, and provides himself with master and crew.<sup>7</sup>

When a charter-party authorizes the charterer "to relet the vessel, in whole or in part," the charterer is authorized to make sub-contracts of affreightment, and the vessel will be bound thereby.<sup>8</sup>

If the charter-party be under seal, it is governed by technical rules incident to instruments under seal.<sup>9</sup>

When a charter-party is a contract for the carriage of goods, the ship-owner has a lien on the cargo for his freight money, but when

(U. S.) 191; *Hurry v. Hurry*, 2 Wash. C. 145.

A person authorized to act for the charterers of a vessel as their agent to procure a cargo in a foreign port is not thereby authorized to modify or cancel a charter-party concluded by his principals.

*Ye Ling & Co. v. Corbitt*, 9 Fed. Rep. (D. C.) 433. *Cargo of salt*, 4 Blatch. C. C. 224.

1. *The Schooner Tribune*, 3 Sum. C. C. 144, 149. And this is true notwithstanding the fact the vessel is sailed on shares. *Swan v. Ruckman*, 25 How. (N. Y.) Pr. 468.

An informal agreement in the nature of a charter-party, acted upon by parties, may be treated as equivalent to a charter-party. *Lidgett v. Williams*, 4 Hare, 462.

A charter-party made in good faith by the managing owner is binding on all interested in the vessel. *Bangs v. Lowber*, 2 Cliff. C. C. 157; *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch (U. S.), 39.

But a ship-broker at the home port of the vessel cannot bind the owners by a charter-party executed upon the mere authority of a telegram from the master, without consulting the managing owner; nor will the silence of the managing owner after notice operate as a ratification, if such notice contains an incorrect statement of the facts. *Craig v. Magee*, 11 Fed. Rep. C. C. 175.

Whilst the managing owner has implied authority to charter he has not a

like authority to cancel an existing charter. *Thomas v. Lewis*, 4 Ex. D. 18.

2. *The Nouva Raffaelina*, L. R. 3 Adm. & E. 483; *Cross v. Pagliano*, L. R. 6 Ex. 79.

3. *Mott v. Ruckman*, 3 Blatch. C. C. 71; *Hill v. The Golden Gate*, 1 Newb. (D. C.) 309.

4. *Hill v. The Golden Gate*, 1 Newb. (D. C.) 309.

5. *Vandewater v. The Yankee Blade*, 1 McAll. (D. C.) 9.

6. *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch (U. S.), 39; *Donahoe v. Kittell*, 1 Cliff. C. C. 135.

Such a contract is a mere covenant for the conveyance of merchandise, or for the performance of a stipulated service. *Parrish v. Crawford*, 2 Strange, 1251; *Colvin v. Newbury*, 1 Clark & F. 283. And the owner is responsible, under such circumstances, for the conduct of the master and crew. *Gracie v. Palmer*, 8 Wheat. (U. S.) 605.

7. *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch (U. S.), 39; *Clarkson v. Edes*, 4 Cow. (N. Y.) 470.

8. *The T. A. Goddard*, 12 Fed. Rep. (D. C.) 174.

And the bill of lading is a reletting in part. *The T. A. Goddard*, 12 Fed. Rep. 174.

9. A contract of affreightment, if not under seal, may be dissolved at any time, before breach, by consent of the parties, and such consent need not be expressed in an instrument under seal; but if the charter-party itself be under seal, it can

the charter-party amounts to a demise of the ship, the rule is otherwise.<sup>1</sup>

**4 Usual Contents.**—Charter-parties are ordinarily printed in common form, the unusual terms agreed upon between the parties being inserted in writing.

The order of the various settled provisions of the document is usually as follows:<sup>2</sup>

1. The name of the contracting parties. The description of the ship; her present situation or local position, either at sea or in dock.

2. Warranty of fitness of the ship for the adventure.

3. The promise by the ship-owner that the ship shall, with all convenient speed, load, proceed, and deliver, on being paid freight, a full and complete cargo (provisions as to excepted perils).

4. The promise of the charterer to pay freight and load within a prescribed time, or pay demurrage.

5. Lay-days agreed on by the ship-owner and the rate of demurrage, if stipulated time is exceeded.

6. Clause of *cesser* of liability.

7. Penalty for non-performance.

The usual and printed parts of the contract are construed with the same formality as covenants in a deed.<sup>3</sup>

Preliminary statements as to the burthen, build, and location of a vessel are the nature of representations or declarations of what is known, and therefore ought to be stated with extreme accuracy.<sup>4</sup>

only be discharged or dissolved by an agreement under seal. *Gross v. Nugent*, 5 B. & A. 65; *Ellen v. Topp*, 6 Ex. 424.

1. *Newbury v. Calvin*, 8 B. & Cr. 166.  
2. The above is a skeleton of the ordinary form. In practice, based on this outline, charter-parties of great length and complexity are not infrequently drawn up. The Law of Merchant Shipping (Foard), 355.

3. The Law of Merchant Shipping (Foard), 257.

4. Thus a statement that the ship is lying in a certain dock," or is "A 1 at Lloyds," or that she will sail on a certain day, is or may be an allegation upon which the entire contract will be based, and in particular cases, have been construed as conditions precedent, which, if not performed, entitle the promisee to renounce the contract. *Glaholm v. Hays*, 2 M. & G. 257; *Oliver v. Fielden*, 18 L. J. Ex. 353.

If the ship is named, the charterer is entitled to the ship he bargains for, and may have an injunction to restrain a mortgagee from exercising his power of sale or from interfering with the ship for any other purpose. *De Mattos v. Gibson*, 28 L. J. Ch. 165.

The statement that the ship is lying in a certain dock or at a certain wharf imports a warranty and renders the contract voidable, if not in part performed. *Behm v. Burness*, 32 L. J. Q. B. (Exch.) 204.

The statement of the burthen or tonnage of a ship as "about so many tons" is usually considered to be a description, and will not ordinarily be deemed a warranty unless so agreed, or the surrounding circumstances established that a vessel of a particular size and tonnage was essential. *Watts v. Camors*, 10 Fed. Rep. 145. A variance to the extent of a ton or half a ton in size might be fatal if it was a warranty, and if an excess would frustrate the contract. *Windle v. Barker*, 25 L. J. Q. B. 349. A statement that a ship will sail on or before a given date, is not necessarily a condition precedent, but would entitle a charterer to recompense in damages if not complied with. *Hall v. Cazenove*, 4 East, 477; *Deffell v. Brocklebank*, 3 Bligh, 561.

If the vessel be guaranteed to stow and carry a specific amount of cargo, the charterers are not bound to accept a vessel of less capacity. *Simonetti v. Foster*, 2 Fed. Rep. 415.

And if the charterer suffers loss in con-

Preliminary statements as to the ship being tight, stanch, and strong, and in every way fitted for the voyage, form a contract of seaworthiness, which, even if not expressed, is involved in all contracts for the carriage of goods, whether by charter-party or otherwise.<sup>1</sup>

The obligation to sail "forthwith," or "with all convenient speed," does not mean at this very moment nor at any specific period of time; it means with all proper despatch and without unreasonable delay.<sup>2</sup>

Where the ship is to load at a named port, and the promise is qualified as usual by the term, "or as near thereto as she can safely get," the ship complies by loading as near as possible without running an unnecessary risk.<sup>3</sup>

sequence, he is entitled to recover damages. *Gomila v. Culiford*, 20 Fed. Rep. 734.

The vessel is not liable *in rem* for misrepresentation or concealment of facts by her master or owner in respect to her tonnage or capacity. *The Eli Whitney*, 1 Blatch. C. C. 360.

But fraudulent representation in these regards may defeat the right to freight. *Weston v. Minot*, 3 Wood & M. C. C. 448.

1. *Richardson v. Staunton*, 41 L. J. C. P. 180; *Steel v. State Line St. S. S. Co.*, 3 Asp. C. 72.

Under a charter-party the contract of seaworthiness is, that the vessel shall be seaworthy at the time she leaves or sails actually on the voyage. *Worms v. Story*, 25 L. J. Ex. 1. And the ship-owner must keep his ship seaworthy unless prevented by perils of the sea of unavoidable accidents. *Werk v. Leathers*, 1 Woods C. C. 271. *The Bark Gentleman*, *Olcott (D. C.)* 115. And this implies that the vessel must be fit to carry such a cargo as was actually carried. *The Lizzie W. Virden*, 8 Fed. R. 624.

The law places on the owner of the vessel the obligations of a warrantor. *McCann v. Conery*, 11 Fed. R. 747.

It is an ordinary presumption that a ship is seaworthy and her machinery in good order when she undertakes a voyage. *Pyman v. Von Singen*, 3 Fed. Rep. 802.

The owner is answerable for visible as well as for latent defects, whereby the cargo is damaged. *Hubert v. Recknagel*, 13 Fed. R. 912.

The obligation of seaworthiness in reference to passengers has been said not to have existed at common law. *Christie v. Gredd*, 2 Camp. 81; *Crofts v. Waterhouse*, 3 Bing. 319.

But the modern decisions extend the

doctrine of seaworthiness to passengers as well as to goods. *Cohen v. Davidson*, 2 Q. B. D. 455; *Steel v. State Line S. Co.* 3 App. C. 72.

This warranty also involves the obligation that the ship shall sail with a fit and adequate crew, a sufficient and capable master, and that she shall be properly found. *Thompson v. Hopper*, 27 L. J. Q. B. (Ex. D.), 441.

And the ship must be furnished with ground tackle sufficient to enable her to meet ordinary peril. *Wilkie v. Geddes*, 3 Doug. 57.

With proper and necessary anchors. *Harrison v. Douglass*, 3 Ad. & E. 396. And with a competent master as well as properly manned. *Tait v. Levi*, 14 East, 481; *De Mattos v. Gibson*, 28 L. J. Ch. 498. A supply of suitable compasses is a prerequisite to seaworthiness. *Lord v. G. N. & P. S. Co.*, 4 Sawyer (D. C.), 292.

And the master may not load a greater cargo than the ship contracted for will safely carry. *Weir v. Aberdeen*, 2 B. & A. 320; *Foley v. Tabor*, 2 F. & F. 663.

2. *Hudson v. Hill*, 43 L. J. C. P. 273. "Directly," would mean less than in a reasonable time, but would not necessarily mean immediately. *Thompson v. Gibson*, 10 L. J. Ex. 241; *Duncan v. Topham*, 18 L. J. C. P. 310.

As to the engagements involved in the word "immediately." *Queen v. Justices of Berks*, 4 Q. B. D. 469; *Falsdike v. Stone*, 3 L. R. C. P. 607.

A loss by delay or deviation, if going to the root of the contract and frustrating the purposes of the voyage, is a condition precedent. But short of this, the charterer has an action for damages. *McAndrew v. Chapple*, 1 L. R. C. P. 643; *Tarrabochia v. Hickie*, 26 L. J. Ex. 26.

3. *Shield v. Wilkins*, 19 L. J. Ex. 238. If the approach be blocked by ice, she



"To load a full and complete cargo" involves an obligation to fill the whole reach and burden of the ship, and the term "cargo" means the entire load of the ship.<sup>1</sup>

As an alternative expression, the words "other lawful merchandise" are frequently used. When the words follow a cargo of specified goods, they are interpreted as meaning goods of the same kind.<sup>2</sup>

The words "and there deliver at freighter's risk and expense the same on being paid freight" have been construed as an agreement that the owner must be ready and willing to deliver on payment of the money.<sup>3</sup>

The perils excepted under the usual form of charter-party are identical with those ordinarily used with the bill of lading.<sup>4</sup>

The same is also true of the demurrage clause.<sup>5</sup>

must wait until the impediment be removed.

A temporary obstruction is no dissolution of the contract. *Metcalf v. Britannia Iron Works Co.*, 2 Q. B. D. 423.

1. *Borrowman v. Drayton*, 2 Ex. Div. 15. Ordinarily, the terms mean a full and complete cargo, according to the usage of the port. *Cuthbert v. Cummings*, 11 Ex. D. 405.

What is a "full and complete cargo," may be determined by the usage of trade. *Duckett v. Satterfield*, 3 L. R. C. P. 227. The property to be carried must be placed under the control of the carrier or his servants. *Grosvenor v. N. Y. C. R. Co.* 39 N. Y. 34.

And delivery must be made to a servant whose proper duty is to receive it and not to an irresponsible servant or agent. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388.

If there be an agreement to freight the hull of the ship without specifying the burden, the ship must be filled; the hirer must pay his freight money, full or empty. *Duffie v. Hays*, 17 Johns. (N. Y.) 327; *The Brig Cynthia*, 1 Pet. Ad. (D. C.) 203; *Kleine v. Catara*, 2 Gall. C. C. 61.

A failure on the part of the charterer to comply with his engagement, accompanied by the sailing of the vessel empty, will render the charterer liable for the sum which would have been earned by the ship, if he had complied with his covenant. *Kleine v. Cattara*, 2 Gall. C. C. 61.

2. *Gibbs v. Lawrence*, 30 L. J. Chanc. 170; *Russian St. Nav. Co. v. Silva*, 13 C. B. N. S. 610.

The term refers to the kind rather than to the amount of the goods. If lawful and not diseased or contraband they must be received, whether heavy or light,

agreeable or disagreeable. *Weston v. Minot*, 3 Wood. & M. C. C. 436.

If the words "other lawful merchandise" follow a declaration of assorted goods, with specified rates for each assortment, the freighter must pay on the basis of the stipulated quantity of the enumerated goods shipped. *Cockburn v. Alexander*, 6 C. B. 791.

3. *Duthie v. Hilton*, 4 L. R. C. P. 138.

Under an ordinary bill of lading freight is demandable only when the goods are discharged from the vessel and an opportunity had for their examination by the party who is to receive them; but the carrier is not bound to make an actual delivery, except upon payment of the freight. 1265 *Vitrified Pipes*, 14 *Blatch. C. C.* 274.

"Freight on right delivery" is the same as "freight upon right delivery." *Paynter v. Jones*, 2 L. R. C. P. 348.

When freight is made payable "after delivery," delivery is a condition precedent. *Potage v. Cole*, 1 Wm. Sanders, 356; *Foster v. Coleback*, 28 L. J. Ex. 81.

A delivery on the usual wharf will discharge the carrier. *Hyde v. Trent & Mersey Nav. Co.*, 5 T. R. 389.

But the master is not entitled to deliver goods immediately on the arrival of the vessel and without notice to the owner, and if he should land them, and they should be destroyed, he will be responsible to the owner for the loss. *Gatliffe v. Bourne*, 4 Bing. N. C. 314.

But it is a good answer to the liability of the ship-owner to say that the goods were safely delivered at the wharf and taken care of there until destroyed by fire. *Gatliffe v. Bourne*, 4 Bing. N. C. 314.

4. For decisions thereon, see BILL OF LADING.

5. For decisions thereon, see DEMURRAGE.

As charter-parties are frequently executed by agents, the question which most frequently arises with regard to the signature is, whether, where an agent, acting for his principal, has entered into a charter-party, he has entered it in such a form as to render himself personally liable or not. This depends upon the intention of the parties as disclosed by the language of the contract itself and the mode in which it is done. Where a person signs a contract in his own name, without qualification, he is *prima facie* a contracting party, and, to prevent this liability from attaching, it must appear clearly from other portions of the agreement that he did not intend to act as a principal.<sup>1</sup>

If a contract not only describes one of the parties as agent, but clearly indicates that he is acting only as such for a named principal, he is relieved from liability although his signature is unqualified.<sup>2</sup>

The signature, however, "as agent," is the strongest evidence to show that the person signing incurs no personal liability.<sup>3</sup>

Charter-parties of late years have contained provisions limiting the liability of the parties; as, for example, to absolve the charterer from all liability for demurrage and other incidental charges after the cargo is shipped, or to exempt the vessel owner from liability after the cargo has been landed.

This clause is technically known as the Cesser Clause, and its construction has given rise to some difficulty.<sup>4</sup>

The measure of damages for the breach of the charter-party is necessarily the price which has been agreed upon, as the value of the ship per day or hour or voyage; but where the parties agree that a specific sum should be payable as a penalty for all breaches, it will be sustained if it be in effect liquidated damages.<sup>5</sup>

**5. Special Terms Construed.**—"To be employed" means not only the act of not doing anything, but also to be engaged to do it; to be under contract or orders.<sup>6</sup> "Empty" means without cargo.<sup>7</sup> The term "incident to the navigation of the river" has the same signification as the words "perils of navigation," or "dangers of the sea," or "dangers of navigation."<sup>8</sup>

The covenant "dangers of the seas excepted" does not cover a loss by fire originating on board.<sup>9</sup> "With all possible despatch" is a warranty, and goes to the root of the contract, and is a condi-

1. *Parker v. Winlow*, 7 E. & B. 942.

2. *Gadd v. Houghton*, 1 Ex. Div. 357.

3. *Deslandes v. Gregory*, 2 E. & E. 602.

4. *Maude and Pollock's Law of Merchant Shipping*, 335, 336; *Price v. Green*, 16 M. & W. 346.

5. Where there is uncertainty whether the parties intended the sum named as a penalty or as damages, the court will be inclined to view as a penalty. *Barton v. Glover*, Holt N. P. C. 43.

Mere largeness of amount will not, however, determine it to be so. *Herbert*

*v. The Salisbury & Yeovil Ry. Co.*, 2 L. R. Eq. 221.

The use of the term "liquidated and ascertained damages," with a declaration that it is not a penalty, is not decisive. *Davies v. Penton*, 6 B. & C. 216; *Green v. Price*, 13 M. & W. 701.

6. *U. S. v. The Catherine*, 2 Paine C. 721.

7. *Perrine v. The Chesapeake & Del. Can. Co.*, 9 How. (U. S.) 172.

8. *The Waltham*, 13 Opin. Att.-Gen.

9.

*Airey v. Merrill*, 2 Curt. (D. C.) 8.

tion precedent to the right of recovery.<sup>1</sup> If there be a stipulation for "despatch in discharging," the vessel is entitled to demurrage for delay caused in waiting her turn in respect to other vessels.<sup>2</sup>

But "customary despatch" means the usual despatch of persons who are ready to receive a cargo, and excludes all custom in accordance with which the charterer claims the right to decline to receive cargo simply because it was to his advantage to postpone;<sup>3</sup> it means despatch in accordance with the lawful, reasonable, and well-known customs of the port.<sup>4</sup> But neither custom nor usage is allowed to give meanings to words, or to annex incidents to contracts or to vary or alter the legal construction, or to interpret them, so as to conflict with the statute law.<sup>5</sup> "Working days" means days as they succeed each other, exclusive of Sundays and holidays.<sup>6</sup>

**6. Implied Engagements.**—There are certain terms which, even if not expressed in the contract of affreightment, must ordinarily be regarded as implied. Unless there be an express agreement to the contrary, the ship-owner is held impliedly to warrant that the ship he provides shall be seaworthy and in a condition to perform the voyage and undergo the perils of the sea and other included risks to which she must of necessity be exposed in the course of the voyage.<sup>7</sup> In the absence of any expressed provision as to time, the law implies an obligation on the part of the ship-owner to furnish a vessel within a reasonable time,<sup>8</sup> and to prosecute the voyage without unnecessary deviation.<sup>9</sup> Apart from any expressed contract by a charter-party, a common carrier of goods for hire would ordinarily be bound to take reasonable care of goods intrusted to him from the moment of receiving them.<sup>10</sup> And to transport and deliver them with reasonable care, skill, and diligence.<sup>11</sup> To carry them safely in the usual manner and not circuitously.<sup>12</sup> To obey the directions of the owner in respect to

1. *Lowber v. Bangs*, 2 Wall. (U. S.) 728; *Deshong v. Cosby*, 1 Woods C. C. 289.

2. *Keen v. Audenreid*, 5 Ben. (D. C.) 535.

3. *Lindsay v. Cusimano*, 10 Fed. R. (D. C.) 302.

4. *Smith v. 60,000 ft. of Lumber*, 2 Fed. R. (D. C.) 396.

5. *Noble v. Durell*, 3 T. R. 271; *Hockin v. Cook*, 4 T. R. 314.

6. *Pedersen v. Eugster*, 14 Fed. R. (D. C.) 422.

7. *Kopitoff v. Wilson*, 1 Q. B. D. 377. The ship-owner not only undertakes that the ship shall be fit to carry a cargo of merchandise, but where a particular cargo has been named in the contract, he undertakes that the ship shall be fit to carry the cargo named. *Stanton v. Richardson*, L. R. 7 C. P. 421.

8. *Stanton v. Richardson*, L. R. 7 C. P. 421.

9. *Davis v. Garrett*, 6 Bing. 716.

But a deviation for the purpose of saving life is justifiable. *Scaramanga v. Stamp*, 4 C. P. D. 316. In general a delay by deviation is the same as a delay in starting. *McAndrew v. Chapple*, L. R. 1 C. P. 643.

10. *Nugent v. Smith*, 1 C. P. D. 423; *The Chasta*, 4 L. R. A. & E. 446.

11. *The Parana*, 1 P. D. 455.

12. *Davis v. Garrett*, 6 Bing. 716.

But he is not bound to adopt the shortest route. *Myers v. L. & S. W. R. Co.*, 5 L. R. C. P. 1. Nor is he obliged to adopt extraordinary means to insure it. *Bridson v. G. N. R. Co.*, 28 L. J. Ex. 51. He is bound to carry, if a common carrier, by the route which he professes to be his route, and cannot justify a delay because it is said to be a usual mode consequent on particular method of delivery. *Hales v. L. & M. W. R. Co.*, 32 L. J. Q. B. 292.

them.<sup>1</sup> Subject to the perils excepted, he is responsible for the safe delivery of articles and for the same weight of merchandise that he has actually in truth received.<sup>2</sup> He is excused from the performance of his obligation, in reference to the foregoing liabilities, when prevented by the act of God or the king's enemies.<sup>3</sup>

The carrier is also excused if the contract to carry, though possible and legal at the time it is made, becomes impossible afterwards by an act of God or its performance be illegal.<sup>4</sup>

**7. Construction of Contract.**—The usual and printed portions of the contract are construed with the same formality as covenants in a deed.<sup>5</sup> The informal and written parts are necessarily mercantile and uncertain, often hurriedly framed with a view to immediate exigencies and without much consideration, and with regard thereto, it is the duty of the court to give effect, if possible, to the intention of the parties as apparent on the instrument.<sup>6</sup>

If there be any reasonable doubt as to the sense and meaning of the whole instrument, written words are entitled to have a greater effect attributed to them than to printed ones.<sup>7</sup> It is the province of the court to construe all written contracts, but if particular words have obtained by mercantile or other usage a peculiar meaning, it is for the jury to say what the meaning of these expressions is, and then for the court to decide on the meaning of the contract.<sup>8</sup>

**8. Custom and Usage.**—Charter-parties may be explained but not contradicted by evidence of usage of the particular trade to which the contract relates.<sup>9</sup> The general custom of merchants, like

1. *Bailey v. H. R. R. Co.*, 49 N. Y. 70; *The Felix*, 2 L. R. A. & E. 273.

2. *Davidson v. Gwynne*, 12 East. 381; *Brown v. Powell St. Co.*, 10 L. R. C. P. 562.

3. *Nugent v. Smith*, 1 C. P. D. 19, 423; *Grey v. Mobile Trading Co.*, 55 Ala. 387.

4. *Baly v. De C. Respigney*, 4 L. R. Q. B. 130; *The Teutonia*, 3 L. R. A. & E. 394.

5. *The Law of Merchant Shipping* (Foard), 257.

6. The intention of the parties, so far as it is just and reasonable and in accordance with law, governs. *Lowber v. Bangs*, 2 Wall. (U. S.) 736; *Richie v. Atkinson*, 10 East. 295.

If, however, the meaning be clear, it is conclusive, and a claim that it does not express the intention of the parties will not be entertained. *The Hermitage*, 4 Blatch. C. C. 474.

In the earlier cases, harsh and oppressive stipulations were not infrequently rejected or explained away, the effect of which was to practically make for the parties a new contract. The present rule seems to be to give to clear and

unambiguous stipulations their obvious meaning without reference to the possible hardships of the consequence. *Stadhard v. Lee*, 3 B. & S. 364.

The court will not, at the instance of one party, so construe a contract that it will be necessarily void at the option of that party, unless it appears that both parties intended it to be so construed. *Watts v. Camors*, 10 Fed R. C. C. 145.

The intent of the parties is not to be inferred from single clauses or from single facts, but from the tenor of the whole instrument construed in the light of facts which are admissible in explanation of its intent and meaning. *The Abberfoyle*, Abb. Ad. (D. C.) 255; *The Volunteer*, 1 Sum. C. C. 551; *The Anna Kimball*, 2 Cliff. C. C. 4.

7. *Robertson v. French*, 4 East. 130; *Pearson v. Goshen*, 33 L. J. C. P. 265.

But printed words cannot be rejected in order to give effect to written passages. *German v. Tyrie*, 33 L. J. Q. B. 97; *Mayer v. Lovell*, 9 L. R. C. P. 107.

8. *Smith v. Bland*, Ry. & M. 260; *Hutchinson v. Bowker*, 5 M. & W. 535.

9. *Gould v. Oliver*, 2 M. & Gr. 208.

proof of usage, is admissible to interpret the otherwise indeterminate intentions of the parties, and to ascertain the extent and nature of their contract.<sup>1</sup> But neither usage nor custom is allowed to give meanings to words, or to annex incidents to contracts, or to vary or alter their legal construction, or to so interpret them as to bring them in conflict with law.<sup>2</sup>

Charter-parties may be explained but not contradicted by evidence of usage of the particular trade which the contract relates, or to explain and ascertain the true meaning of a particular word or words when they have various meanings.<sup>3</sup> Of the general custom of merchants, courts will take judicial notice, but particular customs of a port or place by specific usages must be proven.<sup>4</sup>

**9. Conditions Precedent.**—In determining whether particular statements do or do not amount to conditions precedent, the rule of construction is to discover, if possible, the intentions of the parties as apparent on the instrument and from surrounding circumstances.<sup>5</sup> Generally speaking, any stipulation which goes only to a portion of the consideration, or, in other words, the breach of which would deprive the party who has a right to insist upon it of a portion only of the benefit of his contract will not be construed as a condition precedent.<sup>6</sup>

Any particular stipulation which if broken would wholly frus-

1. *The Reeside*, 2 Sum. C. C. 567; *Oelricks v. Ford*, 23 How. (U. S.) 63.

Evidence of usage is admissible to explain what is ambiguous in the charter-party, but it is inadmissible to vary or contradict what is plain. *Turnbull v. The Citizens' Bank of La.*, 16 Fed. R. C. C. 145.

In a written instrument of charter-party where an unambiguous term is used, which has an accepted signification both in commercial and judicial language, proof of usage will not be permitted to show that such a term has a local meaning repugnant to its settled sense. *Pedersen v. Eugster*, 14 Fed. R. (D. C.) 422.

The evidence as to usage is restricted to the fact of a general usage and practice. The judgment or opinion of the witness is inadmissible. *Cunningham v. Fond-bianque*, 6 C. & P. 44; *Lewis v. Marshall*, 7 M. & Gr. 729.

As to the admissibility of evidence of usage. *Wigglesworth v. Allison*, Notes thereto, Smith's Leading Cases (8th Ed.), vol. i., 594.

2 *Noble v. Durell*, 3 T. R. 271; *Hockin v. Cook*, 4 T. R. 314.

The existence of a custom amongst merchants at a particular port for shippers to make out for the master a correct copy of the bill of lading, cannot impose a duty not named in the contract or existing by law. *Dutton v. Powles*, 30 L. J. Q. B. 169.

3. *Palmer v. Blackburn*, 1 Bing. 61; *The Reeside*, 2 Sum. C. C. 567; *Bradwell v. Butler*, 1 Newb. (D. C.) 175; *Pierpont v. Fowle*, 2 Wood. & M. C. C. 44.

"Good barley and fine barley" are not the same. *Hutchison v. Bowker*, 5 M. & W. 335.

4. *The Law of Merchant Shipping* (Foard). 280.

Particular usages must be reasonable. *Paxton v. Courteney*, 2 F. & F. 131; *Foxall v. Inter. Land Co.*, 16 L. T. N. S. 637. It must be uniform and known. *Salvador v. Hopkins*, 3 Burr. 1707; *Abbott v. Bates*, 43 L. J. C. P. 150.

But its existence for one year has been held sufficient. *Postlethwaite v. Free-land*, 4 Ex. Div. 155. And one witness has been held sufficient to establish its uniformity or notoriety. *McKenzie v. Dunlap*, 3 Macq. 22.

5. To which intention, when once discovered, all technical forms of expression must give way. *Stavers v. Curlin*, 3 Bing. N. C. 368; *Luger v. Duthie*, 1 Asp. 3; *Dimech v. Corlett*, 12 Moo. P. C. C. 199.

No formal arrangement of words is necessary; the reason and sense of the thing is to be collected from the whole contract. *Dimich v. Caulett*, 12 Moo. C. C. 199.

6. *Ritchie v. Atkinson*, 10 East, 295.

trate the contract is, while the contract remains executory, a condition precedent.<sup>1</sup> When the whole consideration for any stipulation fails, or if it becomes impossible to be performed substantially as the parties intended, by the voluntary act of one of the parties, the other is not bound to proceed.<sup>2</sup>

**10. Obligations of Parties.**—Under a contract simply giving the use and disposal of a vessel, the owners are not bound, in the absence of proof of usage or custom, to alter materially the construction of the vessel.<sup>3</sup> When the vessel becomes disabled by accident, while loading, the freighter will not be bound by the charter unless she is repaired and rendered fit for contemplated use in a reasonable time.<sup>4</sup> The positive refusal to furnish a cargo dispenses with the obligation of waiting to receive it.<sup>5</sup> The owner under a charter-party is only a bailee for hire, and as such is bound to the use of only ordinary skill and care.<sup>6</sup> The performance of the conditions of the charter-party is imperative.<sup>7</sup> And if what is agreed to be done is possible or lawful, it must be done;<sup>8</sup> breach of performance is not excused by accident.<sup>9</sup> No exceptions of a private nature, not contained in the contract itself, can be engrafted by implication as an excuse for non-performance.<sup>10</sup> When the general owner obtains the possession, command, and navigation of the vessel and contracts to carry a cargo on freight for the voyage, the charter-party is a mere contract of affreightment sounding in covenant, and the owner is responsible for the conduct of the master and mariners.<sup>11</sup> On a mere contract of affreightment, the charterer is not clothed with the character of owner, and the general owner will be liable for every damage chargeable to the carrier, unless it appears by present stipulations that the obligation has been assumed by the charterer.<sup>12</sup> An executory contract for the employment of the vessel, and a purchase by the charterer of a share in the vessel, does not alter the *status* of the charterer as a bailee for hire.<sup>13</sup>

The charterer may, before the sailing of the vessel, substitute a

1. *Bradford v. Williams*, 7 L. R. Ex. 259; *Jackson v. The Union Marine*, 44 L. J. C. P. 27.

2. *Kleine v. Catara*, 2 Gall. (C. C.) 60; *Richardson v. Stanton*, 1 Asp. (N. S.) 449.

3. *Beecher v. Bechtell*, 3 Blatch. (C. C.) 40.

But are bound to keep her in good condition. *The Frances Wright*, 7 Ben. D. C. 88.

4. *Purvis v. Tunno*, 1 Brev. (S. Car.) 259; s. c., 2 Am. Dec. 664.

5. *Hall v. Hurlbut, Tacey* (C. C.), 598; *Kleine v. Catara*, 2 Gall. (C. C.) 61.

6. *Lamb v. Parkman*, 1 Sprague (D. C.), 343.

7. *Hudson Can. Co. v. Penn. C. Co.*, 8 Wall. (U. S.) 289; *Randall v. Lynch*, 12 East. 179.

8. *The Harriman*, 9 Wall. (U. S.) 177; 95.

*Oglin v. Ins. Co. of Va.*, 2 Wash. (C. C.) 319.

9. *Holyoke v. Depew*, 2 Ben. (D. C.) 341; *Spence v. Chadwick*, 10 Q. B. 517.

10. *Howland v. Greenway*, 22 How. (U. S.) 502; *Atkinson v. Ritchie*, 10 East, 530.

11. *Gracie v. Palmer*, 8 Wheat. (U. S.) 605; *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch (U. S.), 39; *Leary v. U. S.*, 14 Wall. (U. S.) 611.

Such a contract is a mere covenant for conveyance of merchandise or the performance of the stipulated service. *Richardson v. Winsor*, 3 Cliff. (C. C.) 399.

12. *Richardson v. Winsor*, 3 Cliff. (C. C.) 406; *Colvin v. Newbury*, 6 Bligh, 187.

13. *Ward v. Thompson*, Newb. (D. C.)

sound cargo for one damaged, and it is the duty of the master to receive the substituted cargo.<sup>1</sup> If the agreement be to take all lawful goods and merchandise, the master must carry any cargo that is comprised within the terms if delivered to him in good condition,<sup>2</sup> but he may refuse goods if they are in a condition not to be carried without injury to the cargo.<sup>3</sup> When the charter-party is a mere contract of affreightment, the owners are common carriers, and will in general be responsible for a failure to convey the goods.<sup>4</sup> A person may be the owner for the voyage if he is to have exclusive possession, control, and management, appoint the master, run the vessel, and receive the entire profits.<sup>5</sup> Under such circumstances, *he* will be responsible and not the general owner.<sup>6</sup> The words "let" and "to freight" do not of themselves make the charterer owner for the voyage.<sup>7</sup>

**11. Vessel Let on Shares.**—When the vessel is leased or chartered to the master, who directs her employment, hires her crew, and divides the earnings between himself and the owners, he and not the general owners is liable on contracts for supplies for the vessel while thus employed.<sup>8</sup>

**12. Charter to Government.**—When the charter provides for a *per diem* compensation, the government is not the owner for the voyage, and cannot be held liable for the expense of pilot and crew sent to the vessel's assistance.<sup>9</sup> Nor is the government liable for demurrage for detention on the return trip after the discharge of the vessel under the terms of the contract.<sup>10</sup> When an officer whose duty it is to supervise government contracts orders the price fixed upon by the contract of his assistant with the vessel-owner reduced, the original contract price cannot be recovered if the owner after notice allows her to remain in the service of the government.<sup>11</sup> When payment is to be made day by day until discharged, a retroactive order of discharge will not deprive the

1. *The Cargo of The Luedkin*, 6 Ben. (D. C.) 565.

2. *Freeman v. A Cargo of Salt*, 40 Hunt's Mer. Mag. 457.

3. *Boyd v. Moses*, 7 Wall. (U. S.) 316.

4. *The Volunteer*, 1 Sum. (C. C.) 551.

5. *Certain Logs of Mahogany*, 2 Sum. (C. C.) 597; *Gracie v. Palmer*, 8 Wheat. (U. S.) 632.

6. *Gracie v. Palmer*, 8 Wheat. (U. S.) 632; *Hill v. The Golden Gate*, Newb. (D. C.) 308.

7. The appointment of the master and crew is not in all cases conclusive. *Drinkwater v. The Spartan*, 1 Ware (D. C.), 160; *The Waldo*, 2 Ware (D. C.), 165; *Donahoe v. Kettell*, 1 Cliff. (C. C.) 139.

8. *The Volunteer*, 1 Sum. (C. C.) 551; *Palmer v. Gracie*, 8 Wheat. (U. S.) 632.

9. *Skolfield v. Potter*, 2 Ware (D. C.), 395; *Thorp v. Hammond*, 12 Wall. (U. S.) 416. And the owners do not incur

a joint liability. *The Phebe*, 1 Ware (D. C.), 266; *Taggard v. Loring*, 16 Mass. 336.

10. In victualling and manning the vessel the master acts on his own account, and not as agent of the owner. *Fox v. Holt*, 4 Ben. (D. C.) 290; *Webb v. Peirce*, 1 Curt. (U. S.) 104.

11. He is deemed owner *pro hac vice*. *Kenzell v. Kirk*, 37 Barb. (N. Y.) 113. And is liable for "small generals." *Mayo v. Snow*, 2 Curt. (C. C.) 106. Whether he is liable for repairs appears to depend on usage. *Packard v. The Louisa*, 2 Wood. & M. C. C. 55; *The Reeside*, 2 Sum. (C. C.) 567.

9. *Reed v. The U. S.*, 11 Wall. (U. S.) 591.

10. *Claim of Clarke & Co.*, 4 Opinion Att.-Gen. 83.

11. *Emery v. U. S.*, 4 Ct. of Cl. 401; *Clyde v. U. S.*, 5 Ct. of Cl. 134; *Cobb v. U. S.*, 5 Ct. of Cl. 176.



vessel-owner of his right to the charter-money.<sup>1</sup> It is the duty of the government to notify the owner, and until notice is given the owners are entitled to payment for the hire.<sup>2</sup> The owners are entitled to extra freight for conveyance of goods beyond the point agreed on.<sup>3</sup> If the vessel be injured in the government service, by a forced employment beyond her capacity, the government will be liable for damages.<sup>4</sup>

**13. Dissolution of Contract.**—Contracts of affreightment may be dissolved by the consent of the parties; and at any time before breach it is not necessary that there should be any new consideration for the dissolution.<sup>5</sup> But if not dissolved, the rule as to performance is that where a party by his own act creates a duty or charge, he is bound to perform it notwithstanding inevitable accident, because he might and ought to have provided against the happening of such a contingency by his contract.<sup>6</sup> If, however, after the contract is made, it becomes unlawful for either party to perform it, then the performance cannot be insisted upon, nor can damages be recovered for the non-performance.<sup>7</sup>

**14. Damages for Breach of Contract.**—If the master or owner refuses to perform the contract, the charterer may resort to a personal action for damages.<sup>8</sup> The owner is bound to make compensation, in the event of non-performance, for actual damages only.<sup>9</sup> The measure of damages for which the owner is liable for breaking up the voyage is the actual loss and expense incurred, labor and services in the procuring another vessel, and reasonable disbursements and taxed costs.<sup>10</sup> For failure to sail at the proper time, or for delay in delivery, the measure of damages is the differ-

1. *Leary v. U. S.*, 9 Ct. of Cl. 233.

2. *Smith v. U. S.*, 9 Ct. of Cl. 237.

3. *Swain v. U. S.*, 2 Dev. 35.

4. *Schultz v. U. S.*, 3 Ct. of Cl., 56; *Morgan v. U. S.*, 5 Ct. of Cl. 182.

5. *King v. Gillett*, 7 M. & W. 55; *Adams v. New Castle S. S. Asso.*, 4 Q. B. D. 462.

6. *Paradine v. Jayne*, Aleyn, 27; *Adams v. Royal Mail Steam Packet Co.*, 5 C. B. N. S. 492.

This general rule is subject, however, to this qualification, that where the event is of such a character that it cannot reasonably be supposed to have been in contemplation by the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used in reference to the possibility of the particular contingency which afterwards happened. *Bailey v. DeCrespigny*, L. R. 4 Q. B. 185.

Where time is expressly limited in the terms of the contract for the loading or discharge of the ship, the merchant will be liable if he neglects to perform the contract on his part, even though he may

be prevented by some unforeseen event. *Schilizzi v. Derry*, 4 E. & B. 673; *Kish v. Gibb*, 1 H. & N. 810; *Hills v. Sughrue*, 15 N. & W. 253.

7. *Bailey v. DeCrespigny*, N. R. 42 D. 180.

If after the making of the contract the exportation of the articles which were to compose the cargo were prohibited by the law of this country the contract will be at an end. *Barker v. Hodgson*, 3 M. & S. 270.

A prohibition at the port of discharge by a foreign government would not have this effect. *Blight v. Paige*, 3 B. & P. 295.

A blockade of the port of discharge, or an interdiction of commerce with it, after the commencement of the voyage, works a dissolution of the contract. *Scott v. Libby*, 2 Johns. (N. Y.) 336.

8. *The Gen. Sheridan*, 2 Benedict (D. C.), 296.

But if performance has not been entered upon, there is no remedy *in rem*. *The Gen. Sheridan*, 2 Benedict (D. C.), 296.

9. *Harrison v. Stewart*, Taney's Rep. (D. C.) 485.

10. *The Tribune*, 3 Sum. (C. C.) 144.

ence between the fair market price at the port of destination on the day the vessel ought to have arrived and the time that she did actually arrive.<sup>1</sup>

**15. Jurisdiction—Remedy.**—In addition to the courts of common law, the jurisdiction of the admiralty extends to all contracts of affreightment upon the high seas or navigable waters of the United States.<sup>2</sup> Courts of equity also will in fitting cases interfere by injunction.<sup>3</sup> The method of procedure in the admiralty is both *in personam* and *in rem*; the latter will lie whenever by the maritime law a lien exists.<sup>4</sup>

**CHASE**, in its general signification, is a great quantity of woody ground lying open, and privileged for wild beasts and wild fowl; and the beasts of *chase* properly extend to the buck, doe, fox, marten, and roe; and in common and legal sense to all the beasts of the forests.<sup>5</sup>

1. Page v. Munro, 1 Holmes (C. C.), 233; The Success, 7 Blatch. (C. C.) 551.

2. N. J. Steam Nav. Co. v. Merchants Bank, 6 How. (U. S.) 344; Morewood v. Enequist, 23 How. (U. S.) 491.

But no jurisdiction exists with regard to the enforcement of preliminary agreements to enter into a charter-party. Andrews v. F. & M. Ins. Co., 3 Mason (C. C.) 6; The Tribune, 3 Sum. (C. C.) 4.

3. A charter-party is not a mere contract for the conveyance of goods from one place to another, but for the services of a specific ship often selected after a careful consideration of the purposes for which it is adapted, and though a court of equity cannot enforce specific performance of the various provisions of the charter-party, yet an injunction will lie to restrain the employment of the vessel in a manner inconsistent with their charter. De Mattos v. Gibson, 28 L. J. Ch. 498.

4. Oakes v. Richardson, 2 Low. (D. C.) 173; Maury v. Culliford, 10 Fed. R. (C. C.) 388.

For further information with regard to charter-parties, see Maude & Pollock's Law of Merchant Shipping; The Law of Merchant Shipping (Foard); Abbott on Shipping; Desty's Shipping and Admiralty; Parsons on Shipping; Abbott's and Prichard's Digests.

5. Co Litt. 233. Though see 1 Jones Rep. 278.

It differs from a park in that it is not inclosed, and also in that a man may have a chase in another man's ground as well as in his own. 2 Bl. 38.

It has a greater compass than a park, more variety of game, and more officers.

It is commonly less than a forest, and not endowed with so many liberties, as the courts of attachment, swainmote, and justice-seat. Crompt. in his Jurisd., fol. 148, says a forest cannot be in the hands of a subject, but it forthwith loses its name, and becomes a chase; but, fol. 197, he says a subject may be lord and owner of a forest. Both sayings are in some sort true; for the king may give or alienate a forest to a subject, so as when it is once in the subject, it loses the true property of a forest, because the courts called the justice-seat, swainmote, etc., do forthwith vanish, none being able to make a Lord Chief Justice in Eyre of the forest, but the king; yet it may be granted in so large a manner, as there may be attachment, swainmote, and a court equivalent to a justice-seat. Manwood, part 2, c. 3, 4.

A chase is *ad communem legem*, and not to be guided by the forest laws. A man may have a free chase as belonging to his manor in his own woods; for it does not issue out of the soil, but is a collateral inheritance. 4 Inst. 318.

If a man have freehold where is a chase, he may cut timber without the license of any, though not so of a forest. But if he cut so much that there is not sufficient for covert, and to maintain the game, he shall be punished at the suit of the king. See 11 Rep. 22. The owner of the soil may have by prescription common in the chase for his sheep, and warren for his conies. Inclosing a free chase is said to be a good cause of seizure into the king's hands. It is not lawful to make a chase, park, or warren, without license from the king under the broad seal. Jacob's Law: Dictionary.

**CHASTE**, in the seduction statutes, means actual<sup>1</sup> virtue<sup>2</sup> in conduct and principle. One who falls from virtue, but afterwards reforms, is chaste within the meaning of the statutes.<sup>3</sup> (See also CHASTITY; SEDUCTION.)

1. That is, what the woman really is, as distinguished from what she is reputed to be.

**Reputation.**—Evidence of 'bad reputation, therefore, is inadmissible. Bishop on Statutory Crimes, § 639; Crozier v. People, 1 Parker's Crim. Rep. (N.Y.) 453; Carpenter v. People, 8 Barb. (N.Y.) 603, 608; People v. Kenyon, 5 Parker's Crim. Rep. (N.Y.) 254; Andre v. Iowa, 5 Iowa, 389; Kauffman v. People, 11 Hun (N.Y.), 82, 87; State v. Prizer, 49 Iowa, 531; 2 Wharton's Cr. L. § 1757. Safford v. People, 1 Parker's Cr. R. (N.Y.) 474, holding the contrary, is opposed by later cases.

In *Ohio*.—Ohio Rev. St. § 7022, relates to all seduced women "of good repute for chastity," and therefore it was held, in *Bowers v. State*, that it was not competent for defendant to prove specific acts of illicit intercourse by the prosecutrix with other persons, but that he must attack her reputation for chastity.

**Effect on Verdict.**—Where evidence as reputation of prosecutrix for unchastity was received, it was on appeal held that "it is not enough that the court sitting in review of the judgment may be of the opinion that the result ought and probably would have been the same if the objectionable evidence had been excluded." *Kauffman v. People*, 11 Hun, 82, 87; *Coleman v. People*, 58 N. Y. 555.

**Reputation in Support of Prosecution** is admissible in evidence to rebut testimony as to acts of lewdness. *State v. Prizer*, 49 Iowa, 533, explaining *State v. Sherr*, 32 Iowa, 88; Bishop on Statutory Crimes, § 650.

2. **Virtue.**—"Something of purity of heart and feeling beyond the mere physical fact that [the woman] has not been defiled." Bishop on Statutory Crimes, § 639; *Wood v. Georgia*, 48 Ga. 288-9. "A female who delights in lewdness—who is guilty of every indecency, and lost to all sense of shame," "whose conversation and manners may even have suggested the thought and opened the way," is not "chaste," though she has not been guilty of sexual intercourse. *Andre v. Iowa* 5 Iowa, 389; *Boak v. Iowa*, 5 Iowa, 430. See also *Carpenter v. People*, 8 Barb. (N.Y.) 608.

3 **Reformed women** are 'chaste.' *Carpenter v. People*, 8 Barb. (N.Y.) 603; *Kenyon v. People*, 26 N. Y. 203; *Boyce v. People*, 55 N. Y. 644; *Com. v. McCarty*, 4 Pa.

L. J. 136; s. c., 2 Clark (Pa.), 351; *Boak v. State*, 5 Iowa, 430; *State v. Carron*, 18 Iowa, 372; *State v. Sutherland*, 30 Iowa, 570; *State v. Dunn*, 53 Iowa, 526; *State v. Timmins*, 4 Minn. 325; *People v. Millsbrough*, 11 Mich. 278; *Wilson v. State*, 73 Ala. 527; 2 Wharton's Cr. L. § 1757; *People v. Clark*, 32 Mich. 112.

**Second Betrayal.**—A woman who is seduced under promise of marriage may remain sufficiently chaste to make a second betrayal by the same man a seduction under the statute. *People v. Millsbrough*, 11 Mich. 278. *Christiancy, J.*—"While we express no opinion as to a female who is shown to be unchaste with other men, we think all that is necessary in a case like the present, where there is no such evidence, is, that her personal character should be such as to satisfy the jury that she would not have yielded in the particular case, without the express promise of marriage."

**Consent**, except sometimes where it is prompt and ready, is no defence on charge of seduction. *People v. Cook*, 61 Cal. 478; *Lewis v. People*, 37 Mich. 518; *Tucker v. State*, 8 Lea (Tenn.), 633; 2 Whart. Cr. Law, § 1759. See *People v. Clark*, 33 Mich. 112.

**Presumption as to Chastity.**—The cases on this point are at variance. (1) Some hold that the chastity of the prosecutrix must be presumed, in the absence of proof. *State v. Wells*, 48 Iowa, 671; *Crozier v. People*, 1 Parker's Cr. Law, 453; *State v. Higdon*, 32 Iowa, 262; *Wilson v. State*, 73 Ala. 527. (2) Others consider that, since also the defendant is presumed to be innocent, some evidence of chastity must be brought forward by the prosecution. *People v. Roderigas*, 49 Cal. 10; *Zabriskie v. State*, 43 N. J. Law, 640; *Oliver v. Com.*, 101 Pa. St. 218; *West v. Wisconsin*, 1 Wis. 217. *Van Syckel, J.*, in *Zabriskie v. State*, 43 N. J. Law, 640: "The fact that she has sacrificed that virtue which was her glittering crown casts such a shadow upon her, that, in the most charitable view of the case, it should be left without presumption either way, to be determined by competent evidence, what her prior repute has been." This conclusion seems to be the better view. Bishop on Statutory Crimes, § 648. "Yet ordinarily such evidence can in the nature of things be only slight and circumstantial." Bishop

## Definition.

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on Statutory Crimes, § 648; *West v. Wisconsin*, 1 Wis. 217. It need not directly show chaste character, but the chastity "may be shown, *prima facie*, by presumption from other facts and circumstances attending the transaction; as, for instance, that the unmarried female—the subject of the injury—was at the time residing with her parents, or other relatives, or her guardian, or in some respectable household or by *proof* of other like circumstances consistent with, and the usual concomitants of, chaste female character." *People v. Roderigas*, 49 Cal. 10. Or the fact that she went into good society. *Crandall v. People*, 2 Lans. (N. Y.) 311.

In *State v. Wells*, 48 Iowa, 671, the court not only held that presumption of chastity of prosecutrix existed until evidence was offered to rebut it, but they laid down that it is not enough for defendant to produce evidence raising a *reasonable doubt* as to chastity, but it must be such as would overcome the presumption of law in its favor by a fair preponderance. The court support their position by reference to several cases in regard to burden of proof where defence of insanity is set up. The insanity cases are indeed useful as analogous, but they are divided as to the ruling requiring fair preponderance.

In *Lawson's Insanity as a Defence to Crime* it is stated that there are three theories: first, that the burden is on the prisoner to prove defence beyond reasonable doubt; now almost obsolete, says *Lawson*, except perhaps in *Delaware* (p. 514 of his work), and *New Jersey* (p. 514); second, that the burden is on the prisoner until it is overcome by a *preponderance* of evidence showing the prisoner's insanity to the satisfaction of the jury, which is the rule in *England* and in 17 American States (merely *fair preponderance*, not *clear preponderance*. *Coyle v. Com. of Pa.*, 100 Pa. St. 573); third, that the burden rests on the State to prove sanity where there is doubt raised by the evidence, which is the rule in nine States.

**The Indictment** must allege the fact of previous chaste character. *People v. Roderigas*, 49 Cal. 10; *Bishop on Stat. Crimes*, § 647; *State v. Stogdell*, 13 Ind. 565; 2 *Whart. Cr. Law*, § 1757. "And perhaps, in some cases, it must where those words are not in the statute." *Bishop on Stat. Crimes*, § 647. See *State v. Stogdell*, 13 Ind. 565, where an averment to the effect that the female was of *good repute* for chastity seems to have been considered sufficient, though the report of the case is meagre.

**The woman may testify** to prove her previous chaste character. *Kenyon v. People*, 26 N. Y. 203.

**Unchaste Conduct** of a time *after the seduction* cannot be given in evidence against the female's previous character. It very likely is the result of the defendant's having seduced her. *State v. Wells*, 48 Iowa, 671; *Mann v. State*, 34 Ga. 5; *Boyce v. People*, 55 N. Y. 644—in which respect the rule is different, properly, from that of some (not all) authorities in adultery cases.

**Effort to Compromise**, on the woman's part, when she had become the mother of defendant's child, was held to be properly rejected when offered in evidence against her. *State v. Dietrich*, 51 Iowa, 467.

**Previous Unchastity**.—Unchastity previous to the offence may be shown either by direct testimony as to specific act or acts, or by evidence of wanton and indiscreet act or acts towards some other person than defendant. *People v. McCordle*, 5 Parker's Crim. Rep. (N. Y.) 180; *State v. Bell*, 49 Iowa, 440. See also *VIRTUE*, *supra*, note 2.

**Examination of Prosecution**.—She may be asked, on cross-examination, in respect, to prior unchaste acts and conversations, or sleeping in bed with other men than defendant. *State v. Sutherland*, 30 Iowa, 570. Since the woman's chastity is in evidence by her mere prosecution of the action, she may properly be cross-examined as to it. Of course, she cannot be compelled to answer so as to expose herself to indictment.

**Remote Evidence**.—Proof of indiscretion eight years before, when prosecutrix was a girl of fourteen, was held not to be receivable, as *Bishop* says (*Stat. Cr.* § 649) it "allows too little for the influence of mature years and probable reformation." *State v. Dunn*, 53 Iowa, 526.

**Rebuke by Parent**.—Evidence of having been rebuked once by parent was held inadmissible—first, because the rebuke merely indicated the reprover's opinion, and second, because conduct may call for rebuke yet not be unchaste. *State v. Curran*, 51 Ind. 112.

**"Previous Chaste Character"**.—As indicated already, this means chaste character up to the time of the offence; hence subsequent unchastity is not defence to seducer.

**"Care and Protection" Statute**.—The offence prohibited by Kansas Crimes and Punishment Act, § 233, of defiling a female under eighteen years of age while she is confided to defendant's care and protection, may be committed, although the female may be of unchaste character, and may consent to the unlawful embraces of defendant. *Kansas v. Jones*, 16 Kans. 608.

**CHASTITY.**—Purity or freedom from unlawful sexual intercourse.<sup>1</sup> The law justifies a woman killing one who attempts to

1. 1 Hale P. C. 485, 486; 4 Broom & H. Com. 214.

The ravishment of a prostitute or of a mistress is rape. 2 Bishop Cr. Law, § 1119; *Richie v. State*, 58 Ind. 355.

**Reputation for Chastity in Rape Cases.**

—A different rule prevails than in the seduction cases, for the reason that in the latter consent is no defence, while in prosecutions for rape it is.

(a) **Previous to the Supposed Offence.**—

Evidence that the woman had a bad reputation for chastity previous to the supposed commission of the offence is admissible. *Rex v. Clarke*, 2 Stark. N. P. C. 241; *Rex v. Barker*, 3 C. & P. 589; *Pleasant v. State*, 15 Ark. 624; *Pratt v. State*, 19 Ohio St. 277; *State v. Forshner*, 43 N. H. 89; *R. v. McClure*, 2 Craw. & Dix, 244; *Camp v. State*, 3 Ga. 417. "It helps the probabilities that the connection was voluntary on her part, and that his manifestations of apparent force came rather from his presuming her consent than from a purpose to ravish her." 2 Bishop on Criminal Procedure, § 965, where many cases are cited. See *Roscoe on Crim. Ev.*, § 648, quoted below.

(b) **Subsequent Reputation for Unchastity.**—Whether evidence of subsequent reputation is admissible is disputed. Such evidence was received in *Reg. v. Barker*, 3 Car. & Payne, 589, and Mr. Bishop thinks that the better rule is to receive it.

On the other hand, it was rejected by *Patteson, J.*, in *Reg. v. Clay*, 5 Cox C. C. 146. He referred to *R. v. Barker*, but declined to follow it as to this point. It was held inadmissible, too, in *State v. Forshner*, 43 N. H. 89, and in *Pratt v. State*, 19 Ohio St. 277. In *State v. Forshner*, *Bell, J.*, said (1861): "A state of facts proved to have existed is presumed to continue, unless some reason is shown for doubt. But the reverse is not true. The bad character a person may have now is not assumed to have always existed." In *Elsam v. Faucett*, 2 Esp. 562, in an action for crim. con., evidence of misconduct in the woman subsequent to her connection with defendant was rejected. In *Douglass v. Tousey*, 2 Wend (N.Y.) 352, in an action for slander for calling plaintiff a thief, evidence of plaintiff's bad reputation as a prostitute was rejected, partly because it related to a time subsequent to the alleged slander. On motion for new trial, this ruling was sustained, the court assigning, as one of its reasons, the fact that the reputation

was a subsequent one. See 1 Greenl. on Ev., § 54. Mr. Wharton (Cr. Law, vol. 1, § 568) says the reputation for unchastity is only admissible when acquired before defendant's alleged commission of the crime.

(c) **Proof of Reputation.**—The court will not receive such proof through an agent of defendant sent into the neighborhood of the prosecutrix about the time of the trial, especially to collect evidence as to the reputation of the prosecutrix for unchastity at a time previous to the alleged offence of defendant. Such testimony would amount only to hearsay. *Douglass v. Tousey*, 2 Wend. (N.Y.) 352; *State v. Forshner*, 4 N. H. 89.

**Prior Illicit Intercourse with Defendant.**

—"If on previous occasions the woman has voluntarily surrendered her person to the defendant, this, even more distinctly than her being a common prostitute, indicates alike her willingness and his presuming on it; therefore he may show such fact in his defence." 2 Bishop on Crim. Procedure, § 966. The following cases authorize this statement: *State v. Jefferson*, 6 Ired. (N.Car.) 305; *State v. Forshner*, 43 N. H. 89; *People v. Abbott*, 19 Wend. 192; *Woods v. People*, 55 N. Y. 515, 517; *State v. Reed*, 39 Vt. 417, 419.

**Specific Acts with Other Men.**—It has frequently been decided that evidence of specific acts of intercourse with other men may not be given. *Peck, J.*, said, in *McDermott v. State*, 13 Ohio St. 334, that "it by no means follows that a desire to have sexual intercourse with one person tends, legitimately, to prove a willingness to have like intercourse with another and different person. Indeed, the reverse is much the most probable; but, however this may be, the introduction of such proof is opposed to the well settled rules of evidence." Further, it is pointed out that the woman is presumed to be unprepared to disprove such specific accusations; and it is said that to admit them would be to create collateral and confusing issues. These views are upheld, also, in the following cases: *McCombs v. State*, 8 Ohio St. 643; *Pleasant v. State*, 15 Ark. 624; *Camp v. State*, 3 Kelly (Ga.), 422, *dictum*; *Rex v. Clarke*, 2 Stark. 241; *Rex v. Hodgson*, *Russell and Ryan*, 211 (leading case, decided unanimously by twelve judges); *Richie v. State*, 58 Ind. 355; *R. v. Holmes*, 12 Cox C. C. 147; *State v. Knapp*, 45 N. H. 154; *Comm. v. Regan*, 105 Mass 593, where evidence of declarations by prosecutrix

that she was pregnant by other men was ruled out; *State v. White*, 35 Mo. 500; *Comm. v. Harris*, 131 Mass. 336; *Rogers v. State*, 1 Tex. Ap. 187; *Woods v. People*, 1 Thomp. & Cook (1 N. Y. Sup. Ct.), 610.

In *State v. Henry*, 5 Jones (N. Car.), 66, exposure by prosecutrix of her person to others was not allowed to be proven because it was not shown that the exposure was known to the accused. Whether it would have been admitted had that been shown, the court said they were not called upon to decide.

**Cross-examination of Prosecutrix.**—The practice of most courts, not all, both in England and America, is to permit the prosecutrix to be asked questions of this sort, although in no court can she be compelled to criminate herself. Mr. Bishop says that if she denies the connection (with other men), the defendant is bound by her answer and cannot prove the denial false. *Crim. Procedure*, § 966. In Wharton's *Crim. Law*, § 568, the diversity of authorities is declared. In these cases it was held that defendant is bound by her answers: *R. v. Cockroft*, 11 Cox C. C. 410 (1870); *R. v. Holmes*, 12 Cox C. C. 137, overruling *R. v. Robins*, 2 M. & R. 512; *People v. Jackson*, 3 Parker's *Crim. Rep.* (N. Y.) 391, denying *People v. Abbott*, 19 Wend. (N. Y.) 192. And see the authorities cited, *supra*, respecting specific acts.

In the following cases it was held that the defendant is not bound by her answers, but may give evidence of specific acts of intercourse with other men in order to rebut the inference against consent on her part to the act charged against him: *People v. Abbott*, 19 Wend. (N. Y.) 192, a carefully considered case; *R. v. Robins*, overruled, as has been said; *Strang v. People*, 24 Mich. 1; *State v. Reed*, 39 Vt. 417; *State v. Johnson*, 28 Vt. 512; *Benstine v. State*, 2 B. J. Lea (Tenn.), 169; *People v. Benson*, 6 Cal. 221.

In Koscoe's *Criminal Evidence*, 648, it is said that where the man is led from the conduct of the woman to believe in her willingness, the act of connection cannot amount to a rape, for which he cites Denman, J., to that effect in *People v. Urry*, tried in 1873 at Lincoln Spring Assizes.

1. The first class of cases regard the answers of the prosecutrix respecting her chastity with particular men, as immaterial and not in the issue.

2. The second class consider that her denials strengthen the presumption of her resistance of defendant. They therefore

regard them as material, not collateral, since the charge is that *against* her consent the act was committed. In *State v. Johnson*, 28 Vt. 512, the court said: "In determining that question, which is purely [as to] mental act, it is important to ascertain whether her consent would, from her previous habits, be the natural result of her mind, or whether it would be inconsistent with her previous life, and repugnant to all her moral feelings."

In *People v. Abbott*, 19 Wend. (N. Y.) 192, it is said that the cases allowing evidence of *general* lightness of character, street-walking, etc., are based on this very principle. "Why is this?" asks Cowan, J. "Because there is not so much partiality that a common prostitute or the prisoner's concubine would withhold her assent, as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of *another*, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity?" Both are equally under the protection of the law, but so are the prostitute and concubine whose character may yet be assailed by evidence of their immorality.

See the subject of unchastity, as evidence of consent, discussed in Wharton's *Crim. Law*, and in Bishop on *Criminal Procedure*.

**Compelling Prosecutrix to Answer.**—No court, however, will compel prosecutrix to criminate herself. In *People v. Abbott*, 19 Wend. (N. Y.) 192, the court said that her answer would be compelled, and reference was made to 2 Phil. on Ev. 937, and to *Roberts v. Alatt*, 1 Mood. & Malk. 932. These authorities are disposed of, however, by recalling that at common law adultery and fornication were cognizable only in the spiritual courts, whereas today the statute law of probably every State makes such offences indictable. But *quare* as to District of Columbia. See *Pollard v. Lyon*, 91 U. S. 225.

**Specific Acts with Other Men as Explaining Physical Condition of Prosecutrix.**—In *Sherwin v. People*, 69 Ill. 55, the court recognized the rule supported by the first class of cases, but held that it was inapplicable to the case before them. There the woman testified that she was unconscious, and did not know whether the accused committed the rape or not, and the prosecution proved by a physician, who examined her three weeks afterwards, that she did not bear the physical evidences of virginity, and gave it as his opinion that she had had carnal connec-

ravish her, and so, too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. In the latter case, however, the homicide may be excusable.<sup>1</sup>

Unwritten words attributing want of chastity to a woman are, in many of the States, probably in all,<sup>2</sup> actionable *per se*,<sup>3</sup> though at common law no action lay.

tion with a man at some time before. It was held that evidence of intercourse with other men was admissible to explain the physical *indicia*. In *Benstine v. State*, 2 Lea (Tenn.), such explanation was allowed, but there the court took the ground that evidence of particular acts with other men was admissible in all rape cases.

In action for *breach of promise* to marry, evidence of plaintiff's unchastity subsequent to the breach is inadmissible. 1 Greenl. Ev. § 54.

**Proof by Inference.**—Query whether, in those States where proof of particular instances is received as evidence of consent by prosecutrix, evidence may be given of indiscreet and indecent conduct leading to the inference that illicit intercourse occurred. It may. *State v. Jefferson*, 6 Iredell (N. Car.), 305. It may not. *Benstine v. State*, 2 B. J. Lea (Tenn.), 174; *Strang v. People*, 24 Mich. 7.

**Remote Acts** done many years before would hardly seem to be admissible in evidence. *Benstine v. State*, 2 B. J. Lea (Tenn.), 174. And see the similar note under CHASTE.

**Solicitation to Commit Unchaste Acts.**—For discussion of this subject see this work, SOLICITATION; 1 Bishop's Crim. Law, § 768; Wharton's Cr. Law, § 1738, § 179. As the views of these two writers are not in harmony, perusal of each of the references will be desirable. See especially *Smith v. Commonwealth*, 54 Pa. St. 209; *State v. Avery*, 7 Conn. 266; *Cox v. People*, 82 Ill. 191; *People v. Murray*, 14 Cal. 159; *R. v. Higgins*, 2 East, 5.

**Credibility of Prostitute.**—Whether evidence of common prostitution is admissible to impeach a female witness, *quære*. It is. *Commonwealth v. Murphy*, 14 Mass. 387. It is not. *Comm. v. Moore*, 3 Pick. 194. Compare *Comm. v. Murphy*; *Spears v. Forrest*, 15 Vt. 435; *State v. Smith*, 7 Vt. 141; *Morse v. Pineo*, 4 Vt. 281; *Jackson v. Lewis*, 13 Johnson, 504; 2 Stark Ev. 369, note by Metcalf.

1. The Roman law also justified homicide, when committed in defence of the chastity either of one's self or relations.

Dig. 48, 8, 1. And so also, according to Selden, stood the law in the Jewish republic. De Leg. Hebræor., l. 4, c. 3. See 1 Whart. Cr. L. § 495. *Opportunity of Escape*, § 306, removes the justification.

Where a husband kills an adulterer deliberately and in revenge, it is murder. 1 Russ. on Crimes, 525; 1 Whart. C. L. § 459.

Hot blood may reduce to manslaughter not only homicide by husband, but by any one having a legal and natural right to protect, as a brother. Whart. C. L. § 460.

2. Not so in *District of Columbia*—*Pollard v. Lyon*, 91 U. S. 225—if special damage is not averred and shown.

3. **Words Imputing Want of Chastity, at Common Law—Unwritten Words.**—The old English decisions respecting slander are incongruous and in some respects irreconcilable. Judge Spencer, in *Brooker v. Coffin*, 5 Johns. (N. Y.) 190, 1 Am. L. C. 98, alluded to the great uncertainty of the law, and to the necessity of laying down a rule which would remove difficulty. In the name of the court he then prescribed the following rule: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be *in themselves* actionable;" and that rule has ever since been followed in New York, and has been very extensively adopted in the courts of other States. 1 Am. Lead. Cases, 98; *Pollard v. Lyon*, 91 U. S. 225; *Dunnell v. Fiske*, 11 Metc. (Mass.) 552; *Gosling v. Morgan*, 32 Pa. St. 275; *Giddens v. Mirk*, 4 Ga. 364, 368; *McCuen v. Ludlum*, 2 Harrison 13; *Kinney v. Hosea*, 3 Harr. (Del.) 77; *Taylor v. Kneeland*, 1 Doug. (Mich.) 68, 72.

It is unnecessary that legal infamy should attach to the offence, provided it be indictable either at common law or by statute, and be infamous or disgraceful in a general or moral sense. *Young v. Miller*, 3 Hill (N. Y.), 21; *Crawford v. Wilson*, 4 Barb. 505, 511.

In most States it is enough to support the action for slander, *per se*, that it

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charges an offence morally base and wicked, and indictable by statute, though only punishable by fine. *Coburn v. Harwood*, Minor (Ala.), 93; *Hillhouse v. Peck*, 2 Stew. & Porter (Ala.), 395; *Miller v. Parish*, 8 Pick. (Mass.) 384; *Pollard v. Lyon*, 91 U. S. 232; *Todd v. Rough*, 10 S. & R. (Pa.) 18, 22.

In *Missouri*, *Maryland*, and *Vermont* corporal punishment has been held necessary. *Birch v. Benton*, 26 Mo. 161; *Billings v. Wing*, 7 Vt. 439; *Wagaman v. Byers*, 17 Md. 187. And in *Starkie* on Slander, p. 43, it has been laid down that where the crime imputed is one not punishable corporally, the words imputing the crime are not actionable *per se*. But in most of the States corporal punishment is not necessary to support action of slander *per se*.

**Adultery and Fornication** were matters of ecclesiastical cognizance, and punishable in the spiritual courts, and were not punishable in the common-law courts. Accordingly at common law unwritten words charging adultery or fornication were not actionable saving in London and some other localities, where by custom the common-law courts exercised jurisdiction over adultery and fornication.

**Instances.**—Thus it was held not actionable, in the absence of special injury, to call a woman a whore, or prostitute, or common prostitute. *Brooker v. Coffin*, 5 Johns. (N. Y.) 188; *Wilby v. Elston*, 8 C. B. 142; 1 Stark. on Slander, 28; *Townshend on Slander*, § 172. Or to charge an unmarried one with having had a bastard. *Vin. Abr.*, Act. for Words, D. A. 19, 23; *Graves v. Blanchard*, 2 Salk. 696; *Colabyn v. Viner*, W. Jones, 356; *Falkner v. Cooper*, Carth. 55; *McQueen v. Fulghan*, 27 Tex. 463. Or to call a woman a bawd. *Cavel v. Birket*, Sid. 438. *Contra*, *Hicks v. Hollinghead*, Cro. Car. 261. Or to charge a married woman with adultery, or an unmarried one with fornication. *Townshend*, § 172; *Heard on Libel*, 46. Or to charge a young woman with self-pollution. *Anon.*, 60 N. Y. 262. Or to say of a woman, "She was hired to swear the child on me; she has had a child before this, when," etc.

**Charge of Fornication.**—It does not amount to a charge of fornication without innuendoes showing more meaning than the words themselves contain, to say of a woman that she is not a decent woman. *Dodge v. Lacey*, 2 Carter (Ind.), 212. Or a bad character, a loose character. *Vanderlip v. Roe*, 25 Pa. St. 82. Or has raised a family of children by a negro.

*Patterson v. Edwards*, 2 Gilman (7 Ill.), 720. But it does to say of an unmarried woman, she had a child, and buried it in the garden. *Worth v. Butler*, 7 Blatchf. 251. Or that she "has been to swear a young one." So, with proper innuendoes, the words, "A. caught them [plaintiff and another] together in the packing-room."

Says Duncan, J., in *Walton v. Singleton*, 7 S. & R. 457: "There is no offence which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad and coarse language."

To charge a woman with "getting fat." *Emmerson v. Marvel*, 55 Ind. 265. Or of being a "bitch." *Schwick v. Kollman*, 50 Ind. 336; *K. v. H.*, 20 Wis. 252. Or "a bad woman." *Riddle v. Thayer*, 127 Mass. 487. Or "bad girl." *Snell v. Snow*, 13 Met. 278; *Fitzgerald v. Robinson*, 112 Mass. 371, 382. Or "having had intercourse with" a certain man. *Merritt v. Dearth*, 48 Vt. 65. These charges, unless explained by the circumstances as intended in a defamatory sense, do not sustain an action of slander. *Odgers on L. & S.* § 84, note.

**Excommunication.**—In *Massachusetts*, in a sentence of excommunication from a church read by the minister on Sunday in the presence and hearing of the congregation, it was recited "that the plaintiff had clearly violated the seventh commandment," and in a subsequent part of the sentence it was declared "that this church does now as always bear its solemn testimony against the sin of fornication and uncleanness;" *held*, that the sentence did not impute the charge of adultery in its legal sense as an indictable offence. *Farnsworth v. Storrs*, 5 Cushing (Mass.), 412.

**Injury to Business or Profession.**—Where the words uttered injure a woman in her business or professional character, action lies at common law without proof of special damage. The words need not expressly refer to that character, but must affect it, and not other qualities of the individual. Thus to impute prostitution to a schoolmistress has sometimes been held not actionable *per se*. *Odgers on Libel and Slander*, § 84. Though it is to be remarked that these cases, though illustrating perfectly the principle, are based on a very narrow idea of the duties of a teacher. And see *Wright*, 651, where action was allowed for calling a school-teacher a dirty slut.

**Special Injury.**—Injure to name and fame is not special injury. *Pollard v.*



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Lyon, 91 U. S. 225. Special injury means *pecuniary or material loss*. Pollard v. Lyon, 91 U. S. 225; s. c., 1 Am. Lead. Cas. § 104. And allegation that plaintiff has fallen into disgrace, infamy, and lost her credit, reputation, and peace of mind, is not sufficient. Woodbury v. Thompson, 3 N. H. 194; s. c., 1 Am. L. C. § 104. Nor that she is shunned by her neighbors. Beach v. Ranney, 2 Hill (N. Y.), 310, 314. The office or profession need not be one of profit, but it must be of material temporal advantage. So that exclusion from a religious society is not legal damage. Roberts v. Roberts, 33 Law Journal, Q. B. 250; Townshend on Libel, 320. See this explained, Odgers on Libel and Slander, § 19. The gist of the action is the loss of reputation; some material loss is required as *legal evidence* of that injury to reputation.

Yet the courts will deem *slight pecuniary loss* as sufficient special damage. Accordingly, averment of the loss of valuable hospitality and of a support or income derived from the bounty of others, will be sufficient. Moore v. Meagher, 1 Taunton, 40; Olmsted v. Miller, 1 Wend. (N. Y.) 506; Williams v. Hill, 19 Wend. (N. Y.) 305. Or refusal of civil treatment, meat and drink at a hotel. Olmsted v. Miller, 1 Wend. (N. Y.) 510. Or of the loss of health, and the consequent incapacity of transacting business. Bradt v. Towsley, 13 Wend. (N. Y.) 253; Fuller v. Fenner, 16 Barb. (N. Y.) 334.

**Damage Resulting from the Slander.**—*Illness* resulting from words not actionable *per se* will not support action. Odgers L. & S. 312. But the injury must be a *natural result*.

In an anonymous case in 60 N. Y. 262 a girl having been charged with secret vice, her father refused her music-lessons, and a silk dress, which he had previously promised; it was held that this was not a natural result, for the reason that the father disbelieved the story, and hence no action lay. This decision expressly refrained from deciding what would be the result had the parent believed the report; and to the present writer it seems open to some question even as limited, since, as the defendant could not foresee the father's disbelief, he must have had an idea of what in fact did happen.

In another case, cited in Odgers on Slander, § 323, defendant said to K., Jane, K.'s wife, is a notorious liar; she was all but seduced by C., and I advise you, if C. comes to Dublin, not to permit him to enter your place. K. thereupon turned his wife away. *Held*, that while

loss of *consortium* is special damage, it was not a natural, reasonable result of the slander in this case, and therefore could not support an action.

**"The Act of a Third Party**, if caused by the defendant's language, is *not* too remote; and this, whether such action be in itself a ground of action by the plaintiff against such third party or not. . . . The defendant cannot be held liable for any eccentric or foolish conduct on the part of the person he addressed; but only for the ordinary and reasonable consequences of his words." The contrary doctrine was laid down, sometimes, formerly, and is stated as law in the note in 1 Am. L. Cases to Brooker v. Coffin.

Lord Chancellor Campbell, in Lynch v. Knight, 9 H. L. 593, expressed regret at the unsatisfactory state of the law, according to which an imputation by unwritten words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin is not actionable without proof that it has actually produced special temporal damage. And Lord Brougham said that he would go further, and say that the law was not only "unsatisfactory," but "barbarous." Same case, p. 594.

And in *Ohio* and in *Georgia* the courts deliberately broke away from the old common law, holding that this was required out of deference to the enlightened sentiment of the age.

**Writing.**—Charge of want of chastity is actionable if in writing.—Odgers on L. & S. 24; Townshend on L. & S. (3d Ed.) § 177; Bodwell v. Osgood, 3 Pick. (Mass.) 379; Woodard v. Eastman, 108 Mass. 404.—without proof of special damage.

**Statute Law.**—In many States, acts of incontinence are now punishable under statutes, and in such jurisdictions, therefore, the imputing of such a crime is actionable *per se*, without showing special damage. Also in several States the charging a person with fornication or adultery is by statute actionable. But excommunicating a person for violation of the seventh commandment, reciting in the sentence of excommunication "that the church does now as always bear its solemn testimony against the sin of fornication and uncleanness," was held not to impute legal adultery. Farnsworth v. Storrs, 5 Cush. (Mass.) 412.

The general enactment of laws subjecting persons guilty of adultery, fornication, or sodomy to punishment has of itself rendered slanders imputing such crimes actionable *per se*; but especial statutes have been passed, in addition, in many States. Mo. Rev. St. § 2120.

A witness cannot be impeached by evidence of her unchastity, except when she is prosecuting for certain assaults.<sup>1</sup>

**CHATTELS.** (See also ACCESSION; ADMINISTRATION; ATTACHMENT; BAILMENT; CONTRACTS; CHOSSES IN ACTION; COPYRIGHT; DONATIO CAUSA MORTIS; DOWER; EXECUTORS; FIXTURES; FORFEITURE; INSOLVENCY AND BANKRUPTCY; JOINT TENANCY; JUDGMENTS; PATENTS; REMAINDERS AND REVERSIONS; TENANCY IN COMMON; TORTS; TRADE-MARKS; etc.)

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*By Attachment against Property*,

1. **Definition.**—Chattels includes all kinds of property except freehold, or things which are parcels of it.<sup>2</sup> Movable means everything which in its nature may be removed, except what is appropriated to real estate by destination, as keys of a house, and certain fixtures; personal property includes not only movables, but also something more; the whole of which is designated as chattels. This term includes all kinds of property except the freehold, or things which are parcels of it.<sup>3</sup>

(a) **Movables.**—Things personal by law include things movable,

*In Mississippi, Virginia, and Georgia* it is enacted that all words which are commonly considered insults, and lead to breach of the peace, shall be actionable.

*In Tennessee, Arkansas, Illinois, and Missouri*, imputing either orally or in writing adultery or fornication is actionable. *In Missouri* it is also a misdemeanor.

*Indiana.*—Imputing to a female incest, fornication, adultery, or whoredom, or to impute to any one incest, is actionable.

*Florida.*—Charge by a citizen against another, imputing incest, fornication, or adultery, is actionable.

*North Carolina, New York, New Jersey.*

—Want of chastity.

*Maryland.*—Want of chastity in *feme sole*.

*Michigan.*—Annoying female with obscene words.

**Masturbation.**—But to charge a girl with self-pollution is not actionable *per se* in *New York*, where it is not indictable. Anonymous, 60 N. Y. 262.

1. **Credibility of Prostitute.**—Whether evidence of common prostitution is admissible to impeach a female witness, query. It is. Comm. v. Murphy, 14 Mass. 387. It is not. Comm. v. Moore, 3 Pick. 194. overruling Comm. v. Murphy; Spears v. Forrest, 15 Vt. 435; State v. Smith, 7 Vt. 141; Morse v. Pineo, 4 Vt. 281; Jackson v. Lewis, 13 Johns. 504; 2 Stark. Ev. 369. note by Metcalf.

2. Chitty Pr. 90.

3. 1 Bouvier's Inst., No. 462.

and also something more; all of which is comprehended under the general term of chattels, a word signifying goods. This name is derived from the technical word *catalla*, which primarily signified only beasts of husbandry, or cattle, but in its secondary sense is applied to all movables in general. The idea of goods, or movables only, is not sufficiently comprehensive to include everything that the law considers chattel interest.<sup>1</sup>

(b) *Personal Property* includes not only things temporary and movable, but all subjects of property not of a freehold nature, nor descendible to the heirs at law. Chattels is a very comprehensive term, including every kind of property which is not real estate or a freehold.<sup>2</sup>

(c) *Nature*.—Chattels are goods movable, except such as are in the nature of freehold or parcel of it.<sup>3</sup> Chattels are every kind of property except the freehold, or the things which are parcels of it; it is a more extensive term than goods or effects.<sup>4</sup>

(d) *Real and Personal*.—Chattels, considering their nature, may be divided into real and personal.<sup>5</sup> Chattels are either (1) personal, which belong immediately to the person of the owner, and for which, if they are injuriously withheld from him, he has no other remedy than by personal action; (2) real, which either appertain, not immediately to the person, but to some other thing by way of dependency, as a box with writings of land, or issue out of some immovable thing, as a lease, or rent for a term of years; and they concern the realty, lands, and tenements, such as an interest in advowsons, in statutes-merchant, and the like.<sup>6</sup> Chattels are distributed by law into two kinds: chattels real and chattels personal.<sup>7</sup>

**I. CHATTELS REAL.—Definition.**—Chattels real are interests annexed to or concerning the realty, as a lease for years of land. The duration of the time of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person.<sup>8</sup> It is a personal estate if the term be for a thousand years. If the interest falls below the dignity and character of a freehold, it is governed and descendible as a chattel. It does not attend the inheritance, because if it did it would partake of the quality of an estate in fee.<sup>9</sup> Estates at will and for years are considered by law as only chattel interests. The lessees of this kind of estates are considered as only the bailiffs of the owners.<sup>10</sup> Any estate in land which does not amount to a freehold is a chattel real. It is so called because it concerns or savors of the realty; also to distinguish it from things which have no concern with realty.<sup>11</sup> The interest which the lessee possesses is not his real but his personal property. It is a chattel, though the rent

1. 1 Bl. Com. b. 11, 386.

2. 2 Kent Com. 342.

3. Wharton's L. Dict.

4. Webster's Dict.

5. Bouvier's Inst., No. 462.

6. 1 Inst. 118.

7. 1 Bl. Com. b. 11, 386; 2 Kent Com. 342.

8. 2 Kent Com. 342.

9. Brewster v. Hill, 1 N. H. 350; Gay's Case, 5 Mass. 419.

10. Watkins' Convey. 61.

11. Willard's Real Est. 49, 81.

may be only nominal, and the term ninety or even a thousand years.<sup>1</sup> Chattels real are interests issuing out of, or annexed to, real estate. They have one quality which denominates them real, viz., immobility, but want another, viz., a sufficient, legal, indeterminate duration; and this want it is that constitutes them chattels.<sup>2</sup> Many chattels have a movable nature, but being attached to the freehold, go along with it in descent and alienation, such as deeds and other papers which constitute the muniments of title to the inheritance.<sup>3</sup> So also pigeons in a pigeon-house, deer in a park, and fish in an artificial pond, go with the inheritance as heirlooms to the heir.<sup>4</sup>

1. Williams Real Prop. 9.

2. Bl. Com. b. 11, 386

3. Co. Litt. 20 a.

4. Co. Litt. 8 a.

Heirlooms are a class of property distinct from fixtures. 2 Kent Com. 343. Heirlooms do not seem to be recognized in the law of the United States. 1 Washb. Real Prop. 6.

Fixtures differ from heirlooms, and are sometimes considered as personal chattels and, at other times as part of the realty. Fixtures, technically speaking, are personal chattels annexed to the land, and which may afterwards be severed and removed by the party who has annexed them, or his personal representatives, with or without the consent of the owner of the freehold. A fixture is annexed to the freehold either actually or by construction, and the annexation must be made by joining the chattel to the freehold. 1 Bouvier's Inst., No. 472; Pothier's *Des Choses*, sec. 1.

Kent says: "The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation so as almost to render the right of removal of fixtures a general rule, instead of being an exception. The general rule, which appears to be the result of the cases, is that things which the tenant has affixed to the freehold for the purpose of trade or manufactures may be removed, when the removal is not contrary to any prevailing usage, or does not cause any material injury to the estate, and which can be removed without losing their essential character or value as personal chattels." 2 Kent Com. 343; Cook v. Champlain T. Co., 1 Denio (N. Y.), 92.

The right to remove fixtures depends on the situation of the parties who claims them, which may be classified as follows: 1. Between the executor and the heir; 2, between the vendor and vendee; 3,

between the mortgagor and the mortgagee; 4, between the devisee and executor; 5, between the landlord and tenant for years; 6, between tenants for life and their executors and their remaindermen or reversioners; 7, between landlord and tenant at will. 1 Bouvier's Inst., No. 473.

Under the common law the husband gains a title to the rents and profits during coverture of the wife's realty. 1 Bl. Com. b. 11, 433. A chattel real under the common law would thus vest in the husband, *sub modo*. As in a case of a lease for years, the husband received all the rents and profits of it, and could sell, surrender, or dispose of it during the coverture. Co. Litt. 46.

This term for years was liable to execution for the husband's debt. Co. Litt. 351.

In the absence of statutes, pews in a church partake of the nature of realty. 1 Washb. Real Prop. 9. The pew-owner has exclusive right to occupy it, and can maintain trespass against any one who occupies his seat against his will. *Freligh v. Platt*, 5 Cow. (N. Y.) 494; *Gay v. Baker*, 17 Mass. 435; *Gorton v. Hadsell*, 9 Cush. (Mass.) 508.

The interest of the pew-holders or owners is the right to occupy their respective pews as part of the auditory upon occasion of public worship; they have no ownership in the church lot. *Wheaton v. Gates*, 18 N. Y. 395; *Kimball v. Parish*, 24 Pick. (Mass.) 347; *Cooper v. Pres. Church*, 32 Barb. (N. Y.) 222; *Kellogg v. Dickinson*, 18 Vt. 266.

The owner of a pew cannot dig a vault under it or erect anything over it without the consent of the owners or trustees of the church. *Daniel v. Wood*, 1 Pick. (Mass.) 102.

If the church becomes dilapidated, and has to be rebuilt, the right of the pew-holder is gone. *Voorhees v. Church*, 17 Barb. (N. Y.) 103; *Van Houton v. Church*, 2 Green (N. J.), 126.

(i) *By Testament and Administration*, which is acquiring title to chattels on the death of a person who leaves his property undisposed of, or transferred by will.<sup>1</sup>

(j) *By Accession*.—"Accession" is the right to all which one's property produces, and the right to it by accession either naturally or artificially.<sup>2</sup>

(k) *By Intellectual Labor*.—By "intellectual labor" is meant the rights an author has in his writings called literary property, and of an inventor in his inventions.<sup>3</sup>

(1) *A Patent* is a grant by the State of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention.<sup>4</sup>

(2) *A Copyright* is the right an author has in his literary productions, such as books, maps, charts, or musical composition, print, cut, or engraving.<sup>5</sup>

(3) *A Trade-mark* is a distinguishing mark or device used by manufacturers on their goods or labels, the legal right in which is recognized by law.<sup>6</sup>

subject of bankruptcy throughout the United States. U. S. Const. art 1, sec. 4.

The U. S. Bankrupt Act of 1867 was repealed June 7, 1878, 20 St. at L. 99. Insolvent laws prevail throughout the United States. While the bankrupt law of the United States is in force it destroys the validity of the operation of a State insolvent law even though no proceedings be under it at the time. The bankrupt law supersedes the State insolvent law, for they, in the proceedings, would be repugnant to each other and conflict. *Griswold v. Pratt*, 9 Metc. (Mass.) 16. *Compare Ex parte Ziegenfuss*, 2 Ired. (N. Car.) 463.

1. 2 Kent's Com 409.

2. Civil Code of Louisiana, No. 546, 547.

It is not easy to reduce to specific rules as to the right of accession. They may be arranged, however, into three artificial kinds of accession: 1. *Adjunction*, or the union of two things belonging to different owners; 2. *Specification*, or the formation of a new species with personal chattels belonging to another; 3. *Commixtion*, or the mixture of several things belonging to several owners. 1 Bouvier's Inst. No. 503.

3. 1 Bouvier's Inst. No. 508.

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of the civil law were the chattels personal of the common law. Whatever was fixed to the freehold *perpetui usus causa* was justly deemed a part of the *res immobiles* of the civil law.<sup>1</sup> Things personal are goods, money, and all other movables which may attend upon the owner's person wherever he thinks proper to go.<sup>2</sup> Chattels personal are such that belong immediately to the person of a man.<sup>3</sup> Chattels personal belong immediately to the person of the owner, and for which, if they are injuriously withheld from him, he has no other remedy than by a personal action.<sup>4</sup>

**2. Property in.**—Property in chattels is of two kinds: (i.) *in possession* and (ii.) *in Action*.

**I. IN POSSESSION.**—Property in possession may be (a) *absolute* or (b) *qualified*.

(a) *Absolute.*—*Definition.*—Absolute property denotes a full and complete title and dominion over it.<sup>5</sup> Property in possession absolute is where a man has solely and exclusively the right and also the occupation of any movable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default.<sup>6</sup>

**I. Joint Tenancy.**—*Definition.*—Joint tenancy as regards personal property is where two or more persons hold chattels by the same title, obtained at the same time, for the same interest, and having the same possession.<sup>7</sup>

**II. Tenancy in Common.**—*Definition.*—A tenancy in common of chattels is one of property owned by two or more persons by unity of possession only.<sup>8</sup>

1. Taylor's Elem. Civil Law, 475.

2. Shep. Touch. 268; 1 Platt's Leases.

3. 1 Bouvier's L. Dict.

4. 1 Inst. 118.

5. 2 Kent Com. 348.

6. 1 Bl. Com. 388.

A person can have absolute possession of inanimate things, as goods, plate, money, jewels, implements of war, garments and the like, which cannot be moved out of the owner's possession without his own act or consent. It is different with animals, which are divided into *domitæ* or tame, and *feræ naturæ*, or wild. Of the domestic animals, as the horse, kine, sheep, poultry, and the like, one can have absolute property as in inanimate beings. But in animals, *feræ naturæ*, a man can have no absolute property.

7. 1 Bouvier's Inst. No. 484.

Joint tenancy in chattels is very much restricted. It does not apply to stock used in any joint undertaking, either in trade or agriculture. When one joint partner in trade or agriculture dies, his interest or share in the common does not survive, but goes to the personal representative. *Jeffreys v. Small*, 1 Vern. (Eng.) 217.

A joint tenant of an estate can only convey his part. Co. Litt. 186 a.

8. 1 Bouvier's Inst. No. 485.

If one tenant in common of a chattel sells the share of his co-tenant, as well as his own, he is answerable in trover. *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Hyde v. Stone*, 7 Wend. (N. Y.) 354.

It is a conversion as to the share of the other. *Park, B.*, 1 M. & W. (Eng.) 685. But one tenant in common of a chattel cannot bring trover against his co-tenant for simply dispossessing him, for each has an equal right to the possession. But for the loss or destruction or sale of the whole chattel by one of the co-tenants an action of trover will lie against him by the other. Co. Litt. 200 a; *Farr v. Smith*, 9 Wend. (N. Y.) 338; *Lucas v. Wasson*, 3 Dev. (N. Car.) 398; *Cole v. Terry*, 2 Dev. & Battle (N. Car.), 252; *Herrin v. Eaton*, 13 Me. 192; *Mersereau v. Norton*, 15 Johns. (N. Y.) 179.

Trover will lie—not trespass—by one co-tenant of goods against another who sells the whole interest in the chattel. *Waddell v. Cook*, 2 Hill (N. Y.), 47.

One tenant in common of personal property can sell his own share only. *Bradley v. Boynton*, 22 Me. 287. If he

III. *Severalty*.—*Definition*.—A chattel may belong in severalty to one person alone. By severalty is understood the state of property which is held by only one person in his own right, without any other person being joined or connected with him in point of interest during the continuance of his estate.<sup>1</sup>

(b) *Qualified*.—*Definition*.—A qualified property in a chattel is a transient or conditional interest in a chattel which may be divested on some contingency without the consent of the party interested. The legal possession and occupation of a chattel personal, not coupled with the present ability to make such occupancy and possession permanent, are characteristic of this kind of chattels.<sup>2</sup> Qualified property is that property which is not perfect in the hand of the owner, but his right to it is qualified, or limited, or special.<sup>3</sup> Personal property has a qualified or special nature, on account of peculiar circumstances of the possessor, when the chattel is susceptible of absolute ownership. For instance, a bailee has a qualified property in the chattel bailed, and so has the bailor. The pledgor and the pledgee have also a qualified property in the things pledged.<sup>4</sup>

sells the whole property in common, the vendee of the original co-tenant cannot be sued while in possession. The person in possession under such sale is a co-tenant with the rightful owner. The remedy is trover against the co-tenant. *Dain v. Cowing*, 22 Me. 347.

1. 1 Bouvier's Inst., No. 483.

2. 2 Kent Com. 347; 2 Bl. Com. b. 11, 391.

3. Story's Bailm. sec. 93; 2 Greenl. Ev. sec. 637.

4. 1 Bouvier's Inst., No. 477.

A qualified property may subsist in wild animals by man's reclaiming them and making them tame. Such as deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, fish in a private pond, and the like. These are the property of the man reclaiming them while in his actual possession; but if they regain their natural liberty his property instantly ceases, unless they have *animus revertendi*. While these chattels continue in the possession of the owner they are under the protection of the law. It is a felony by the common law to steal such of these reclaimed animals as are fit for food; but not if they are only kept for pleasure, curiosity, as dogs, bears, cats, apes, parrots, and singing-birds. When wild animals rear their young upon the land of a person, he has a qualified property in the young ones until they depart. For a stranger to take them away would be trespass in some cases and felony in others. 1 Bl. Com. b. 11, 391-395.

This common-law doctrine has been changed in many particulars. Trespass

will lie for taking, interfering with, or exercising acts of ownership over the personal property of another. 1 Chitty Pl. 168.

Dogs, tamed animals, as parrots, monkeys, bees, which have been reclaimed, and the like, are personal property, and trespass lies for taking or injuring them. Williams Pers. Prop. 19; Pierson v. Post, Caines (N. Y.), 175; Buster v. Newkirk, 20 Johns. (N. Y.) 75; Commonwealth v. Chace, 9 Pick. (Mass.) 15; Goff v. Kitts, 15 Wend. (N. Y.) 550.

Pursuit alone gives no property in wild animals. Before the property vests the wild animal must be brought within the power of the pursuer. Actual taking may not always be necessary. Pierson v. Post, 3 Caine's Cas. (N. Y.) 175.

It is required that the possession be so far complete, by the aid of nets, snares, or other means, that the animal cannot escape. An action will not lie against a person for killing and taking a fox which has been pursued by another, and is actually in view of the person who first found, started, and chased it. The mere pursuit, and being in sight of the animal, does not create a property, because no possession has been acquired. Com. v. Chace, 9 Pick. (Mass.) 15; Buster v. Newkirk, 20 Johns. (N. Y.) 75.

This seems to be the rule of the civil law, that the property in a wounded wild animal does not attach until the animal is in actual possession. Co. Litt. 182 a.

Hiving and reclaiming bees gives property in them; but merely marking the tree in which they are found does not



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A receipt given by a debtor, not a warehouseman, to a creditor, for property owned by and in possession of the debtor, is void as against other creditors, the transaction being within the statute requiring every mortgage of chattels or conveyance intended to operate as a mortgage to be recorded, unless change of possession takes place. *Thorne v. Wilmington Bank*, 37 Ohio St. 254.

**Question of Law.**—Whether an instru-

(i) *By Testament and Administration*, which is acquiring title to chattels on the death of a person who leaves his property undisposed of, or transferred by will.<sup>1</sup>

(j) *By Accession*.—"Accession" is the right to all which one's property produces, and the right to it by accession either naturally or artificially.<sup>2</sup>

(k) *By Intellectual Labor*.—By "intellectual labor" is meant the rights an author has in his writings called literary property, and of an inventor in his inventions.<sup>3</sup>

(1) *A Patent* is a grant by the State of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention.<sup>4</sup>

(2) *A Copyright* is the right an author has in his literary productions, such as books, maps, charts, or musical composition, print, cut, or engraving.<sup>5</sup>

(3) *A Trade-mark* is a distinguishing mark or device used by manufacturers on their goods or labels, the legal right in which is recognized by law.<sup>6</sup>

subject of bankruptcy throughout the United States. U. S. Const. art 1, sec. 4.

The U. S. Bankrupt Act of 1867 was repealed June 7, 1878, 20 St. at L. 99. Insolvent laws prevail throughout the United States. While the bankrupt law of the United States is in force it destroys the validity of the operation of a State insolvent law even though no proceedings be under it at the time. The bankrupt law supersedes the State insolvent law, for they, in the proceedings, would be repugnant to each other and conflict. *Griswold v. Pratt*, 9 Metc. (Mass.) 16. *Compare Ex parte Ziegenfuss*, 2 Ired. (N. Car.) 463.

1. 2 Kent's Com 409.

2. Civil Code of Louisiana, No. 546, 547.

It is not easy to reduce to specific rules as to the right of accession. They may be arranged, however, into three artificial kinds of accession: 1. *Adjunction*, or the union of two things belonging to different owners; 2. *Specification*, or the formation of a new species with personal chattels belonging to another; 3. *Commixtion*, or the mixture of several things belonging to several owners. 1 Bouvier's Inst. No. 503.

3. 1 Bouvier's Inst. No. 508.

The constitution of the United States provides that authors and inventors, for a limited time, shall have the right to the exclusive use and profit of their productions and discoveries. Congress shall have power "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective

writings and discoveries." Art. 1, sec. 8.

4. 2 Kent's Com. 366.

5. 1 Bouvier's Inst. No. 515.

6. Webster's Dict.

The act of Congress of July 8, 1870, provides that any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of anything mentioned in the text, of any dramatic composition, photograph, or negative thereof, or of any painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the act, have the sole right of printing them and vending the same. U. S. Stat at L. sec. 86.

The fundamental principle of trade-marks is that no one shall put off his chattels for sale as the goods of a rival or competitor, and cannot make use of marks, names, or other *indicia* so as to deceive the public in making it appear that he is selling the chattels of some special manufacture of a special brand. *Singer Manuf. Co. v. Loog*, 8 App. Cas. (Eng.) 15; *Johnson v. Orr Ewing*, 7 App. Cas. (Eng.) 219; *Perry v. Truefitt*, 6 Beav. (Eng.) 66; *Seixo v. Provezende*, L. R. 1 Ch. (Eng.) 192; *Leather Co. v. Am. Leather Co.*, 11 H. L. C. (Eng.) 523; *McLean v. Fleming*, 96 U. S. 245; *Manhattan Med. Co. v. Wood*, 4 Cliff. (U. S. C. C.) 461; *Marshall v. Pinkham*, 52 Wis. 572.

Trade-marks may be sold and transferred and be lawfully used by the purchaser. But he must not use them so as

(1) *By Attachment against Property*, which is a legal mode by which a title to property may be acquired by operation of law.<sup>1</sup> Attachment is a proceeding for the collection of debts by preliminary levy upon property of the debtor to conserve it for eventual execution after the lien shall have been perfected by judgment.<sup>2</sup>

**CHATTEL MORTGAGES.** (See also **CONDITIONAL SALES**; **MORTGAGES.**)

*Definition and Criteria*, 175.  
*Form, Contents, and Execution*, 179.  
*Affidavit*, 182.  
*Who may Mortgage Chattels*, 182.  
*What may be Mortgaged*, 183.  
*What the Mortgage Covers and Secures*, 186.  
*Nature of Mortgagor's Interest*, 189.  
*Validity, by What Law Governed*, 191.  
*Registration*, 191.  
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*Change of Possession*, 195.

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*Nature of Mortgagee's Title*, 200.  
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**1. Definition and Criteria.**—A chattel mortgage is an instrument of sale conveying the title of the property to the mortgagee with terms of defeasance, and if the terms of redemption are not complied with, then at common law the title becomes absolute in the mortgagee. The nature of the agreement must be such that by the mere non-performance of the condition by the mortgagor the title will be transferred to the mortgagee by the force of the agreement. This test is decisive.<sup>3</sup> It is held, however, that an instru-

to make untrue pretences. An attempt to deceive as to the maker or character of the article will not be protected. *Curtis v. Bryan*, 2 Daly (N. Y.), 312; *Samuel v. Berger*, 24 Barb. (N. Y.) 163; *Walton v. Crowley*, 3 Blatchf. (U. S. C. C.) 440. One who has a secret process of manufacturing an article, whether patentable or not, will be protected by injunction against persons who, in violation of contract or duty, and in breach of confidence who may undertake to apply it to their own use, or to disclose it to a third party. *Peabody v. Norfolk*, 98 Mass. 452.

1. 2 Kent's Com. 402.

2. Waffle's Attach. 1.

Blackstone divides the title to chattels personal into—1, by occupancy; 2, by prerogative; 3, by forfeiture; 4, by custom; 5, by succession; 6, by marriage; 7, by judgment; 8, by gift; 9, by contract; 10, by bankruptcy; 11, by testament; 12, by administration. 2 Bl. Com. b. 11, 399.

3. *Parshall v. Eggart*, 52 Barb. (N. Y.) 367; *Miner v. Judson*, 2 Hun (N. Y.), 441; *Mowry v. Wood*, 12 Wis. 413.

A chattel mortgage is a mortgage of

personal property. *Bouvier's Law Dict.*, citing 2 Kent's Com. 516.

A conveyance of chattels, absolute in form, made to secure the payment of a loan of money at a future day, defeasible on the payment of a note given for the amount loaned, is, as between the parties, a mortgage. *Carpenter v. Snelling*, 97 Mass. 452; *Taber v. Hamlin*, 97 Mass. 489.

Whenever a transaction resolves itself into a security for a debt, it is a mortgage. The right of redemption must exist in order to constitute a mortgage, so that the debtor shall be entitled to redeem his property. *Wilmerding v. Mitchell*, 42 N. J. L. 476.

A receipt given by a debtor, not a warehouseman, to a creditor, for property owned by and in possession of the debtor, is void as against other creditors, the transaction being within the statute requiring every mortgage of chattels or conveyance intended to operate as a mortgage to be recorded, unless change of possession takes place. *Thorne v. Wilmington Bank*, 37 Ohio St. 254.

**Question of Law.**—Whether an instru-

ment by which one agrees to sell and the other to purchase certain personal property at a specified price, and that the vendor shall have a "lien" upon the property until the price is paid, is in the nature of a chattel mortgage.<sup>1</sup>

A chattel mortgage is distinguished from a pledge in this—that whether possession of the chattel is delivered to the mortgagee or not, the title passes to the mortgagee, subject to be defeated upon performance of the condition, and in case of a breach it becomes absolute at law in the mortgagee; while in the case of a pledge a special property only passes to the pledgee, and the general property remains in the pledgor.<sup>2</sup>

ment by virtue of which the plaintiff avers that he became entitled to the possession of personal property, alleged to have been converted by the defendant, is or is not a mortgage, is a question of law; and to enable the court to determine it, the complaint should set forth, if not the whole instrument, at least those provisions which are relied on as giving to it the character of a mortgage. *Fairbanks v. Bloomfield*, 2 Duer (N. Y.), 349.

**Money Debt Necessary.**—A mortgage is essentially a security for a debt, and when no debt exists a mortgage is impossible. *West v. Hendrix*, 28 Ala. 226; *Robinson v. Farely*, 16 Ala. 472.

But in *Byram v. Gordon*, 11 Mich. 531, it is said that it is not necessary to the validity of a chattel mortgage, as to third persons, that it should be for the payment of any sum certain or of any money whatever; it may be for the performance of any other act, or of any contract, by the mortgagor or a third person.

1. *Dunning v. Stearns*, 9 Barb. (N. Y.) 630; *Whiting v. Eichelberger*, 16 Iowa, 422; *Yenni v. McNamee*, 45 N. Y. 614. Compare *Freeman v. Bass*, 34 Ga. 355; *Metcalfe v. Fosdick*, 23 Ohio St. 114; *Barrett v. Mason*, 7 Ark. 253.

A written agreement properly executed, stipulating that the amount due for rent of land shall be paid before the crops are removed, is held to operate as a mortgage upon the crops. *Weed v. Standley*, 12 Fla. 166; *Brown v. Coats*, 56 Ala. 439; *Lamson v. Moffatt*, 61 Wis. 153. Compare *Haynes v. Ledyard*, 33 Mich. 319.

Slaves were conveyed by an agent who was only authorized to mortgage, with notice of which authority the grantee was chargeable. *Held*, that the conveyance should be deemed a mortgage only. *Coppage v. Barnett*, 34 Miss. 621.

2. *Heyland v. Badger*, 35 Cal. 404; *Wright v. Ross*, 36 Cal. 414; *Conner v. Carpenter*, 28 Vt. 237; *Conard v. Ins. Co.*, 1 Pet. (U. S.) 449; *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Brownell v. Hawkins*,

4 Barb. (N. Y.) 491; *Wood v. Dudley*, 8 Vt. 435; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Sims v. Canfield*, 2 Ala. 555; *Barfield v. Cole*, 4 Sneed. (Tenn.) 465; *Evans v. Darlington*, 5 Blackf. (Ind.) 320.

A mortgage is a pledge and something more; for it is an absolute pledge, to become an absolute interest if not redeemed in a certain time. *Doak v. Bank*, 6 Ired. (N. Car.) 309.

**Possession.**—A subsidiary distinction between a pledge and a chattel mortgage lies in the fact that transfer of possession to the pledgee is absolutely essential to the creation of the former species of security, but not at all necessary in the latter. See *Eastman v. Avery*, 23 Me. 248; *Brownell v. Hawkins*, 4 Barb. (N. Y.) 491; *Homes v. Crane*, 2 Pick. (Mass.) 610.

**Roman Law.**—The distinction last mentioned is also recognized in the modern civil law. "The term *pignus* [pledge], in its recent and most extensive signification, must be understood as also including *hypotheca* [mortgage]; but in its stricter acceptation it is used to denote that species of mortgage which arises when the thing pledged is also delivered to the mortgagee. A creditor may very often have an opportunity to detain an *hypotheca*, but such detention has not the effect of changing this kind of a pledge into a *pignus*. The detentor may become the *natural* possessor of the thing pledged, without obtaining the *possessio civilis*." Tomkins & Jencken's Mod. Rom. Law, 185.

An instrument in writing by which the owner of personal property turns it out as "security" for a debt which he contracts, and by the terms of which it appears to have been contemplated that the property should remain in the possession of the owner, is to be treated as a mortgage and not as a pledge. *Coty v. Barnes*, 20 Vt. 78.

An instrument giving security upon a

Parol evidence is admissible both in law and equity to show that a bill of sale of chattels, absolute upon its face, was intended by the parties to operate as a mortgage only; and when this intention is discovered, the conveyance will be treated as a mortgage.<sup>1</sup> But it is only between the parties that an absolute bill of sale may be treated as a mortgage; this will not be done to the prejudice of creditors.<sup>2</sup> And the proof that a bill of sale absolute on its face was intended as a mortgage ought, in the absence of fraud or imposition, to be clear, decisive, and without doubt.<sup>3</sup>

chattel for the payment of a debt on a future day, possession to remain in the debtor, and authorizing the creditor to take possession on default, is a mortgage and not a pledge, notwithstanding the words used are, "I hereby pledge," etc. *Langdon v. Buel*, 9 Wend. (N. Y.) 80.

A debtor delivered to his creditor a watch and chain, at the same time executing and delivering to the creditor an instrument expressed as follows: "I hereby agree to give up all claim to the watch, etc., if all claims due to you from me are not paid by" a date specified. *Held*, that this was a mortgage and not a pledge. *Bunacleugh v. Poolman*, 3 Daly (N. Y.), 236.

**Mortgage Changed to Pledge.**—If the mortgagor of chattels makes a new and distinct contract with the mortgagee to deliver to him the mortgaged chattels and also other chattels, to be held as security for the payment of the debt which the mortgage was made to secure, and delivers them accordingly, and the mortgagee takes and holds possession of them under such new contract, he thereby becomes *pawnee* of all the chattels so delivered. *Rowley v. Rice*, 10 Metc. (Mass.) 7.

1. *Reed v. Jewett*, 5 Me. 96; *Caswell v. Keith*, 12 Gray (Mass.), 351; *Despard v. Walbridge*, 15 N. Y. 374; *Smith v. Beattie*, 31 N. Y. 542; *Brogden v. Walker*, 2 Har. & J. (Md.) 285; *Leighman v. Marshall*, 17 Md. 550; *Dadney v. Green*, 4 H. & M. (Va.) 101; *Sledge v. Clopton*, 6 Ala. 603; *Carter v. Burris*, 10 Sm. & Mar. (Miss.) 527; *Fowler v. Stoneum*, 11 Tex. 478; *Horne v. Puckett*, 22 Tex. 201; *National Ins. Co. v. Webster*, 83 Ill. 470; *McAnnulty v. Seick*, 59 Iowa, 596; *Fuller v. Parish*, 3 Mich. 211; *Cooper v. Brock*, 41 Mich. 488.

**Admissible at Law.**—Parol evidence that what appears to be an absolute bill of sale was in fact intended as a mortgage is admissible in an action at law, as well as in equity. *Fuller v. Parish*, 3 Mich. 211; *Despard v. Walbridge*, 15 N. Y. 374.

A bill of sale, though absolute on its face, will be treated as a chattel mortgage, if it can be proved that it was intended as security for money loaned or to be loaned. *Ing v. Brown*, 3 Md. Ch. 521; *Scott v. Henry*, 8 Engl. (Ark.) 112; *Rogers v. Vaughan*, 31 Ark. 62; *Frost v. Allen*, 57 Ga. 326; *Laeber v. Langhor*, 45 Md. 477; *Blodgett v. Blodgett*, 48 Vt. 32; *Plummer v. Shirley*, 16 Ind. 380.

**Sale with Terms of Defeasance.**—Where an absolute bill of sale is made, and at the same time the vendee gives back an instrument of defeasance, the transaction will be construed a mortgage if it can be consistently done. *Barnes v. Holcomb*, 12 Sm. & Mar. (Miss.) 306; *Hopkins v. Thompson*, 2 Port. (Ala.) 433.

A bill of sale accompanied by a *verbal* defeasance is a chattel mortgage. *Omaha Book Co. v. Sutherland*, 10 Neb. 334.

A writing, making in the first place an absolute conveyance of a horse, and then containing a condition that the instrument shall be void upon the payment by the vendor to the vendee of a certain sum of money, is in law a mortgage. *McFadden v. Turner*, 3 Jones (N. Car.), 481.

But if an absolute deed is made of a chattel, and a defeasance made at the same time, but separate from it, it should not operate as a mortgage to the prejudice of third persons. *Gaither v. Mumford*, 2 Tayl. (N. Car.) 167.

Where a bill of sale of goods, and a lease absolute on its face, is executed to secure a previous debt, and the vendee stipulates that the vendor shall have a certain time to pay the amount and retain possession of the goods until such payment, the transaction amounts to a chattel mortgage. *Ford v. Ransom*, 39 How. Pr. (N. Y.) 429; *Winslow v. Tarbox*, 6 Shep. (Me.) 132.

2. *State v. Bell*, 2 Mo. App. 102; *Gaither v. Mumford*, 2 Tayl. (N. Car.) 167.

3. *Williams v. Cheatham*, 19 Ark. 278; *Triebler v. Andrews*, 31 Ark. 163; *Freeman v. Baldwin*, 13 Ala. 246.



The inclination of courts of equity has always been to lean against conditional sales, because an error which converts a conditional sale into a mortgage is not so injurious as one which changes a mortgage into a conditional sale. Hence in all cases of doubt the courts will be disposed to construe a transaction as a chattel mortgage rather than a conditional sale.<sup>1</sup>

That section of the statute of frauds which provides that any conveyance made in trust for the use of the person making the

**Evidence of Extraneous Circumstances.**

—To convert an absolute conveyance into a security for money there must be facts and circumstances  *dehors*  the deed, showing that it was so intended, and proof of the declarations of the parties alone will not be sufficient. *Colvard v. Waugh*, 3 Jones Eq. (N. Car.) 335.

To determine whether a bill of sale is a mortgage or not, it is a well-established rule that the courts will not be limited to the terms of the written contract, but will consider all the circumstances connected with it, such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances verbal or written, as well as the acts and declarations of the parties, and will decide on the whole circumstances taken together. *Scott v. Henry*, 8 Engl. (Ark.) 112.

On a bill filed to have a deed absolute on its face declared a mortgage, a writing executed by the grantee several months after the original deed, reciting that it was agreed between him and the grantor, at the time the deed was executed, that if the latter repaid to him by a specified day the amount of the consideration money expressed in the deed, then he would reconvey to him all the property therein mentioned, and binding himself to reconvey accordingly, is evidence of the highest character against the grantee; and although it may not be sufficient of itself to show that the parties intended the deed to operate as a mortgage, yet if the other evidence in the case taken in connection with it, establishes that to have been the purpose of the parties, or even renders it doubtful whether a mortgage or a conditional sale was intended, it is enough to induce a court of equity to declare it a mortgage. *Locke v. Palmer*, 26 Ala. 312.

**Proof of Undue Imposition.**—An absolute bill of sale of a chattel was decreed to stand only as a mortgage upon proof that the vendor was upwards of seventy years old, infirm, embarrassed, his property levied on and about to be sold, and that the vendee, who was his son-in-law, took advantage of all these circumstances to make the transaction assume the form

of an absolute sale instead of a mortgage. *Smith v. Pearson*, 24 Ala. 348.

**Estoppel.**—A party is not precluded from proving that a bill of sale absolute upon its face was in fact a mortgage by his having admitted, for the purpose of avoiding a continuance of his cause, that such paper was a bill of sale. *National Ins. Co. v. Webster*, 83 Ill. 470.

1. *Locke v. Palmer*, 26 Ala. 312; *Parish v. Gates*, 29 Ala. 254; *Pioneer Gold Mining Co. v. Baker*, 23 Fed. Repr. 258; s. c., 10 Sawy. (U. S. Cir.) 539; *Hughes v. Sheaff*, 19 Iowa, 335; *Watson v. James*, 15 La. Ann. 386; *Scott v. Britton*, 2 Yerg. (Tenn.) 215; *Wilson v. Weston*, 4 Jones Eq. (N. Car.) 349; *Brown v. Dewey*, 2 Barb. (N. Y.) 28. See *infra*, this volume, tit. **CONDITIONAL SALES**.

The general tests in doubtful cases are the adequacy of the consideration and the continuance or extinguishment of the debt. *Parish v. Gates*, 29 Ala. 254.

Still the intention of the parties to the contract is the true test; and when a conditional sale is clearly established it will be enforced. *Hughes v. Sheaff*, 19 Iowa, 335.

If a promissory note for a sum certain is given for an article of personal property, and in the note it is stipulated that the article shall remain the property of the promisee until the note is fully paid, the transaction will constitute a mortgage, and the promisee is entitled to possession, unless agreement be made to the contrary. *Woodman v. Chesley*, 39 Me. 45.

Where it is shown that the parties to a written agreement designed, at the time of executing it, a borrowing and lending, not a purchase and sale, of the property therein conveyed, it is a mortgage, and nothing can divest it of the equity of redemption, not even a subsequent agreement of the parties that it shall be irredeemable. *Weatherley v. Weatherley*, 40 Miss. 462.

Where a conditional sale of personal property reserves title in the vendor, such reservation must be in writing, and the instrument will be treated as an equitable mortgage. *Talmadge v. Oliver*, 14 S. Car. 522.

same shall be void as against creditors, does not apply to chattel mortgages.<sup>1</sup>

**2. Form, Contents, and Execution.**—A valid mortgage of personal property may be created by a writing which uses the word "mortgage" only without any other words of conveyance, nor is it necessary that it should contain a power of sale or authorize the mortgagee to take possession on default.<sup>2</sup> But to render a chattel mortgage valid as against attaching creditors of the mortgagor there must be at least a distinct and specific condition that can be clearly stated, on performance of which the property would be released.<sup>3</sup> A chattel mortgage need not be under seal.<sup>4</sup> And as between the parties to the transaction, it need not even be in writing. A verbal agreement to give and accept security upon personal property is valid between the parties, although of no validity as against creditors and subsequent purchasers in good faith.<sup>5</sup> A chattel mortgage may be void for uncertainty as well as a mortgage of real estate.<sup>6</sup>

1. *Godchaux v. Mulford*, 26 Cal. 316; *Curtis v. Leavitt*, 17 Barb. (N. Y.) 309. See *Chapman v. Hunt*, 14 N. J. Ex. 149.

An instrument transferring to a creditor a stock of goods, and providing that he shall pay certain creditors and himself, and then return any surplus to the maker, is a chattel mortgage and not a general assignment, and it is a valid instrument. *Waterman v. Silberberg*, 23 Repr. (Tex.) 315; *Texas Bank v. Lovenberg*, 63 Tex. 506. Compare *Camp v. Thompson*, 25 Minn. 175.

A mortgage may be valid though it be not wholly for the mortgagee's benefit, nor will its containing a trust for the benefit of a third person of itself suffice to render it an assignment, so as to bring it within the act which requires assignments to be of all the debtor's property and without preferences. *Morse v. Powers*, 17 N. H. 286.

2. *Mervine v. White*, 50 Ala. 388. An instrument of writing, very inartificially drawn, which shows on its face that the relation of debtor and creditor existed between the parties, and by which it is declared that the creditor "shall have a lien" on a horse, the property of the debtor, "to have and to hold" until the debt is paid, operates as a mortgage, although it contains no words of conveyance. *Ellington v. Charleston*, 51 Ala. 166.

A chattel mortgage and a written agreement to govern the same subject-matter between parties, executed contemporaneously, must be treated as one contract. *Blakeslee v. Rossman*, 43 Wis. 116.

**Lex Loci.**—The construction of a mortgage of personal property is to be gov-

erned by the *lex loci*. *Tucker v. Toomer*, 36 Ga. 138.

**Mortgage of Stock.**—A mortgage of shares of stock in a corporation is valid without a transfer thereof upon the books of the company. *Ede v. Johnson*, 15 Cal. 53.

3. *Fairfield Bridge Co. v. Nye*, 60 Me. 372.

4. *Gibson v. Warden*, 14 Wall (U. S.) 244; *Milton v. Mosher*, 7 Metc. (Mass.) 244; *Gerrey v. White*, 47 Me. 504; *Sweetzer v. Mead*, 5 Mich. 107; *Flory v. Denney*, 11 Eng. Law & Eq. 584.

As a chattel mortgage need not be under seal, and as the mortgage of such property of a firm, made by one of the partners to secure a firm debt, is valid, the addition by him of a seal thereto does not vitiate it. *Milton v. Mosher*, 7 Metc. (Mass.) 244.

A sealed mortgage of personal property may be waived or altered by a subsequent parol agreement. *Acker v. Bender*, 33 Ala. 230.

5. *Couchman v. Wright*, 8 Neb. 1; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Brooks v. Ruff*, 37 Ala. 371; *Morrow v. Turney*, 35 Ala. 131. Compare *Day v. Swift*, 48 Me. 368.

A verbal chattel mortgage, if accompanied by delivery of the property, is valid. *Bardwell v. Roberts*, 66 Barb. (N. Y.) 433.

Informalities in the attestation or execution of a mortgage created by verbal contract and reduced to writing do not affect its validity. *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514.

6. *Golden v. Cockril*, 1 Kan. 259; *Rood v. Welch*, 28 Conn. 157.

As between the mortgagor and mortgagee of personal chattels a specific and particular description of the several articles mortgaged, by which to identify them from other like articles owned by the mortgagor, is not necessary.<sup>1</sup> But in order to give the mortgage general validity it is requisite that it should contain such a description of the property covered as will enable third persons clearly to identify the property, when aided by inquiries which the instrument itself indicates and directs.<sup>2</sup> But it is to be observed that an actual

1. *Call v. Gray*, 37 N. H. 428.

2. *Lawrence v. Everts*, 7 Ohio St. 194; *Mills v. Kansas Lumber Co.*, 26 Kan. 574; *Griffiths v. Wheeler*, 31 Kan. 17.

**Description of Horses and Cattle.**—"What may properly be regarded as a sufficient description of horses and cattle in an instrument of conveyance depends to some extent upon circumstances aside from the peculiar description of the animals themselves. For example, if a mortgagor owned but a small number of such animals, and should include in the mortgage all that he owned, stating therein the place or places where they were kept, or the uses in which they were employed, a less particular description of each by natural marks or individual characteristics would suffice for identification than if the mortgagor were owner of a large number, part of which only were included in the mortgage, and no information should be given in the instrument of the place where the animals were kept, or for what purposes or uses, whether freighting, carriage-driving, riding, racing, or breeding." *Stone, J.*, in *Tabor v. Sampson*, 18 Repr. (Col.) 165.

**Descriptions which have been Held Sufficient.**—When the articles mortgaged are very numerous, it is not necessary to describe each article; a mortgage of all the property of a particular description in a certain store is sufficient. *Harding v. Coburn*, 12 Metc. (Mass.) 333; *Russell v. Winne*, 37 N. Y. 591.

A mortgage expressed to be of "my entire crop of cotton and corn of the present year" is capable of being made sufficiently definite by extrinsic proof. *Ellis v. Martin*, 60 Ala. 394.

A mortgage of "my entire crop of corn, cotton-seed, fodder, peas, potatoes, and cane that I may make the present year upon my place," is not void for uncertainty. *Seay v. McCormick*, 68 Ala. 549.

"One half of all the crops growing" on certain described lands means one undivided half, and is a sufficient description. *Melin v. Reynolds*, 18 Repr. (Minn.) 177.

If a mortgage is made of all the prop-

erty "now in the shop occupied by me in said B.," and is without date, parol evidence is admissible to show the day of the execution and delivery of the instrument; the description is sufficient. *Burditt v. Hunt*, 25 Me. 419.

A mortgage of "the property described in the annexed schedule marked A, except such articles as are by law exempt from levy and sale under execution," is not void for uncertainty as to articles enumerated in the schedule, and which necessarily or presumptively do not fall within the exception. *Newell v. Warner*, 44 Barb. (N. Y.) 258.

A mortgage of cattle is not invalid because it describes them incorrectly as to their age, where it clearly appears from the evidence what cattle were intended. *Harris v. Kennedy*, 48 Wis. 500.

Where several oxen are described in a mortgage as "red, white, and blue," the full description need not apply to each. *Fordyce v. Neal*, 40 Mich. 705.

"Fourteen mules now on my plantation in Russell County" is a sufficient description in a chattel mortgage, and parol evidence of the fact that the mortgagor had but one plantation in said county, and that he had on it fourteen mules, renders the description definite and certain. *Hurt v. Redd*, 64 Ala. 85.

A description in a mortgage "one black mule, about eight years old," is not so indefinite as to render the mortgage void. *Connally v. Spragins*, 66 Ala. 258. Compare *Tindall v. Wasson*, 74 Ind. 495.

A chattel mortgage of ten horses in the mortgagor's possession is not void for uncertainty in the description, and the mortgagee may prove that horses taken by him were those actually mortgaged. *Eddy v. Caldwell*, 7 Minn. 225. Compare *Blakeley v. Patrick*, 67 N. Car. 40.

In *Indiana*, parol evidence being admissible to identify the property, a mortgage is not invalidated by describing the chattel as a "dark bay mare." *Burns v. Harris*, 66 Ind. 536. Compare *Cowden v. Lockridge*, 60 Miss. 385.

The description of property in a chat-

delivery of the specific articles covered by a chattel mortgage into the possession of the mortgagee, before any rights of third parties have intervened, will cure a defect in the description of the property.<sup>1</sup> A chattel mortgage should in general contain a description of the debt or liability for which it is given. But if it is executed in good faith for a valuable consideration, and not for the purpose of defrauding any creditor of the mortgagor, its validity is not affected by the fact that its condition misrepresents the obligation or liability in fact secured and intended to be secured by it.<sup>2</sup>

A chattel mortgage is presumed to have been executed at its date till the contrary is shown; and the time of acknowledging and

tel mortgage as "41 Berkshire hogs and 65 grain sacks" is not so uncertain as to invalidate the mortgage. *Knapp v. Dietz*, 64 Wis. 31. Compare *Everett v. Brown*, 64 Iowa, 420.

**Descriptions which have been Held Too Indefinite.**—The words "all book debts due and owing, or which should, during the continuance of the security, become due and owing to the mortgagor," in a chattel mortgage, must be construed to include all the book debts becoming due to the mortgagor in any trade which he may carry on anywhere, though the mortgage itself is for the stock in trade, fixtures, etc., of the mortgagor's regular occupation, and are hence too indefinite to pass any future book debts due the mortgagor. The clause is too indefinite at law, and to be effective in equity the description is not certain enough to support a bill for specific performance. *Re Izon v. Tailby* (Eng. Ct. of App.), 23 Repr. 190.

Under the Canadian statute (20 Vict. c. 3, § 4), which requires that a mortgage of chattels "shall contain such efficient and full description thereof that the same may be thereby readily and easily known and distinguished," a mortgage of a horse describing it simply as "one sorrel horse" is, as to third persons, void for want of sufficient description. *Montgomery v. Wight*, 8 Mich. 143.

In an intended mortgage of crops in these words, "all the cut and growing and having grown," on certain described land, the word "crops" will not be supplied; the description is fatally defective. *Clay v. Currier*, 17 Repr. (Iowa) 683.

A mortgage upon a stated quantity of mixed logs in the drive is void for uncertainty as against third persons if it does not furnish the data for separating the mortgaged logs from the mass. *Richardson v. Alpena Lumber Co.*, 40 Mich. 203.

"One four-horse iron-axle wagon" is

not a sufficient description. *Nicholson v. Karpe*, 58 Miss. 34.

A mortgage of "30 head of cattle, 6 oxen, 3 horses," etc., is void for uncertainty. *Kelly v. Reid*, 57 Miss. 89; *McCord v. Cooper*, 30 Ind. 9.

1. *Parsons Bank v. Sargent*, 20 Kan. 576.

**Schedule.**—A chattel mortgage is valid which describes the property mortgaged by reference to a schedule attached to another mortgage by the same mortgagor on file in the same office. *Newman v. Tymeson*, 13 Wis. 172. See *Van Heusen v. Radcliff*, 17 N. Y. 580.

2. *Manor v. Sheehan*, 30 Minn. 419; *Cushman v. Luther*, 53 N. H. 562; *Kaysing v. Hughes*, 64 Ill. 123.

But a chattel mortgage securing a collateral note, described in the mortgage and affidavit as an absolute debt, is not valid against creditors of the mortgagor. *Kennard v. Gray*, 58 N. H. 51.

The Ohio statute in relation to chattel mortgages requires a mortgage given to indemnify the mortgagee against a liability as surety for the mortgagor to have entered thereon a true statement of such liability, and that the instrument was taken in good faith to indemnify against any loss resulting therefrom, and the omission of such statement renders the mortgage void as against the mortgagor's creditors. *Hanes v. Tiffany*, 25 Ohio St. 549.

Under a statute requiring the debt or liability intended to be secured to be specified in the condition of the mortgage, a general description of all debts or all demands will not be sufficient. *Page v. Ordway*, 40 N. H. 253. See *Webb v. Stone*, 24 N. H. 282.

Although a mortgage may be valid without any written description of the debt, parol evidence is not admissible to vary the conditions expressed. *Varney v. Hawes*, 68 Me. 442.

recording tends to establish the time of execution.<sup>1</sup> In several of the States it is required by statute that a chattel mortgage be duly acknowledged by the mortgagor.<sup>2</sup> And a mortgage which is not acknowledged at all, or not properly acknowledged, although it may be obligatory upon the parties to it, is void as to junior mortgagees, subsequent purchasers in good faith, and creditors of the mortgagor.<sup>3</sup> But where the mortgagee is in possession of the mortgaged chattels before any lien or other right attaches, the mortgage will be good against all persons, regardless of the acknowledgment.<sup>4</sup>

**3. Affidavit.**—In several of the States the statutes provide that no chattel mortgage shall be valid (except as between the immediate parties) unless the mortgagor and mortgagee shall make an affidavit that the mortgage is made for the purpose of securing the debt specified in the consideration thereof and for no other purpose, and that the same is a just debt due the mortgagee from the mortgagor.<sup>5</sup> When this is omitted the mortgage is not good against an attaching creditor.<sup>6</sup>

**4. Who may Mortgage Chattels.**—Generally speaking, any person who owns chattels, and who is by law authorized to enter into other valid contracts in respect to his property, may execute a

1. *Merrill v. Dawson*, 1 Hemp. (U. S. Cir.) 563. See *Stonebreaker v. Kerr*, 40 Ind. 186.

2. Ill. Rev. Stat. c. 95, § 2; Minn. Genl. Stat. 1878, c. 39, § 3; Md. Rev. Code 1878, art. 44, §§ 47-50; Cal. Code, § 7957; Colo. Genl. Stat. 1883, § 164; Wash. Code, § 1987; Dak. Civ. Code, §§ 1744-6; Idaho Acts 1885, p. 74, § 2; Fla. Dig. 1881, c. 31, § 1.

3. *Forest v. Tinkham*, 29 Ill. 141; *Sage v. Browning*, 51 Ill. 217; *McDowell v. Stewart*, 83 Ill. 538; *Selking v. Hebel*, 1 Mo. App. 340.

**Good against Mortgagor.**—A chattel mortgage made upon good consideration, although it has not been acknowledged according to the statute, is good against the mortgagor and any one claiming under him by virtue of a void conveyance. *Machette v. Wanless*, 2 Col. Ter. 169.

**Acknowledgment before Interested Party.**—An acknowledgment of a chattel mortgage taken and certified by a party beneficially interested in it is void, and does not authorize record of the instrument; nor does such record, if made, impart any legal notice to third persons. *Wilson v. Traer*, 20 Iowa, 231; *Hamers v. Doyle*, 61 Ill. 307.

4. *Chipron v. Feikert*, 68 Ill. 284.

5. New Hamp. Genl. Stat. 1878, c. 137, § 6; Verm. Rev. Ls. 1880, § 1967; New Jer. Act, 1880, c. 178, § 2; Ohio Rev. Stats. § 4154; Nev. Act, 1885, c. 54.

6. *Field v. Silo*, 44 N. J. L. 355.

But a chattel mortgage without the affidavit required by statute is valid against one having knowledge that it was made in good faith and for a valuable consideration. *Roberts v. Crawford*, 58 N. H. 499.

**Statement of Consideration.**—Simply affirming under oath that the consideration of a chattel mortgage is the sum for which it is given, without disclosing how the debt on which it is founded arose or was incurred, is not a compliance with the statute requiring the mortgagee to file an affidavit showing the consideration of his mortgage. *Ehler v. Turner*, 35 N. J. Eq. 68.

Where a debt and a liability are secured by a chattel mortgage, and the affidavit speaks of the debt only, the mortgage will be good as to the debt, although invalid as security for the liability. *Sumner v. Dalton*, 58 N. H. 295.

**Mode of Making Affidavit.**—If the mortgagor and mortgagee write their own names in the body of the affidavit to a chattel mortgage, this is not a compliance with the statute which requires that the parties shall make and subscribe the affidavit. *Stone v. Marvel*, 45 N. H. 481.

A chattel mortgage to secure a debt due a town is valid when the necessary affidavit is made and subscribed by one of the selectmen as such. *Sumner v. Dalton*, 58 N. H. 295.

chattel mortgage.<sup>1</sup> But one cannot mortgage property which he does not own. And if one executes a mortgage upon chattels which belong to another, the latter's ratification will not affect the rights of one taking a mortgage from the true owner without knowledge of the fact of ratification.<sup>2</sup> The case of a conditional vendee, who holds possession of the goods but is not to acquire any title until the price is fully paid, and who attempts to mortgage them before condition performed, is somewhat anomalous; but it is generally held that the original vendor's title overrides that of the mortgagee.<sup>3</sup>

**5. What may be Mortgaged.**—In most of the American States the rule is that personal property of every description which has an actual or potential existence, and in which the mortgagor has a present interest or right of property, may be the subject of a chattel mortgage.<sup>4</sup> A chattel mortgage covering property

1. A chattel mortgage duly executed by an infant is voidable at his election at any time before he arrives at full age, and within a reasonable time thereafter, and it is avoided by any act which evinces such purpose. *Chapin v. Shafer*, 49 N. Y. 407. See *State v. Plaisted*, 43 N. H. 413.

If several persons own property together as joint tenants or tenants in common, or as partners, they may all join in mortgaging it, and either may mortgage his individual interest. *Monnot v. Ibert*, 33 Barb. (N. Y.) 24; *Milton v. Mosher*, 7 Metc. (Mass.) 244; *Shuart v. Taylor*, 7 How. Pr. (N. Y.) 251.

A chattel mortgage may be executed by an agent who is thereto authorized. *Brownell v. Hawkins*, 4 Barb. (N. Y.) 491.

Under the requirements of Colo. Rev. Stats. p. 103, and the law of 1874, p. 196, that a chattel mortgage be acknowledged before a justice in whose district the mortgagor "may reside," it is held that a non-resident person, whether natural or artificial, cannot execute a valid chattel mortgage in Colorado. *Cook v. Hagar*, 3 Colo. 386.

2. *Maier v. Davis*, 57 Wis. 212.

3. *Goodwin v. May*, 23 Ga. 205; *Kingsland v. Drum*, 80 Mo. 646; *Winchester v. King*, 46 Mich. 102. See *infra*, this volume, tit. CONDITIONAL SALES.

Chattels in the possession of a buyer who is not to become the owner until he has fully paid for them may, at any time before the price is wholly paid, be mortgaged by the seller to another person, and such person will acquire a title superior to that of the conditional buyer. *Everett v. Hall*, 67 Me. 497.

4. See New Hamp. Genl. Laws, 1878, c. 137, § 1; Verm. Rev. Laws, 1880, §

1965; Nev. Act. 1885, c. 54; Wash. Code, § 1986; Wyoming Act. 1882, c. 11, § 7; New Mexico Comp. Laws, § 1586.

**Rolling Stock.**—The rolling stock of a railroad company is personal property, and may be made the subject of a chattel mortgage. *Hoyle v. Railroad*, 54 N. Y. 314; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619; *Stevens v. Railroad*, 31 Barb. (N. Y.) 590.

But it is also said that rolling-stock and other property strictly appurtenant to a railroad is part of the road, and a mortgage thereof in connection with the road, if duly registered as a mortgage of realty, need not be recorded also as a chattel mortgage. *Farmers' Loan Co. v. Railroad*, 3 Dill. (U. S. Cir.) 412.

**Bank Stock.**—Stock in a banking corporation may be mortgaged like any other personal property. *Manus v. Brookville Bank*, 73 Ind. 243. And without a formal transfer thereof on the books of the company. *Ede v. Johnson*, 15 Cal. 53.

**Executory Interests.**—The interest of a party to an executory contract may be mortgaged before performance. *Forman v. Procter*, 9 B. Mon. (Ky.) 124. So the obligee in a title bond has an interest which he can mortgage. *Baker v. Bishop Hill Colony*, 45 Ill. 264.

But an unpaid legacy is not the subject of a chattel mortgage, and an assignment of one need not be filed as a chattel mortgage. *Kilbourne v. Fay*, 29 Ohio St. 254; *Bacon v. Bonham*, 27 N. J. Eq. 209.

And a mere possibility or expectancy not coupled with any interest in or growing out of property cannot be made the subject of a mortgage. *Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570.

The words "goods and chattels," as

to be afterwards acquired by the mortgagor may be valid, as between the parties, if the property is in existence at the time the instrument is executed, and if the goods claimed under the mortgage are clearly within its descriptive terms.<sup>1</sup> But the general rule is that a mortgage of goods which the mortgagor does not own when the mortgage is made, though he afterwards acquires them, is void as against his attaching creditors.<sup>2</sup> Yet if, after ac-

used in the recording acts of West Virginia, do not embrace choses in action. *Tingle v. Fisher*, 20 W. Va. 497.

**Stock of Goods.**—A chattel mortgage on a stock of goods in trade may be *prima facie* fraudulent, as being out of the usual and ordinary course of business, but its validity may be established by proof. *Moore v. Young*, 4 Biss. (U. S. Cir.) 128.

**Goods held by Bailee.**—A mortgage of a chattel is held valid, although, at the time of the mortgage, a third person holds the chattel in possession under the mortgagor, and has a special property therein. *McCalla v. Bullock*, 2 Bibb (Ky.), 288.

**Property not in Existence.**—A mortgage of personal property cannot apply to goods not in existence, or not capable of being identified at the time of its execution. *Milliman v. Naher*, 20 Barb. (N. Y.) 37.

1. *Beall v. White*, 94 U. S. 382; *Scharfenburg v. Bishop*, 35 Iowa. 60; *Fejavery v. Broesch*, 52 Iowa. 88; *Stephens v. Pence*, 56 Iowa. 257; *Hughes v. Wheeler*, 20 Repr. (Iowa), 331; *Arques v. Wasson*, 51 Cal. 620; *Curtis v. Wilcox*, 49 Mich. 425; *Williams v. Winsor*, 12 R. I. 9; *Cayce v. Stovall*, 50 Miss. 396; *Ludwig v. Kipp*, 20 Hun (N. Y.), 265; *Hirshkind v. Israel*, 18 S. Car. 157. Compare *Hunter v. Bosworth*, 43 Wis. 583; *Case v. Fish*, 58 Wis. 56; *Hunt v. Bullock*, 23 Ill. 320.

**Stock in Trade.**—A clause in a chattel mortgage on a stock of goods which purports to extend the lien of the mortgage over after acquired property does not render the mortgage absolutely void where there is no arrangement permitting the mortgagor to deal with the mortgaged goods, and no knowledge of such dealing on the part of the mortgagee, and the absence of any intent to defraud creditors is affirmatively found. *Yates v. Olmstead*, 56 N. Y. 632; *Brett v. Carter*, 2 Low. (U. S. Dist.) 458. Compare *Chapin v. Cram*, 40 Me. 561; *In re Bloom*, 17 Nat. Bank Reg. 425; *Gardner v. McEwen*, 19 N. Y. 123; *Chatham Nat. Bank v. O'Brien*, 6 Hun (N. Y.), 231; *In re Manly*, 2 Bond (U. S. Dist.), 261.

2. *Jones v. Richardson*, 10 Metc. (Mass.) 481; *Looker v. Peckwell*, 38 N. J. L. 253; *Farmers' L. & T. Co. v. Long Beach Improvement Co.*, 27 Hun (N. Y.), 89.

**Doctrine in Equity.**—Equity treats a mortgage of property to be afterwards acquired as a contract binding in conscience to execute a mortgage upon it at the instant it comes into being, and will enforce specific performance. Further, it considers it as already done if no specific performance be requested, and then binds everybody to respect the equitable lien who knows of it, or, without knowing of it, has got the property without valuable consideration. *Little Rock, etc., R. Co. v. Page*, 35 Ark. 304.

A hotel was leased for a term of years by an indenture whereby, among other things, the lessor sold to the lessee the furniture of the hotel, and the lessee resold the same furniture to the lessor as collateral security for the rent, and further agreed that whatever furniture he should place on the premises should be considered as belonging to the lessor as additional security for the rent. New furniture was purchased by the lessee, which was afterwards levied upon by his creditors, and the lessor applied for an injunction to restrain the sheriff from selling the furniture under his levy. *Held*, that the contract constituted an equitable mortgage, and the prayer of the complainant should be granted. *Smithurst v. Edmunds*, 14 N. J. Eq. 408. Compare *Griffith v. Douglass*, 73 Me. 532; s. c., 40 Am. Rep. 395.

**Natural Produce.**—At law a mortgage or sale of future acquired personal property, the mortgagor having acquired neither the thing nor the agent of its production at the time of making the contract, creates no valid subsisting property. But if the future acquired property be the product of present property in the mortgagor—as the wool growing on a flock of sheep, or the produce of a dairy or farm, or anything of that character—the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law. *Conderman v. Smith*, 41 Barb. (N. Y.) 404.

quisition of the property by the mortgagor, and before any other rights have intervened, the mortgagee, by delivery from or by consent of the mortgagor, takes possession of the property under the mortgage conveyance, the title to the property, both in law and equity, will vest in the mortgagee as against all persons.<sup>1</sup> A valid chattel mortgage of growing crops may be made by the owner thereof, provided they have a potential and substantial existence at the time.<sup>2</sup> Whenever one person owns real estate upon which there are fixtures which belong to another who has a right to the possession of them, such owner may mortgage them by a chattel mortgage.<sup>1</sup> Although grass growing is in general parcel

1. *Cook v. Cothrell*, 11 R. I. 482; *Williams v. Briggs*, 11 R. I. 476; *Walker v. Vaughn*, 33 Conn. 577; *Gregg v. Sanford*, 24 Ill. 17; *Titus v. Mabee*, 25 Ill. 257; *Chapin v. Cram*, 40 Me. 561.

A stipulation in a chattel mortgage that property subsequently purchased by the mortgagor shall be subject to the same lien, and that the mortgagor will execute a new mortgage thereof, is an executory agreement, which, until it is executed by a new mortgage, does not bind after-acquired property; nor does it vitiate the mortgage as to property to which it attached at the time of its execution. *Codman v. Freeman*, 3 Cush. (Mass.) 306.

2. *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193; *Hansen v. Dennison*, 7 Ill. App. 73; *Rider v. Edgar*, 54 Cal. 127; *Stephens v. Tucker*, 55 Ga. 543; *Robinson v. Ezzell*, 72 N. Car. 231. Compare *Coman v. Thompson*, 47 Mich. 22; s. c., 41 Am. Rep. 706.

A chattel mortgage on a growing crop, as against an attaching creditor, continues to be a lien on the crop in the possession of the mortgagor after the severance and removal from the land. *Rider v. Edgar*, 54 Cal. 127.

**Part of Crop.**—A mortgage may be of part of a growing crop if the part mortgaged is so described as to be identified by parol evidence, and whether so identified or not is a question for the jury upon the proof. *Stephens v. Tucker*, 55 Ga. 543.

**Maturity of Crop, when Material.**—In some States crops may be mortgaged without regard to the stage of their growth toward maturity. New Hamp. Genl. Laws, 1878, c. 137, § 1; Nev. Act, 1885, c. 54; Wash. Code, § 1986; *Cook v. Steel*, 42 Tex. 53. But in New Mexico not until they are matured and gathered. New Mex. Comp. Laws, § 1586.

A crop is a "growing" crop, so that it can be mortgaged, giving a legal title to the mortgagee from the time the seed is deposited in the ground. *Wilkinson v.*

*Ketler*, 69 Ala. 435; *Cotten v. Willoughby*, 83 N. Car. 75; s. c., 35 Am. Rep. 564; *Hanson v. Dennison*, 7 Ill. App. 73. Compare *Comstocks v. Scales*, 7 Wis. 159.

**Unplanted Crops.**—It is even held that a crop to be planted on one's own land or on land to be let to him, as well as a crop planted and in process of cultivation, is the subject of a valid mortgage. *Rawlings v. Hunt*, 90 N. Car. 270; *Robinson v. Ezzell*, 72 N. Car. 231; *Senter v. Mitchell*, 16 Fed. Rep. 206; *Thrash v. Bennett*, 57 Ala. 156; *Hurst v. Bell*, 72 Ala. 336; *Watkins v. Wyatt*, 9 Baxt. (Tenn.) 250. Compare *Hutchinson v. Ford*, 9 Bush (Ky.), 318; *Comstocks v. Scales*, 7 Wis. 159; *Milliman v. Neher*, 20 Barb. (N. Y.) 37.

A mortgage of crops to be sown is too indefinite and uncertain to be valid against third persons unless at least designating the year or term in which they are to be grown. *Pennington v. Jones*, 57 Iowa, 37.

3. *Godard v. Gould*, 14 Barb. (N. Y.) 662; *McEntee v. Scott*, 2 N. Y. Sup. Ct. 284; *Deering v. Ladd*, 22 Fed. Rep. 575; *Waterloo Bank v. Elmore*, 52 Iowa, 541.

The plaintiffs built a steam-engine for a mill, and before it left their shop took a chattel mortgage upon it, with a stipulation that they might take possession of and remove it whether attached to realty or otherwise. The engine was set up in the mill, which had been previously mortgaged, and which was subsequently sold to the defendant on foreclosure of the mortgage. Held, that the engine continued personal property, and that the plaintiffs were entitled to it. *Eaves v. Estes*, 10 Kans. 314. s. c., 15 Am. Rep. 345. See also *Pierce v. George*, 108 Mass. 78; s. c., 11 Am. Rep. 310 and note.

Where the owners of real estate execute a mortgage upon chattels which may properly be made fixtures, and subse-



of the realty, yet when it is owned by one who does not also own the land, it is personalty, and may be mortgaged as such.<sup>1</sup>

**6. What the Mortgage Covers and Secures.**—Where live-stock is mortgaged, the natural increase and produce of the stock also becomes subject to the mortgage.<sup>2</sup> And where unfinished articles of manufacture are mortgaged, and the mortgagor afterwards adds labor and materials to them, the mortgagee will hold them as against a creditor of the mortgagor, provided they remain substantially the same as when mortgaged.<sup>3</sup> And the same is true of new material added to the mortgaged articles by way of repairs.<sup>4</sup> A mortgage may be made to cover a stock of merchandise as it changes by sales and purchases, but it ought only to be enforced to the extent of the value of the stock on hand at the time when it was given, at least as against any person having an earlier claim in respect to goods subsequently purchased.<sup>5</sup> But in gen-

quently affix them to the real estate, no person having knowledge of such facts can, by purchase of the real estate or otherwise, acquire from the mortgagor any title to such chattels paramount to the mortgagee. *Sowden v. Craig*, 26 Iowa, 156.

But fixtures so permanently attached to the realty as to become a part thereof as between vendor and vendee pass to the vendee free from the lien of a prior chattel mortgage of which said vendee had no notice. A purchaser, in examining the title to real estate, is not required to examine the records of chattel mortgages. *Brinholff v. Munzenmaier*, 20 Iowa, 513.

1. *Smith v. Jenks*, 1 Denio (N. Y.), 580.

2. *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Kellogg v. Loveley*, 46 Mich. 131; 3 C., 41 Am. Rep. 151; *Gundy v. Biteler*, 6 Ill. App. 510.

A mortgage of two cows, which was duly recorded, failed to include their increase. The mortgagor, who retained possession of the cows, sold their calves when they were eighteen months old. *Held*, that the mortgage would not defeat the sale. *Winter v. Landphere*, 42 Iowa, 471.

3. *Harding v. Colburn*, 12 Metc. (Mass.) 333; *Crosby v. Baker*, 6 Allen (Mass.), 295; *Dehority v. Paxson*, 97 Ind. 253.

A mortgage of leather, cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor. *Putnam v. Cushing*, 10 Gray (Mass.) 314.

4. **Repairs.**—A mortgage of a gun, which is subsequently broken by accident and repaired, will be valid against an attaching creditor, although the lock and stock are changed, provided it is cap-

able of identification by parol evidence. *Comins v. Newton*, 10 Allen (Mass.), 518.

Where the mortgagor of a vessel removed the old sails, which were worn out, and put on new ones, and the vessel passed into the possession of the mortgagee, *held*, that the new sails also passed as in the case of repairs, and that the mortgagor could not maintain trover for the sails. *Southworth v. Isham*, 3 Sandf. (N. Y.) 448.

New printing materials, purchased after the giving of a chattel mortgage on the establishment to supply the wear, decay, and destruction of the old, and which have been so commingled with the old as not to be readily distinguished, would be included in the mortgage and become a part of the mortgaged property by accession, but if so kept separate as to be readily distinguishable, would not be so included. *Fowler v. Hoffman*, 31 Mich. 215.

5. *Goodrich v. Williams*, 50 Ga. 425 (construing Ga. Rev. Code, § 1954). *Chisholm v. Crittenden*, 45 Ga. 213.

If a mortgagor, who is intrusted with the possession of the mortgaged goods, intermix them, purposely or through want of proper care, and without the consent of the mortgagee, with other property of his own, so that they cannot be distinguished, the whole mass is subject to the lien and operation of the mortgage. *Willard v. Rice*, 11 Metc. (Mass.) 493; *Dunning v. Stearns*, 9 Barb. (N. Y.) 630; *Adams v. Wildes*, 107 Mass. 123; *Fuller v. Paige*, 26 Ill. 358; *Simmons v. Jenkins*, 76 Ill. 479. *Compare Wilcox v. Jackson*, 7 Colo. 521; *Hamilton v. Rogers*, 8 Md. 301.

H. bought a stock of goods from A., gave him a mortgage thereon for the pur-

eral the lien of the mortgage will be restricted to such articles as are specifically mentioned in it or clearly embraced within its terms.<sup>1</sup> Where personal property is mortgaged to secure a debt, and the mortgagor exchanges such property for other property, with the assent of the mortgagee, the latter property cannot be held under the mortgage, at least as against third persons.<sup>2</sup> A mortgage of personal chattels which, under the statutes, is fraudulent and void as to a part of the chattels covered by it (e.g., as being intended to delay and defraud creditors), is void altogether.<sup>3</sup>

A chattel mortgage made to secure future advances is not on that account fraudulent as a matter of law.<sup>4</sup> The fact that a

chase-money, and afterwards formed a copartnership with S., who furnished goods of equal value. *Held*, that purchases made by the firm of S. & H., to supply the deficiency made by sales from the stock bought from A., were not subject to the mortgage. *Anderson v. Howard*, 49 Ga. 313.

A mortgage of all the goods in a certain store covers the goods, though moved to another place. *Wheelden v. Wilson*, 44 Me. 1.

1. A chattel mortgage on the "fixtures, furniture, and appliance used in and about the carrying on of" a certain store, does not cover wagons and teams used for the delivery of goods. *Van Patten v. Leonard*, 55 Iowa, 520.

A mortgage of "groceries" contained in a "country and village grocery store," does not include pails, shovels, and the like, although such goods are usually kept for sale in such a store. *Fletcher v. Powers*, 131 Mass. 333.

A piano, billiard table, and paintings are included in a mortgage of "all the furniture" in a certain house. *Sumner v. Blackslee*, 59 N. H. 242; s. c., 47 Am. Rep. 196.

A chattel mortgage of a stock of goods and "all books of account and rights of credit arising out of said business," was held not to cover subsequently accruing accounts on sales with the mortgagee's consent in the regular course of trade. *Lorimer v. Allyn*, 64 Iowa, 725. See *La-hbrooks v. Hatheway*, 52 Mich. 124; *Kemp v. Carnley*, 3 Duer (N. Y.), 1.

A mortgage of "the goods and chattels now in" the mortgagor's store, "a schedule of which is hereunto annexed," covers only the goods in the store of which a schedule was made. *Partridge v. White*, 59 Me. 564.

2. *Rhines v. Phelps*, 3 Gilm. (Ill.) 455; *Sharpe v. Pearce*, 74 N. Car. 600; *Rose v. Bevan*, 10 Md. 466; *Barnard v. Eaton*, 2 Cush. (Mass.) 294. But it might be as

between the parties. *Sharpe v. Pearce*, 74 N. Car. 600.

No verbal agreement entered into between the mortgagor and mortgagee after the execution of a chattel mortgage can, as between the mortgagee and a subsequent purchaser from the mortgagor, subject property not originally included within the mortgage to its terms, or give the mortgagee a lien thereon. *Powers v. Freeman*, 2 Lans. (N. Y.) 127. But it might bind the parties themselves. *Burns v. Campbell*, 71 Ala. 271.

The terms of a mortgage cannot be controlled, nor fraud in its execution shown, by the understanding of a witness as to what property was covered by it, especially when he does not state when he had this understanding. *Hurd v. Gallaher*, 14 Iowa, 394.

A mortgagee of personal property has no claim upon a note taken by the mortgagor in payment of the property and transferred to a third person, having no notice that the note was given for mortgaged property. *Kahler v. Hanson*, 53 Iowa, 698.

3. *Russell v. Wynne*, 37 N. Y. 591; *Yates v. Olmstead*, 56 N. Y. 632. Compare *Barron v. Morris*, 14 Nat. Bank. Reg. 371; *State v. Tasker*, 31 Mo. 445.

But the validity of a mortgage is not in the least affected by the fact that the mortgagee holds other independent collateral security for the debt secured by the mortgage. *Ayres v. Wattson*, 57 Pa. St. 360.

4. *Jones v. Indemnity Co.*, 101 U. S. 622; *Lawrence v. Tucker*, 23 How. (U. S.) 14; *Holbrook v. Baker*, 5 Me. 309; *Googins v. Gilmore*, 47 Me. 9; *Boswell v. Goodwin*, 31 Conn. 74; *Brown v. Kiefer*, 71 N. Y. 610; *Ackerman v. Hunsicker*, 85 N. Y. 43; *Carpenter v. Blote*, 1 E. D. Smith (N. Y.) 491; *Steiner v. McCall*, 61 Ala. 406; *Speer v. Skinner*, 35 Ill. 282; *Carter v. Rewey*, 62 Wis. 552; *Berry v. O'Connor*, 19 Repr. (Minn.)

chattel mortgage is given for a sum greater than the actual liability of the mortgagor to the mortgagee, does not of itself render the mortgage void at law.<sup>1</sup> The fact that a chattel mortgage appears on its face to be given to secure an absolute debt, but, in fact, was in good faith given to secure against a contingent liability as surety, does not avoid it as to creditors of the mortgagee.<sup>2</sup> A

574; *Madigan v. Mead*, 31 Minn. 94; *Necklin v. Nelson*, 19 Repr. (Oreg.) 181; *Jones on Chatt. Mtgs.* §§ 94-97; *Herman on Chatt. Mtgs.* § 50.

**Present and Future Debts.**—In the absence of any showing of fraud, a chattel mortgage given as continuing security to cover present and future indebtedness is valid as to the mortgagor's creditors. *Brown v. Kiefer*, 71 N. Y. 610; *Speer v. Skinner*, 35 Ill. 282; *Googins v. Gilmore*, 47 Me. 9; *Fairbanks v. Bloomfield*, 5 Duer (N. Y.), 434; *Lawrence v. Tucker*, 23 How. (U. S.) 14.

As to whether a mortgage which, on its face, is given to secure a present debt, but which is known to have been given only to secure future advances or credits, is valid as against creditors or purchasers, see *Westcott v. Gunn*, 4 Duer (N. Y.), 107.

If the condition of a mortgage is broad enough to cover future claims, it will be construed to apply to existing debts or liabilities, if the language does not forbid such construction, and the mortgage will not be void for that cause as to existing claims. *Page v. Ordway*, 40 N. H. 253.

**Future Advances Must be Contemplated.**

—A chattel mortgage cannot be extended to cover advances not contemplated at the time of its execution. *Sims v. Mead*, 29 Kans. 124. Or not expressed in the instrument. *Driver v. McLaughlin*, 2 Wend. (N. Y.) 596.

A mortgage of personal property given to secure the payment of such sums as may thereafter become due to the mortgagee is not a valid security, as against a judgment creditor of the mortgagor, for claims accruing after the property was attached in his suit, and the mortgagee summoned as trustee. *Barnard v. Moore*, 8 Allen (Mass.), 273.

**Partnership Debts.**—A mortgage by a firm, though valid to secure future advances, cannot inure to secure advances made to their successors after a dissolution of the original firm. *Monnot v. Ibert*, 33 Barb. (N. Y.) 24.

**Renewal Notes.**—A mortgage "for the better security of two notes," etc., the condition of which was that the mortgage should cease if the mortgagor paid the said notes "on the days they respectively

mature," does not secure notes given in renewal of the original mortgage notes, they being given up. *Ayres v. Wattson*, 57 Pa. St. 360.

1. *Frost v. Warren*, 42 N. Y. 204; *Goff v. Rogers*, 71 Ind. 459; *Barkon v. Sanger*, 47 Wis. 500. But if the amount is materially larger than that due, this may be a badge of fraud, and the question is for the jury. *Goff v. Rogers*, 71 Ind. 459.

To render a chattel mortgage void in law, because taken for a larger amount than was in fact due the mortgagee, it must appear that it was so taken intentionally, and not by mere mistake, in computation or otherwise. *Kalk v. Fielding*, 50 Wis. 339.

But the taking a chattel mortgage for a greater amount than is due, from a party known by the mortgagee to be in failing circumstances and pressed by his creditors, is conclusive evidence of fraud. *Butts v. Peacock*, 23 Wis. 359.

**Justly Due.**—The sum "justly due" upon a chattel mortgage given to secure future contingent liabilities, and to be ascertained by the court where the property is attached, and the mortgagee summoned as trustee under Mass. Genl. Stats. ch. 123, § 67, is that sum which will fully secure the mortgagee against all such liabilities covered by the mortgage. *Rogers v. Abbott*, 128 Mass. 102.

The word "due" in a stipulation contained in a chattel mortgage, providing for insurance for the mortgagee's benefit in a sum equal to the full amount due on the mortgage, is construed to be synonymous with "owing," and to contemplate insurance to the extent of the amount remaining unpaid. *Fowler v. Hoffman*, 31 Mich. 215.

2. *Goodheart v. Johnson*, 88 Ill. 58. Compare *Belknap v. Wendell*, 31 N. H. 92. See *Treat v. Gilmore*, 49 Me. 34.

A clause in a chattel mortgage given as security to an accommodation indorser for the payment of certain notes therein named, providing that the mortgagor would indemnify the mortgagee for all damages, costs, etc., which he had incurred or might incur, or in any way become liable for, on account or by reason of the use of his name as indorser or otherwise,

mortgage founded on a usurious consideration is utterly void against all other liens.<sup>1</sup>

**7. Nature of Mortgagor's Interest.**—While the mortgagor of personal property remains in possession, before default, he has such an interest that he may (unless forbidden by the terms of the mortgage) sell and deliver the mortgaged goods, and convey to the purchaser all the interest which he himself has, the purchaser holding subject to the mortgage; and the latter may in turn, before default, sell and deliver to another person, with the same effect; and the remedy of the mortgage, upon breach of condition, is to follow the property into the hands of the last purchaser.<sup>2</sup> And until a chattel mortgage becomes absolute by non-performance of its condition, the mortgagor has an interest in the chattels which is liable to levy and sale on execution, and the purchaser takes subject to the mortgage, and acquires the right of redemption.<sup>3</sup>

for the mortgagor's accommodation or benefit, applies to and covers other similar notes outstanding at the date of the mortgage, although not specified therein. *Ripley v. Larmouth*, 56 Barb. (N. Y.) 21.

If a mortgage of personal property is given to secure a debt, liability, or agreement, the debt, etc., must be strictly between the mortgagor and mortgagee. *Parker v. Morrison*, 46 N. H. 280.

Where a chattel mortgage is made as security for the payment, "according to its tenor," of a promissory note, payable at a day certain, which has passed, the condition must be understood to be the payment of the note in its then existing state. *Pettis v. Kellogg*, 7 Cush. (Mass.) 456.

1. *Thompson v. Van Vechten*, 27 N. Y. 568; *Leslie v. Hoffman*, 1 Edm. Sel. Cas. (N. Y.) 475.

Where a chattel mortgage was made to secure in part a valid debt, and in part the payment of a note given upon a usurious agreement, *held*, that the mortgage could only be enforced to the extent of the valid debt, and as to the residue it was void. *Langdon v. Gray*, 52 How. Pr. (N. Y.) 387; *Vesey v. Ockington*, 16 N. H. 479.

Where a chattel mortgage on its face and by its terms is given to secure a usurious note, but the note secured by it expresses a legal rate of interest, the mortgage is only apparently and not in fact usurious, and therefore is valid. *Ward v. Anderberg*, 17 Repr. (Minn.) 154.

**Violation of Statutes.**—A mortgage made to secure the payment of promissory notes, part of the consideration of which is spirituous liquors sold in violation of law, is wholly void. *Brigham v. Potter*, 14 Gray (Mass.), 522. So of a debt which is in contravention of the in-

solvent laws. *Denny v. Dana*, 2 Cush. (Mass.) 160.

2. *Hall v. Sampson*, 35 N. Y. 277; *Goulet v. Asseler*, 22 N. Y. 228; *Hamill v. Gillespie*, 48 N. Y. 556; *Hathaway v. Brayman*, 42 N. Y. 322; s. c., 1 Am. Rep. 524; *Gardner v. Morrison*, 12 Ala. 517. Compare *Travis v. Bishop*, 13 Metc. (Mass.) 304; *Hurt v. Reeves*, 5 Hayw. (Tenn.) 50. See *infra*, §§ 11, 13, 16 of this article.

3. *Champlin v. Johnson*, 39 Barb. (N. Y.) 606; *Hull v. Carnley*, 11 N. Y. 501; *Hamill v. Gillespie*, 48 N. Y. 556; *Olds v. Andrews*, 66 Ind. 147; *Durfee v. Grinnell*, 69 Ill. 371; *Nelson v. Ferris*, 30 Mich. 497.

Whether or not, under the laws of South Carolina, there remains such a legal estate in the mortgagor of a chattel, at least until breach of condition, as is the proper subject of levy and sale under execution, he certainly has the right to continued possession and use of the chattel until that event, unless expressly denied in the instrument. *McKnight v. Godon*, 13 Rich. (S. Car.) 222.

**After Default.**—After the debt has become due the mortgagee acquires an absolute title, and the mortgagor, although remaining in possession, has no longer any interest which can be levied upon and sold by virtue of an execution. *Champlin v. Johnson*, 39 Barb. (N. Y.) 606; *Judson v. Easton*, 58 N. Y. 664; *Nichols v. Mead*, 2 Lans. (N. Y.) 222.

One who gives a chattel mortgage, specifying no time of payment, to secure a debt already overdue, has thereafter no leviable interest in the mortgaged chattels. The mortgagee becomes the absolute owner, and the interest of the mortgagor is merely the right to pay off the mortgage debt, and his possession is that

Where a chattel mortgage specifically defines the circumstances under which the mortgagee shall become entitled to the possession of the property, the law implies an agreement that it is to remain meantime in the mortgagor.<sup>1</sup>

**8. Validity, by What Law Governed.**—The general rule is, that a chattel mortgage which is valid under the laws of the State where it was executed, both as between the immediate parties thereto and as against third persons, will be so held by the courts of a sister State to which the property may be removed.<sup>2</sup> And if a mortgage is valid where it is made, and if it is executed and recorded according to the laws of the State or country of its execution, it will be enforced in the courts of another State or country as a matter of comity, although it is not executed according to the requirements of the law of the latter State; and this is because of the general principle that the law of the place of contract governs as to the nature, validity, construction, and effect of the contract.<sup>3</sup>

of a bailee. *Battes v. Ripp*, 1 Abb. App. Dec. (N. Y.) 78.

1. *Hall v. Sampson*, 35 N. Y., 274.

Although property is mortgaged by one person to another, that does not authorize any one but the mortgagee, or one claiming under him, to take the property from the mortgagor, and if any other person does so he will be liable for more than nominal damages. *Tallman v. Jones*, 13 Kans. 438.

2. *Offutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 86; *Jones v. Taylor*, 30 Vt. 42; *Taylor v. Boardman*, 25 Vt. 581; *Cobb v. Buswell*, 37 Vt. 337; *Bigelow v. Bridge Co.*, 14 Conn. 583; *Rhode Island Bank v. Danforth*, 14 Gray (Mass.), 123; *Martin v. Hill*, 12 Barb. (N. Y.) 631; *Whitman v. Conner*, 40 N. Y. Super. Ct. 339; *Ryan v. Clanton*, 3 Strobb. (S. Car.) 411; *Barker v. Stacy*, 25 Miss. 477; *Hall v. Pillow*, 31 Ark. 32; *Blystone v. Burgett*, 10 Ind. 28; *Ames Iron Works v. Warren*, 76 Ind. 512; *Simms v. McKee*, 25 Iowa, 341; *Smith v. McLean*, 24 Iowa, 322; *Feurt v. Rowell*, 62 Mo. 524.

Thus the Vermont rule of law requiring a change of possession to render valid a chattel mortgage does not apply to a mortgage made in another State, where the parties resided and where the property was situated at the time the mortgage was executed, when no change of possession is required by the law of that State; and the property when subsequently brought into Vermont by the mortgagor, with the consent of the mortgagee, cannot be attached by the creditors of the former. *Cobb v. Buswell*, 37 Vt. 337.

**Louisiana.**—Chattel mortgages being

unknown to the laws of Louisiana, they cannot be enforced in that State, where movables are not susceptible of being mortgaged, and the supreme court is not bound by the comity of nations to enforce a contract which, if made there, could not defeat the rights acquired by attachment under the State law. *Delop v. Windsor*, 26 La. Ann. 185.

**Invalid at Common Law.**—A chattel mortgage, appearing on its face to have been executed in another State, will not be upheld to defeat the title of an innocent purchaser here, though shown to have been recorded in the county where executed, it not being valid at common law and not shown to be valid by the *lex loci contractus*. *Blystone v. Burgett*, 10 Ind. 28.

**Lex Situs Governs.**—The law of the State in which personal property is at the time of its being mortgaged, as to the steps necessary to be taken to give the mortgage validity as against creditors or subsequent purchasers or incumbrancers, governs when the mortgage is relied on in the courts of that State as the basis of an action or a defence, although the mortgage may have been executed in another State and for the purpose of securing an obligation made and to be performed in the latter. *Whitman v. Conner*, 40 N. Y. Super. Ct. 339.

The registration of a chattel mortgage in Missouri, the residence of the parties, while the property mortgaged is in Kansas, is not sufficient notice to creditors in Kansas. *Golden v. Cockril*, 1 Kans. 259. See *Langworthy v. Little*, 12 Cush. (Mass.) 109.

3. *Offutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 86; *Bigelow v.*

**9. Registration.**—It is provided in nearly all the States that chattel mortgages shall be filed in a designated office—or recorded, or registered—or else they shall not be valid as against creditors of the mortgagor or subsequent purchasers or incumbrancers without notice, unless the property mortgaged is delivered to and retained by the mortgagee.<sup>1</sup> The object of requiring a chattel mortgage

Bridge Co., 14 Conn. 583; Langworthy v. Little, 12 Cush. (Mass.) 109; Rhode Island Bank v. Danforth, 14 Gray (Mass.), 123; Tyler v. Strang, 21 Barb. (N. Y.), 198; Nichols v. Mase, 25 Hun (N. Y.), 640; Whitman v. Conner, 40 N. Y. Super. Ct. 339; Martin v. Hill, 12 Barb. (N. Y.) 631; Edgerly v. Bush, 81 N. Y. 199; Wilson v. Carson, 12 Md. 54; Ryan v. Clanton, 3 Strobb. (S. Car.) 411; Barker v. Stacy, 25 Miss. 471; Beall v. Williamson, 14 Ala. 55; Hall v. Pillow, 31 Ark. 32; Kanaga v. Taylor, 7 Ohio St. 134; s. c., 70 Am. Dec. 62; Blystone v. Burgett, 10 Ind. 28; Ames Iron Works v. Warren, 76 Ind. 512; Arnold v. Potter, 22 Iowa, 194; Smith v. McLean, 24 Iowa, 322; Simms v. McKee, 25 Iowa, 341; Feurt v. Rowell, 62 Mo. 524.

Thus where a chattel mortgage has been duly executed and recorded in Massachusetts, and the mortgagor removes with such property into New Hampshire, a new record of the mortgage need not be made in the latter State. *Offutt v. Flagg*, 10 N. H. 46; *Nichols v. Mase*, 25 Hun (N. Y.), 640.

**Rule in Michigan.**—In *Montgomery v. Wight*, 8 Mich. 143, it is said that laws for recording chattel mortgages can have no force beyond the jurisdiction of the sovereignty enacting them, and the record of a chattel mortgage in Canada is therefore no notice to the creditors of the mortgagor who shall find the property in his possession in Michigan.

So of a chattel mortgage recorded in another State. *Boydson v. Goodrich*, 49 Mich. 65.

1. Maine Rev. Stats. c. 91, § 1; New Hamp. Gen'l Ls. 1878, c. 137, § 2; Verm. Rev. Ls. 1880, § 1966; Mass. Pub. Stats. 1882, c. 192, § 1; act of 1883, c. 73; Rhode Island Pub. Stats. 1882, c. 176, § 9; New York act 1833, c. 279, § 1; New Jer. act of 1878, c. 234; act of 1881, c. 179, § 4; act of 1885, c. 244, § 4; *Maryl. Rev. Code* 1878, art. 44, § 45; *Virg. Code* of 1873, c. 114, § 5; N. Car. Code of 1883, § 1254; S. Car. Gen'l Stats. 1882, § 2346; Georgia Code 1882, § 1956; Fla. Dig. 1881, c. 31, § 1; Ala. Code, § 2162; Tex. Rev. Stats. 1879, § 4341; West Va. Rev. Stats. 1878, art. 96, § 5; Tenn. Code 1884, § 2809; Kans. Comp. Ls.

1879, c. 68, § 9; Mansfield's (Ark.) Dig. §§ 4742, 4750; Ohio Rev. Stats. 1880, § 4150; Ind. Rev. Stats. § 4913; Ill. Rev. Stats. art. 95, § 1; Iowa Rev. Code, § 1923; Mo. Rev. Stats. § 2503; Mich. Annot. Stats. § 6193; Wis. Rev. Stats. § 2313; Minn. Gen'l Stats. 1878, c. 39, § 1; Nebr. Comp. Stats. pt. 1, c. 32, § 14; Cal. Code, § 7957; Oreg. Gen'l Ls. 1872, c. 6, § 46; Nev. Comp. Ls. § 294; Colo. Gen'l Stats. §§ 163, 172; Wash. Code, § 1987; Dak. Civ. Code, § 1744; Montana act 1881, p. 3, §§ 1, 4; Wyom. act 1882, c. 11, § 2.

**Bills of Sale.**—"A bill of sale, absolute upon its face, but executed as a security and intended to operate as a mortgage, is within the operation of a statute making void a mortgage not recorded in case the property be not delivered to and retained by the mortgagee." *Jones on Chatt. Migs.* § 275; *Necklin v. Nelson*, 19 Repr. (Oreg.) 181; *Kuhn v. Graves*, 9 Iowa, 305; *Cooper v. Brock*, 41 Mich. 491; *Fuller v. Parrish*, 3 Mich. 211; *Comm'rs v. Babcock*, 5 Oreg. 472.

**Vessels.**—The statute in relation to the registration of chattel mortgages does not apply to property in vessels which are duly registered and enrolled according to the laws of the United States. *Wood v. Stockwell*, 55 Me. 76; *Cunningham v. Tucker*, 14 Fla. 251.

**Schedule or Inventory.**—A schedule referred to in a chattel mortgage as a part of the same must, equally with the mortgage, be recorded in the town clerk's office, to give effectual notice to the public. *Sawyer v. Pennell*, 1 App. (Me.) 167. *Compare* *Lund v. Fletcher*, 39 Ark. 325.

But if a chattel mortgage is to secure a written agreement, the two are distinct contracts, and no copy of the agreement need be filed with the mortgage in order to render the latter operative against third persons. *Byram v. Gordon*, 11 Mich. 531.

**Lost Mortgage.**—Where a chattel mortgage is lost before being recorded as provided by law, the mortgagee cannot protect himself against a levy of execution by the mortgagor's creditors by recording a copy of the mortgage certified as correct by the justice before whom the orig-

to be filed or recorded is to give notice of its existence to creditors and subsequent purchasers when the mortgagor retains possession of the mortgaged property; hence if the actual possession is transferred to and continues in the mortgagee, that is sufficient notice, and the necessity for filing or recording the mortgage fails.<sup>1</sup> And a chattel mortgage is good as between the parties to it without any filing or change of possession.<sup>2</sup> But it is void as against execution creditors who levy after the making of the mortgage, but prior to its recording.<sup>3</sup> Chattel mortgages are generally required to be filed in the office of the town-clerk, or in the county where the mortgagor resides.<sup>4</sup> In several of the States there are statutory

inal was acknowledged, the copy not being acknowledged. *Porter v. Dement*, 35 Ill. 478.

1. *Morrow v. Reed*, 30 Wis. 81; *Greeley v. Reading*, 74 Mo. 309; *Wescott v. Gunn*, 4 Duer (N. Y.), 107.

In order that a chattel mortgage should be valid without being recorded, there must be an immediate delivery of the goods mortgaged, followed by an actual and continued change of possession. It is not sufficient, as against attaching creditors, that the mortgagee takes possession before the attachment issues. *Pars-hall v. Eggart*, 52 Barb. (N. Y.) 367.

The registration of a mortgage is intended solely for the benefit and protection of the mortgagee, and rests wholly in his election, and in the absence of an agreement, express or implied, to the contrary, he cannot hold the mortgagor liable for the costs or fees of registration. *Simon v. Sewell*, 64 Ala. 241.

2. *Stewart v. Platt*, 101 U. S. 731; *Hodgson v. Butts*, 3 Cranch (U. S.), 138; *Winsor v. McLellan*, 2 Story (U. S. Cir.), 492; *Smith v. Moore*, 11 N. H. 55; *Wescott v. Gunn*, 4 Duer (N. Y.), 107; *Williamson v. Railroad*, 26 N. J. Eq. 398; *Pancoast v. American Heating Co.*, 66 How. Pr. (N. Y.) 49; *Hudson v. Warner*, 2 Harr. & J. (Md.) 415; *Merrick v. Avery*, 14 Ark. 370; *McTaggart v. Rose*, 14 Ind. 230; *Fuller v. Paige*, 26 Ill. 358; *Morrow v. Reed*, 30 Wis. 81.

3. *Cass v. Rothman*, 42 Ohio St. 380; *Garland v. Plummer*, 72 Me. 397; *Sheldon v. Connor*, 48 Me. 584; *Rich v. Roberts*, 48 Me. 548.

4. **Where Filed.**—It is sufficient if a chattel mortgage is filed in the clerk's office of the town where the mortgagor resided at the time of its execution, though he may be a resident of another town at the time of filing. *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

A record of a chattel mortgage in a town where the mortgagee resides, if that be not the town where the mortgagor re-

sides, is of no validity. *Stowe v. Meserve*, 13 N. H. 46.

If the case discloses nothing as to the residence of the mortgagor, the validity of the mortgage, though recorded, is not established. *Bither v. Buswell*, 51 Me. 601; *Smith v. Jenks*, 1 Denio (N. Y.), 580.

Where a township or a part of a township is annexed to the corporate limits of a city or village wherein the office of the county recorder is kept, such recorder's office does not become the place for deposit of chattel mortgages executed by residents of such annexed territory. *Curtiss v. McDougal*, 26 Ohio St. 66.

**Removal of Mortgagor to Another Town.**—The removal of the mortgagor from the town in which he resided when the mortgage was executed and where it was duly recorded, and the taking of the mortgaged property with him, does not invalidate the record of the mortgage or necessitate the recording of it again in the town to which he has removed. *Pease v. Odenkirchen*, 42 Conn. 415; *Elson v. Barrier*, 56 Miss. 394; *Offut v. Flagg*, 10 N. H. 46; *Hoit v. Remick*, 11 N. H. 285; *Barrows v. Turner*, 50 Me. 127; *Brigham v. Weaver*, 6 Cush. (Mass.) 298; *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

"The object in requiring a mortgage to be recorded is to give publicity to such conveyances, and to provide sources of information common to all persons, in order to enable purchasers and creditors and all others to determine with some degree of facility, convenience, and certainty the question of title to property whenever they may be interested to know it; while at the same time it is not among the purposes of the registry acts to subject a *bona fide* mortgagee, who is of course a creditor, to the inconvenience, if not impracticability, of the constant vigilance and ceaseless watching necessary to guard and secure his interests if he were obliged to record his mortgage in every town into which the mortgagor

provisions requiring that chattel mortgages, in order to be valid against creditors, must be recorded or filed within a certain period after their date. In some this period is described as "forthwith;" while in others it ranges from ten to forty days.<sup>1</sup> And even in the absence of such a provision, neglect seasonably to record a mortgage on a stock of goods, through which innocent parties are led to intrust goods with the mortgagor, deprives it of priority of lien as against them.<sup>2</sup> A chattel mortgage is to all intents and

might see fit to remove with the property. If he were required to do this, the mortgagee's security would be rendered worthless by a seizure of the mortgaged property under process of law at the instance of a creditor of the mortgagor." Mr. Freeman's note to *Kanaga v. Taylor*, 70 Am. Dec. 67.

**Removal to Another County.**—A mortgage of a chattel once properly recorded in the county where the chattel was and where the mortgagor lived need not be again recorded because the chattel is removed to another county; the first record affords constructive notice to the world. *Griffith v. Morrison*, 58 Tex. 46; *Bevans v. Bolton*, 31 Mo. 437. Compare *Boydson v. Goodrich*, 49 Mich. 65.

Where a party living in one county executes a mortgage upon a crop to be planted on land bought by him in another county, to which he contemplates removing, such mortgage may be properly registered in the latter county, the mortgagor having actually made such removal after the registration of the paper. *Harris v. Jones*, 83 N. Car. 317.

**Joint Owners.**—A chattel mortgage executed by two or more joint mortgagors residing in different towns in the same State is invalid as against third persons unless it is recorded in every town in which any of the mortgagors resides. *Morrill v. Sanford*, 49 Me. 566; *Rich v. Roberts*, 50 Me. 395; *Altman v. Guy*, 41 Ohio St. 598.

**Partnership.**—A partnership having a definite local abiding-place has a residence there within the meaning of the statute requiring chattel mortgages to be filed in the township or city of the residence of the mortgagor, if a resident of the State; and a chattel mortgage given by the firm in the firm name, and which covers partnership property, is properly filed in the township where one of the partners resides and where is the seat or abiding-place of the firm, although the other partner is a non-resident of the State. *Hubbardston Lumber Co. v. Covert*, 35 Mich. 254; *Briggs v. Leitelt*, 41 Mich. 79.

In *Indiana*, on the other hand, it is

held that a mortgage on partnership goods, executed by one partner on behalf of all, must be recorded in each county where a partner resides, to be valid against creditors. *Granger v. Adams*, 90 Ind. 87.

**Corporations.**—With reference to recording chattel mortgages, the principal office within the State of the corporation mortgagor, and not the *situs* of the property, determines the county of residence. *Wright v. Bundy*, 11 Ind. 398.

A chattel mortgage executed by a joint-stock association need only be filed in the office of the clerk of the town where the company's business is principally conducted, not wherever stockholders reside. *Nelson v. Neil*, 15 Hun (N. Y.), 383.

1. "Forthwith." *Kans. Comp. Ls.* 1879, c. 68, § 9; *Texas Rev. Stats.* 1879, § 4341; *New Mexico Comp. Ls.* § 1587. Ten days. *Ind. Rev. Stats.* § 4913; *Del. Laws*, vol. 15, c. 477, § 1. Fifteen days. *Mass. Pub. Stats.* c. 192, § 1; act 1883, c. 73. Twenty days. *Maryl. Rev. Code* 1878, art. 44, § 50. Forty days. *South Car. Gen'l Stats.* 1882, § 2346.

In computing the time within which a chattel mortgage must be recorded, the day of execution must be excluded and the day of recording included. *Towell v. Hollweg*, 81 Ind. 154. A chattel mortgage is seasonably recorded in ten days from the time of its acceptance by the mortgagee. *Eaton v. McKahan*, 91 Ind. 109.

2. *Simon v. Oppenheimer*, 20 Fed. Repr. 553; *Pond v. Skidmore*, 40 Conn. 213.

But delay in recording a chattel mortgage does not at all affect its validity as between the parties, and avoids it only as against an intervening purchaser in good faith or an intervening judgment creditor. *Wescott v. Gunn*, 4 Duer (N. Y.), 107. And a chattel mortgage, if recorded, however long after its execution, is valid as against an attachment made after the record. *McVay v. English*, 30 Kans. 368.

The town clerk's certificate on the mortgage of his receipt of it for record at



purposes "recorded" from the time it is deposited with the proper officer for record, and thereafter imparts notice; that it should be actually spread upon the record is not essential.<sup>1</sup> And it is "filed" when it is delivered to, and received and kept by, the proper officer for the purposes of notice mentioned in the statute.<sup>2</sup> The title to personal property does not vest in a mortgagee, by virtue of the mortgage, until a delivery of the instrument to him or his agent.<sup>3</sup> In order to prove the contents of a chattel mortgage on the trial, the original mortgage must be produced; a certified copy made by the clerk or register where the mortgage is filed is evidence only of the fact of its filing.<sup>4</sup>

**10. Refiling.**—In many of the States a chattel mortgage ceases to be valid at the expiration of a year from the time of filing or recording, unless the mortgage or a true copy is filed anew, or unless a new affidavit is made within the last thirty days, or other short period before the end of the year.<sup>5</sup> But refiling is not necessary

the time stated proves the fact; and the further entry under the same date, of its being recorded in the town books, proves that it was so recorded on the same day. *Head v. Goodwin*, 37 Me. 181. Compare *Jones v. Parker*, 73 Me. 248.

Where the holder of a chattel mortgage sent a person to the town clerk's office to see if it was on file, and the agent, misunderstanding his instructions, withdrew the mortgage and took it to his principal, who with due diligence caused it to be refiled, held that the lien thereof remained as against one who, with knowledge of the facts, attached the property while the mortgage was absent from the files. *Swift v. Hall*, 23 Wis. 532.

1. *Craig v. Dimock*, 47 Ill. 308; *Meherin v. Oaks*, 20 Repr. (Cal.) 40; *Jordan v. Farnsworth*, 15 Gray (Mass.), 517.

A chattel mortgage delivered to the town clerk with orders not to record it until further notice, and not in fact recorded, cannot be considered as recorded, if the notice has not been given, even though the clerk may have noted thereon the time of receiving it. *Town v. Griffith*, 17 N. H. 165.

In the absence of a town clerk, a delivery of a chattel mortgage to a person in an adjoining office, not his deputy, and the clerk's memorandum of receipt as of the hour of delivery, according to such person's minute thereon, is a sufficient lodgment for record to give a lien therefrom. *Fairbanks v. Davis*, 50 Vt. 251.

The legality of a record as such is not impaired by its being in the handwriting of the grantor, it being in its appropriate place in the record book, and the presumption being that it was allowed by

the register. *Merrill v. Dawson*, 1 Hemp. (U. S. Cir.) 563.

2. *Gorham v. Summers*, 25 Minn. 81.

3. *Jewett v. Preston*, 27 Me. 400; *Foster v. Perkins*, 42 Me. 168.

A mortgage of personal property, made by a debtor to secure a creditor without his knowledge, although recorded, is inoperative until it is approved or assented to by such creditor. *Oxnard v. Blake*, 45 Me. 602.

4. *George v. Toll*, 39 How. Pr. (N.Y.) 497. See *Bissell v. Pearce*, 28 N. Y. 252; *Hewitt v. Morris*, 37 N. Y. Super. Ct. 18.

5. New York Laws 1873, c. 501, p. 767; Laws 1833, c. 279, § 3; New Jer. Rev. Stats., *Mortgages*, 41; Ohio Rev. Stats. § 4155; Mich. Rev. Stats. § 6196; Kans. Comp. Ls. c. 68, § 11; Oreg. Genl. Stats. c. 6, § 48; Nev. Laws 1885, c. 54; Mont. Laws 1885, c. 4; Utah Laws 1885, c. 5; New Mex. Comp. Ls. § 1589.

In other States the refiling must be at the end of two years. Ill. Rev. Stats. 1883, art. 95, § 4; Wisc. Rev. Stats. § 2315; Minn. Genl. Stats. 1878, c. 39, § 3; act 1879, c. 65, § 3; Colo. Genl. Stats. 1883, § 165. In *Dakota* three years. Dak. Civ. Code, § 1748. In *Nebraska* five years. Neb. Comp. Stats. 1881, pt. 1, c. 32, § 16.

Where, after default by the mortgagor, an actual change of possession of the property has taken place, or the rights of the parties have been changed by some new act or contract in relation to the property which would render refiling an idle ceremony, the omission to refile the mortgage will not impair the rights of the mortgagee. *Porter v. Parton*, 34 N.Y. Super. Ct. 398.

A chattel mortgagor, by the concurrence and direction of the mortgagee,

for purposes of protection against those persons as to whom no record was necessary in the first instance. And that the provision of the statute requiring refiling has not been complied with is no defence to an action brought against a person for afterwards wrongfully refusing to deliver up the mortgaged goods which he had purchased before the expiration of the year.<sup>1</sup>

**11. Change of Possession.**—It is the principle of the common law that where a chattel mortgage is silent as to the possession of the property, the mortgagee is entitled to immediate possession upon the execution of the mortgage.<sup>2</sup> Still it is quite customary to stipulate that

indorsed on the mortgage, and signed, sealed, dated, and acknowledged a statement that "this chattel mortgage is here by renewed for one year from this date." Held to create a new mortgage, valid as against him and his creditors. *Smith v. Hooper*, 22 Hun (N.Y.), 11.

**How Refiled.**—Where the holder of a chattel mortgage, to secure a continuance of its validity after the expiration of a year, refiled the original with the statement required by statute indorsed thereon, held a sufficient compliance with the statute requiring that a "true copy" be again filed. *Stockham v. Allard*, 4 Thomp. & C. (N.Y.) 279.

**Where Refiled.**—Under a statute requiring refiling of a chattel mortgage in the clerk's office of the town where the mortgagor resides, a refiling in the town in which he formerly resided, when he has become a non-resident of the State, is of no avail. *Dillingham v. Bolt*, 37 N. Y. 198.

**When Refiled.**—In some States the refiling of the mortgage may be done at any time within thirty days before the expiration of the year. *Newell v. Warren*, 44 N.Y. 244; *Edson v. Newell*, 14 Minn. 228.

In others, in order to preserve the lien of the mortgage beyond the first year, the refiling of a copy as required by law must be done during the thirty days immediately preceding the expiration of the year; a refiling before the commencement of the thirty days is unavailing. *National Bank v. Sprague*, 20 N. J. Eq. 13; *Biteler v. Baldwin*, 42 Ohio St. 125. Compare *Paine v. Mason*, 7 Ohio St. 198.

**Successive Refilings.**—If it is desired to keep the mortgage alive after the first refiling, it is necessary, in several States, that a similar refiling should be made at the expiration of each successive period of time equal to that first limited. Mich. Rev. Stats. § 6197; Wisc. Rev. Stats. § 2316; Oreg. Genl. Stats. c. 6, § 49; Nevada Laws 1885, c. 54; Dak. Civ. Code, § 1748; New Mex. Comp. Laws, § 1589; Minn. Genl. Stats. 1878, c. 39, § 3; act

1879, c. 65, § 3; New York Laws 1873, c. 501, p. 767; Laws 1833, c. 279, § 3. Compare *Newell v. Warren*, 44 N.Y. 244.

**Calculation of Days.**—When the year expires on Sunday that day is included in the thirty days. *Pain v. Mason*, 7 Ohio St. 198; *Nitchie v. Townsend*, 2 Sandf. (N.Y.) 299.

A chattel mortgage must be refiled within one year from the hour of the next preceding filing. Fractions of a day are not to be disregarded in computing the year. *Seamen v. Eager*, 16 Ohio St. 209, 1. *Manning v. Monaghan*, 23 N. Y. 539; *Wiles v. Clapp*, 41 Barb. (N.Y.) 645.

But unless the mortgage is duly refiled it will be void as against a levy made within the year by an execution creditor of the mortgagor. *Thompson v. Van Vechten*, 6 Bosw. (N.Y.) 376.

A chattel mortgagee in possession need not renew his mortgage by affidavit in order to maintain an action for the possession of the property taken from him while the mortgage continued in full force. *Bates v. Wilbur*, 10 Wis. 415.

The omission to refile a chattel mortgage gives no rights to a subsequent mortgagee with notice. *Hill v. Beebe*, 13 N. Y. 556; *Wetherell v. Spencer*, 3 Mich. 123.

If a mortgage which under the statute should be refiled within a year is not filed until after the year, the lien is restored as against an execution issued after the refiling. *Nixon v. Stanley*, 33 Hun (N.Y.), 247.

2. *Broadhead v. McKay*, 46 Ind. 595; *Wolfey v. Rising*, 12 Kans. 535; *Hickman v. Perrin*, 6 Cold. (Tenn.) 135; *Robinson v. Fitch*, 26 Ohio St. 659. Compare *Anderson v. Holmes*, 14 S. Car. 162.

Where the mortgage does not provide that the mortgagor shall retain possession, the mortgagee of personal property may, if he can take possession of it peaceably, retain it until satisfaction of the mortgage, unless other liens have attached to it while in the possession of the mortgagor. *Whisler v. Roberts*, 19 Ill. 274.

the mortgagor shall retain the possession until default, or until the mortgagee shall deem himself insecure. And it seems to be the doctrine of the later English and American cases that when this is done, where the chattels are capable of manual transfer, a presumption of fraud arises as respects creditors and other third parties, but that this presumption can be rebutted by evidence showing the transaction to have been fair and honest, and disclosing a proper reason for retention of possession by the mortgagor.<sup>1</sup> Possession under a chattel mortgage, to be effectual, must be actual, and not merely constructive.<sup>2</sup>

A chattel mortgage on a stock of goods, reserving to the mortgagor the right to continue in possession and to sell the goods and replenish the stock in the ordinary course of business from time to time, with no provision that the proceeds of sales shall be in any

A mortgagee's right to the possession of mortgaged chattels is not affected by a garnishment suit against the mortgagor. *Smith v. Circuit Judge*, 53 Mich. 560.

A mortgagee who takes possession before default is answerable to the mortgagor for the value of any reasonable use to which the property is or could have been put, but not for remote damages. *Jackson v. Hall*, 84 N. Car. 489.

If he allows the chattels to return into the possession of the mortgagor on a forthcoming bond, the legal possession remains in the mortgagee, the mortgagor holding as his bailee. *Moody v. Haselden*, 1 S. Car. 129.

1. *Alton v. Harrison*, L. R. 4 Ch. App. 622; *Martindale v. Booth*, 3 B. & Ad. 498; *Weaver v. Joule*, 3 C. B. N. S. 309; *Kleine v. Katzenberger*, 20 Ohio St. 110; s. c., 5 Am. Rep. 630; *Watson v. Williams*, 4 Blackf. (Ind.) 26; *Brunswick v. McClay*, 7 Neb. 137; *Collins v. Myers*, 16 Ohio, 547; *Peck v. Land*, 2 Kelly (Ga.) 1; *Curd v. Miller*, 7 Gratt. (Va.) 185; *Frost v. Mott*, 34 N.Y. 253; *Griswold v. Sheldon*, 4 N.Y. 581; *Swift v. Hart*, 12 Barb. (N.Y.) 530.

**Question for Jury.**—The question of fraud in a chattel mortgage which permits the mortgagor to retain possession of the chattels and act as apparent owner, is one of fact for a jury to decide. *Brett v. Carter*, 2 Low. (U.S.) 458.

And where evidence of good faith in a chattel mortgage has been given, to rebut the presumption of fraud arising from continued possession by the mortgagor, the finding of the jury thereon is conclusive. *Ostrander v. Fay*, 3 Abb. App. Dec. (N.Y.) 431.

**Vermont.**—In this State a chattel mortgage, not accompanied by a change of possession, is inoperative and void as against creditors of the mortgagor. *Rus-*

*sell v. Fillmore*, 15 Vt. 130; *Sturgis v. Warren*, 11 Vt. 433.

A mortgagee in Maryland who permits the mortgagor to retain possession of the mortgaged chattels and bring them into Pennsylvania and sell them to a *bona fide* purchaser, loses all right thereto. *MacCabe v. Blymyre*, 9 Phila. (Pa.) 615.

**Good between Parties.**—Although the mortgagor retains possession, the mortgage will not, for that reason, be void as between the parties. The only question is as to its validity against subsequent purchasers and *bona fide* creditors. *Morrow v. Turney*, 35 Ala. 131; *Hackett v. Manlove*, 14 Cal. 85. See *Winsor v. McLellan*, 2 Story (U. S. Cir.), 492; *Johnson v. Jeffries*, 30 Mo. 423; *Golden v. Cockril*, 1 Kans. 259; *Smith v. Moore*, 11 N. H. 55; *Smith v. McLean*, 24 Iowa, 322.

2. *Crandall v. Brown*, 18 Hun (N. Y.), 461.

**Symbolical Delivery.**—See *Fry v. Miller*, 45 Pa. St. 441; *Luckenbach v. Breckenstein*, 5 Watts & S. (Pa.) 145; *Morrow v. Reid*, 30 Wis. 81; *Holmes v. Crane*, 2 Pick. (Mass.) 607.

Where only symbolical delivery of mortgaged chattels can be made, and they are left where the right of possession is uncertain, doubts must be decided in favor of creditors and against the mortgagee, since he could have protected himself fully by filing the mortgage. *Anderson v. Brenneeman*, 44 Mich. 198.

Where a firm, of which the mortgagor is a member, is in the use of mortgaged chattels, an agreement between the mortgagor and mortgagee, after default in payment, that a partner of the former shall retain possession of the property for the latter, the property remaining and being used as before, does not work a change of possession. Mere words will not effect

way applied in reduction or discharge of the mortgage debt, is generally held fraudulent and void as to creditors, both in respect to the original stock and to additions thereto.<sup>1</sup> But in several of the States the opinion prevails that such a transaction is not void on its face, though it may afford a presumption of fraud.<sup>2</sup> In any

a change in law when there is none in fact. *Porter v. Parmly*, 52 N.Y. 185.

1. *Wells v. Langbein*, 20 Fed. Rep. 183; *Crooks v. Stuart*, 2 McCrary (U. S. Cir.), 13; *Matter of Manly*, 2 Bond (U. S. Dist.), 261; *Ranlett v. Blodgett*, 17 N. H. 298; *Gardner v. McEwen*, 19 N.Y. 123; *Edgell v. Hart*, 13 Barb. (N.Y.) 380; *Russell v. Winne*, 37 N.Y. 591; *Yates v. Olmstead*, 65 Barb. (N.Y.) 43; *Marston v. Vultee*, 8 Bosw. (N. Y.) 129; *Joseph v. Levi*, 58 Miss. 843; *Peiser v. Peticolas*, 50 Tex. 638; *Martin v. Ogden*, 41 Ark. 186; *Read v. Wilson*, 22 Ill. 377; *Simmons v. Jenkins*, 76 Ill. 479; *State v. Jacobs*, 2 Mo. App. 183; *Lodge v. Samuels*, 50 Mo. 204; *Steinart v. Deuster*, 23 Wis. 136; *Horton v. Williams*, 21 Minn. 187; *Orton v. Orton*, 7 Oreg. 478; *Gregory v. Whedon*, 8 Nebr. 373.

And this effect cannot be avoided by a stipulation in the deed of trust (or mortgage) for monthly accounts to be rendered to the trustee, and for payment to him of the money received, to be applied under his direction to the payment of the current expenses of the business and in making purchases to replenish the stock. *Joseph v. Levy*, 58 Miss. 843.

**Good between Parties.**—A mortgage of a stock of goods with power to the mortgagor to sell in the ordinary course of trade, although fraudulent and void as to creditors and subsequent purchasers, is valid between the parties to it. And one who purchases the entire stock of goods, with intent to hinder creditors, cannot hold such goods against the mortgage, although it was not recorded until after the pretended purchase. *Gregory v. Whedon*, 8 Nebr. 373.

2. *Lister v. Simpson*, 38 N. J. Eq. 438; *Cheatham v. Hawkins*, 76 N. Car. 335; *McLaughlin v. Ward*, 77 Ind. 383; *Morris v. Stern*, 80 Ind. 227; *Clark v. Hyman*, 55 Iowa, 14; s. c., 39 Am. Rep. 160; *Barron v. Morris*, 14 Nat. Bank. Reg. 371; *People v. Bristol*, 35 Mich. 28; *Gay v. Bidwell*, 7 Mich. 519.

If the mortgagee allows the mortgagor, who is a merchant or manufacturer, to remain in possession and sell the property in the usual course of trade, the mortgagor will be considered as acting as the agent of the mortgagee and receiving the money for him; but it will be different if the stock is sold otherwise than in the usual course

of business. *Miller v. Pancoast*, 5 Dutch. (N. J.) 250.

**Question for the Jury.**—Several cases hold that good faith of the mortgage of a stock of merchandise left in the possession of the mortgagor to be retailed by him in the ordinary course of trade is a question of fact for the jury, to be determined upon all the circumstances of the case. *Kleine v. Katzenberger*, 20 Ohio St. 110; *McFadden v. Fritz*, 90 Ind. 590; *Morse v. Riblet*, 22 Fed. Repr. 501; *Marsh v. Bird*, 22 Fed. Repr. 576.

A mortgage by an insolvent person on a stock of goods, providing that the mortgagor may remain in possession for at least nine months, and stipulating that in case of an attempt to remove the goods from the town "and an unreasonable depreciation in value, or if from any other cause the security should become inadequate," the mortgagee may take possession, was held to afford the most cogent intrinsic evidence of fraud. *Cheatham v. Hawkins*, 80 N. Car. 161.

**Mortgage Void only in Part.**—It is said that a mortgage upon a stock of goods which authorizes the mortgagor to sell them and replace with others, at such times and in such manner as he may determine, and use the proceeds generally as he sees fit, is void as to such goods only as the power of sale relates to. *In re Kahley*, 2 Biss. (U. S. Cir.) 383; *Catlin v. Currier*, 1 Sawy. (U. S. Cir.) 7; *Putnam v. Osgood*, 51 N. H. 192; *Nichols v. Hampton*, 46 Ga. 253; *Lund v. Fletcher*, 39 Ark. 325; s. c., 43 Am. Rep. 270; *Bar-net v. Fergus*, 51 Ill. 352.

An agreement in a mortgage of the stock of goods then in the mortgagor's store, that, until default, he might retain possession of the property and make sales, other goods of equal value being substituted for those sold, will not empower the mortgagor to put the mortgaged property into a partnership as his share of the capital. *Barnard v. Eaton*, 5 Cush. (Mass.) 294.

**Sales to be for Mortgagor's own Benefit.**

—Where a lien is ostensibly created on personal property by a mortgage, and the right is retained by the mortgagor to sell the property and appropriate the proceeds to his own use, such a transaction must be held void as against the policy of the law, as tending to delay and de-

event, suffering property covered by a chattel mortgage to remain in the hands of the mortgagor *after default* is a fraud *per se*, and not open to explanation.<sup>1</sup>

**12. Validity as against Third Persons.**—The only persons who can claim protection against unrecorded chattel mortgages are creditors without notice, innocent purchasers for value, and subsequent mortgagees. Thus an unrecorded chattel mortgage where the mortgagor retains possession is valid against attaching creditors who have actual notice of its existence at any time before levy.<sup>2</sup> So a chattel mortgage which is good as to the parties executing it will hold, without record or renewal, as to third persons who purchase with knowledge of the mortgage, as such purchasers are not considered *bona fide*; they acquire only the right of redemption.<sup>3</sup>

fraud creditors. *Greenebaum v. Wheeler*, 90 Ill. 296; *Brackett v. Harvey*, 91 N. Y. 214; *Steinart v. Deuster*, 23 Wis. 136.

**Proceeds of Sales to be Applied on Mortgage Debt.**—A chattel mortgage which permits the mortgagor to retain possession and sell is not unlawful or fraudulent *per se*, if the proceeds are to be paid over to the mortgagee or otherwise applied on the mortgage debt. *Brackett v. Harvey*, 91 N. Y. 214; *Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelley*, 28 N. Y. 360; *Miller v. Lockwood*, 32 N. Y. 293; *Robinson v. Elliott*, 22 Wall. (U. S.) 524; *Metzner v. Graham*, 57 Mo. 404; *Adler v. Claffin*, 17 Iowa. 89; *Kleine v. Katzenberger*, 20 Ohio St. 110; s. c., 5 Am. Rep. 630; *Abbott v. Goodwin*, 20 Me. 407.

Where by agreement the mortgagor is to continue in possession with the right to sell and pay over the proceeds to the mortgagee, the sales made and proceeds received by the mortgagor under such an arrangement should, as between the creditors of the latter and the mortgagee, be considered applied in payment and satisfaction of the mortgage, whether the money is ever actually paid over to the mortgagee or not. *Conkling v. Shelley*, 28 N. Y. 360.

1. *Reed v. Eames*, 19 Ill. 594; *Wilson v. Rountree*, 72 Ill. 570.

2. *Cragin v. Carmichael*, 11 Nat. Bank Reg. 511; *Allen v. McCalla*, 25 Iowa, 464. *Compare Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. (N. Y.) 484. But such notice, if not received by the creditor until after he has procured process and is proceeding to attach or levy upon the property, is not sufficient. *Stowe v. Meserve*, 13 N. H. 46.

The fact that the sheriff who makes the levy is the mortgagee in a chattel mortgage upon the articles levied upon, is not notice to the levying creditor of the ex-

istence of the mortgage. *McCarthy v. Grace*, 23 Minn. 182.

An attaching creditor who has constructive notice of a mortgage upon the property levied upon cannot defeat it by his belief that the mortgage was void. *Allen v. McCalla*, 25 Iowa, 464.

If mortgaged chattels are not delivered to the mortgagee, an attachment takes precedence of the mortgage if made before the mortgage is recorded, although it is recorded within the time (fifteen days) required by statute. *Drew v. Sireeter*, 137 Mass. 460.

**Creditors at Large.**—A chattel mortgage will not be declared void at the instance of a creditor at large of the mortgagor on the ground that the mortgage has not been filed in the proper office. To maintain such right, the party must be a judgment creditor with a lien upon the mortgaged property or a valid claim to its avails. *Stewart v. Beale*, 14 N. Y. Sup. Ct. 405. *Compare Sidener v. Bible*, 43 Ind. 230.

3. *Hathorn v. Lewis*, 22 Ill. 395; *Boyd v. Beck*, 29 Ala. 703; *Lewis v. Palmer*, 28 N. Y. 271; *Sanger v. Eastwood*, 19 Wend. (N. Y.) 514; *Gildersleeve v. Landon*, 73 N. Y. 609. *Compare Travis v. Bishop*, 13 Metc. (Mass.) 304; *Shapleigh v. Wentworth*, 13 Metc. (Mass.) 358.

Where a chattel mortgage provided that the mortgagor should retain possession of the property until default in the payment of the debt, and more than two months after the debt matured he sold and delivered the property to a third person, and no reason appeared why possession was not taken by the mortgagee at the proper time, it was held that the purchaser took the property free from any lien of the mortgage, even though he had actual notice that it was still unsatisfied. *Lemen v. Robinson*, 59 Ill. 115.

**Execution Purchaser.**—One who at an

The failure to file or record a chattel mortgage making it void as against the creditors of the mortgagor by virtue of a statute to that effect, the mortgage in such case is also void as to the executor or administrator of the mortgagor, the estate being insolvent, though it might have been good against the mortgagor himself.<sup>1</sup> It is to be noted that want of registration and retention of possession by the mortgagor are not the only reasons for which a chattel mortgage may be declared void as against creditors. Thus, if a chattel mortgage is executed, not alone to secure an indebtedness to the mortgagee, but also to protect the property of the mortgagor and to hinder and delay his creditors, and this fact is known at the time by the mortgagee, the mortgage will be void as to the creditors attempted to be defrauded.<sup>2</sup> To render a chattel mortgage fraudulent, the intent to defraud must exist when the mortgage is made; the mortgagor's subsequent conduct in dealing with

execution sale, for a valuable consideration, purchases a chattel without notice of an unrecorded mortgage thereof, executed after the contraction of the execution debt, is entitled to the protection afforded to a "subsequent purchaser." *McKnight v. Gordon*, 13 Rich. Eq (S. Car.) 222.

**Purchaser's Vendee.**—The recording acts are to be construed consistently with the rule of equity, that a purchaser with notice from a purchaser without notice is protected equally with his vendor, the latter on his own merit and by immediate title, the former on the merit of his particular vendor, and as the indispensable means of his security. *McKnight v. Gordon*, 13 Rich. Eq (S. Car.) 222.

1. *Becker v. Anderson*, 11 Neb. 493; *Kilbourne v. Fay*, 29 Ohio St. 264. Compare *Griffin v. Wertz*, 2 Ill. App. 487.

**Widow and Heir.**—A chattel mortgage, when possession is not taken by the mortgagee on the maturity of the debt, is void only as to third persons, and the widow, heir, or administrator of the mortgagor is not such third person; and where, in such a case, the mortgagor died before the maturity of the note secured, and the widow elected to take the property mortgaged in lieu of the specific articles which had been assigned to her, it was held that the mortgaged property was not open to selection by her, except subject to the lien of the mortgage. *Sumner v. McKee*, 89 Ill. 127.

**Assignee in Insolvency.**—An unrecorded mortgage of personal property which is not delivered to and retained by the mortgagee is not valid against the assignee in insolvency of the mortgagor. *Bingham v. Jordan*, 1 Allen (Mass.), 373.

Under the statutes of *Nebraska* it is only creditors of the mortgagor and subsequent purchasers in good faith that can assail a chattel mortgage under which the mortgagor retains possession. *Pyle v. Warren*, 2 Neb. 241.

A pledge of personal property is good as against a subsequent registered conveyance, if possession is given to the pledgee. *Crisp v. Miller*, 5 Heisk. (Tenn.) 697.

2. *Strohm v. Hayes*, 70 Ill. 41; *Robinson v. Elliott*, 22 Wall. (U. S.) 513. See *Crapster v. Williams*, 21 Kans. 109. Compare *Olmstead v. Mattison*, 45 Mich. 617; *Allen v. Kennedy*, 49 Wis. 549.

But the fact that the intention of the debtor in making a mortgage to secure a creditor was fraudulent is not of itself sufficient to make the mortgage fraudulent as to such creditor, if the latter in no way participated in the fraud or aided or assisted in the illegal act. *Moline Wagon Co. v. Rummell*, 14 Fed. Repr. 155; *Kohn v. Clement*, 58 Iowa, 589.

The title of a mortgagee of personal property cannot be defeated by an attaching creditor of the mortgagor by showing that the property mortgaged was purchased by the mortgagor with money which he had fraudulently reserved from his creditors on the settlement of his estate as an insolvent debtor. *Codman v. Freeman*, 3 Cush. (Mass.) 306.

**Question of Fact.**—It is well settled that in the case of a chattel mortgage the question whether the mortgage was given for a valuable consideration in good faith and without an intent to defraud creditors is one for the jury, and cannot be taken from them. *Bishop v. Cook*, 13 Barb. (N. Y.) 326; *Bagg v. Jerome*, 7 Mich. 145. See *Voorhis v. Langsdorf*, 31 Mo. 451.

the property, while it may furnish strong evidence of fraud in the making of the mortgage, will not of itself render the instrument void.<sup>1</sup>

**13. Nature of Mortgagee's Title.**—It is the doctrine at law that the mortgagee of chattels has the legal title, but subject to defeasance on performance of the condition.<sup>2</sup> But in equity it is considered that the mortgage is a mere security for the debt and the mortgagor continues the real owner, the equity of redemption being treated as the real and beneficial estate, tantamount to the fee at law.<sup>3</sup> But at common law the mortgagee of chattels acquires, upon breach of the condition by the mortgagor, an absolute title to the chattel.<sup>4</sup>

**14. Redemption.**—The title vesting in the chattel mortgage upon breach of condition is an absolute legal title, but there still remains to the mortgagor a right or equity of redemption, and this equity may be asserted (notwithstanding the mortgagee has taken possession) at any time before foreclosure or sale or other appropriate proceedings to cut it off.<sup>5</sup> In some States a definite period of time is limited by statute within which, after condition broken, the mortgagor may redeem. If he fails to do so within this time, his equity is cut off.<sup>6</sup>

1. *Horton v. Williams*, 21 Minn. 187.

2. *Talbot v. De Forrest*, 3 Iowa, 586; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Porter v. Parmly*, 43 How. Pr. (N. Y.) 445; *Stewart v. Hanson*, 35 Me. 506.

3. *Hannah v. Carrington*, 18 Ark. 85; *Bryan v. Robert*, 1 Strobb. Eq. (S. Car.) 334.

4. *Winchester v. Ball*, 54 Me. 558; *Flanders v. Barstow*, 18 Me. 357; *Ferguson v. Clifford*, 37 N. H. 86; *Conner v. Carpenter*, 28 Vt. 237; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Freeman v. Freeman*, 2 Green (N. J.) 44; *Brown v. Lipscomb*, 9 Port. (Ala.) 472; *Constant v. Mattison*, 22 Ill. 546; *Talbot v. De Forrest*, 3 Iowa, 586; *Nichols v. Webster*, 1 Chand. (Wis.) 203.

In *New York* a mortgage of chattels is a sale on condition. Under it the legal title to the property is vested in the mortgagee subject to the right of the mortgagor to perform the condition. Upon breach of the condition, the legal title becomes absolute in the mortgagee, leaving a mere equity in the mortgagor. The mortgagee may thereupon take possession of the property, and so far as the legal rights of the parties are concerned, he may thenceforth treat it as his own. But if he pursues such a course he waives his claim for any deficiency that might otherwise arise. *Porter v. Parmly*, 43 How. Pr. (N. Y.) 445.

5. *Cutts v. York Co.*, 18 Me. 201; *Charter v. Stevens*, 3 Denio (N. Y.), 35; *Freeman v. Freeman*, 17 N. J. Eq. 44;

*Landers v. George*, 49 Ind. 309; *Doane v. Garretson*, 24 Iowa, 351; *Van Brunt v. Wakelee*, 11 Mich. 177; *Heyland v. Badger*, 35 Cal. 404; *Kemp v. Westbrook*, 1 Ves. 278; *Wayne v. Hanham*, 9 Hare, 62.

The power of sale in a chattel mortgage does not extend the right to redeem until a sale. *Thurber v. Jewett*, 3 Mich. 295.

In an equitable action by the mortgagor to redeem, the court can give complete relief; and where the mortgagee by disposing of the property has prevented a redemption, reparation may be decreed in damages. *Stoddard v. Denison*, 2 Sweeney (N. Y.), 54; *Spaulding v. Barnes*, 4 Gray (Mass.), 330.

A judgment creditor of a mortgagor of chattels may redeem on tendering the principal and interest due on the mortgage, and expenses incurred in and about a sale, if known. *Lambert v. Miller*, 19 Repr. (N. J.) 216.

An agreement between mortgagor and mortgagee to submit to arbitrators the right of the mortgagor to redeem from the mortgage does not acknowledge such right. *Kea v. Council*, 2 Jones Eq. (N. Car.) 345.

If a portion of the mortgaged property has been sold with the mortgagor's consent, and the proceeds applied towards the satisfaction of the debt, he may file a bill to redeem the residue. *Locke v. Palmer*, 26 Ala. 312.

6. *Rhode Island Pub. Stats.* 1882, c.

**15. Discharge of Mortgage.**—Generally speaking, whatever extinguishes the mortgage debt extinguishes the mortgage.<sup>1</sup> Hence the payment and acceptance of the amount secured by the chattel mortgage, whether before or after breach of condition, discharges the lien of the mortgage and reverts the title to the property in the mortgagor without any further act or release.<sup>2</sup> So the mortgagee may, after the maturity of the debt, keep the property without selling it under the mortgage, and in case he does so, if it be of sufficient value it extinguishes the debt, but if it be of greater value than the amount of the debt and there is no sale, the mortgagor has no legal claim for the excess of such value.<sup>3</sup> A chattel mortgage given by a principal debtor to his sureties to protect them against their suretyship is discharged by the creditor's discharging the sureties.<sup>4</sup> If the statute of limitations runs long enough to bar a debt secured by a mortgage, and has not barred a bill or suit as to the property, the debt is protected by the mort-

176, §§ 11, 12; South Car. Genl. Stats. 1882, § 2347. See *Winchester v. Ball*, 54 Me. 558; *Trask v. Pennell*, 59 Me. 419; *Daniels v. Henderson*, 5 Fla. 452.

1. *Packard v. Kingman*, 11 Iowa, 219.  
2. *Leighton v. Shapley*, 8 N. H. 359; *Thompson v. Van Vechten*, 27 N. Y. 568; *Parks v. Hall*, 2 Pick. (Mass.) 206; *Harrison v. Hicks*, 1 Port. (Ala.) 423.

A mere tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted nor kept good, has the effect to release the property from the lien of the mortgage. *Tompkins v. Batie*, 11 Neb. 147.

Where the buyer of a mortgaged chattel delivered to the mortgagee a part of the price upon an understanding between all parties that the latter should relinquish his claim on the chattel and look to the mortgagor for the balance due on the mortgage, held, that though he gave no formal discharge he could not afterwards enforce the mortgage against the buyer of the chattel. *Rickerson v. Raeder*, 4 Abb. App. Dec. (N. Y.) 60. Compare *Oswald v. Hayes*, 42 Iowa, 104.

But a payment made to the mortgagee by a third party who is under no obligation to pay the debt will not operate as a satisfaction of it, unless it is manifestly the intention or interest of the party making the payment that it should so operate. *Walker v. Stone*, 20 Md. 195. See *McLemore v. Pinkston*, 31 Ala. 266.

A bequest of money by the chattel mortgagee to the mortgagor does not extinguish the mortgage debt *pro tanto* unless there is something in the terms of the bequest to show such an intention. *Harrington v. Brittan*, 23 Wis. 541.

The renewal of the evidence of a debt is neither payment nor a discharge of the lien of a mortgage given as security for the debt. *Boyd v. Beck*, 29 Ala. 703.

And a second chattel mortgage on the same property to secure the same debt does not of itself extinguish the first. *Shuler v. Boutwell*, 18 Hun (N. Y.), 171; *Hill v. Beebe*, 13 N. Y. 556. Compare *Daly v. Proetz*, 20 Minn. 411; *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164.

A chattel mortgage made to secure the mortgagee against a contingent liability on negotiable paper is discharged by payment of such paper. *Franklin Bank v. Pratt*, 31 Me. 501; *Packard v. Kingman*, 11 Iowa, 219.

Acceptance of payment of a chattel mortgage by the mortgagee after forfeiture is a waiver of the forfeiture. *West v. Crary*, 47 N. Y. 423; *Porter v. Parmly*, 52 N. Y. 188; *Winchester v. Ball*, 54 Me. 558.

Attachment in a suit on a note does not release a chattel mortgage given to secure it. *Thurber v. Jewett*, 3 Mich. 295.

3. *Olcott v. Railroad*, 40 Barb. (N. Y.) 179; *Davis v. Rider*, 5 Mich. 423.

Where the owner of land which is leased to the owner of personality thereon purchases the personality and the lease, the purchase will not operate to extinguish the lien of an existing chattel mortgage thereon, nor prevent its enforcement by one to whom the mortgage has been assigned after such purchase. *Denham v. Sankey*, 38 Iowa, 269.

4. *Sumner v. Bachelder*, 30 Me. 35. But an extension of time does not affect the mortgagee's right to possession after breach of condition. *Bowens v.*



gaged property, and will not be barred till a suit for it is.<sup>1</sup> A chattel mortgage may also be discharged by presenting to the proper officer a deed or certificate from the mortgagee that the mortgage is satisfied, and by an appropriate entry to that effect upon the records.<sup>2</sup>

**16. Rights of Action in Mortgagee.**—Where a chattel mortgage contains an acknowledgment of a specific indebtedness from the mortgagor to the mortgagee, and declares that the property therein described is transferred as security for the payment of the same, the mortgagee may sue for the debt at its maturity, without being compelled to resort first to the property. He may in case of a tortious conversion of the goods, maintain replevin (or other appropriate action) against the mortgagor or his alienee.<sup>4</sup> The

Benson, 57 Mo. 26. Though it may as against an innocent purchaser. *Cleckley v. Hull*, 30 Ga. 838.

A mortgagee on personal property does not release the property from the lien of his mortgage by his mere silence on being informed that a portion of the property has been disposed of by the mortgagor and delivered to another creditor. *Patterson v. Taylor*, 15 Fla. 336.

A chattel mortgage, though under seal, may be released by a subsequent parol contract, and the mortgagor, when sued for the recovery of the thing mortgaged, may show such parol contract in bar of the action, although the mortgage debt is unpaid. *Wallis v. Long*, 16 Ala. 738; *Acker v. Bender*, 33 Ala. 230.

1. *Almy v. Wilbur*, 2 Wood & M. (U. S. Cir.) 371; *Crain v. Paine*, 1 Cush. (Mass.) 483.

Where a statute declares that chattel mortgages duly recorded shall be good as against creditors for not exceeding one year, it is held, that as between the parties such a mortgage might be good for any length of time. *Laubenheimer v. McDermott*, 5 Mont. 512.

2. *Verm. Rev. Laws 1880*, § 1970; *New York act 1879*, c. 171, § 1; *Minn. Genl. Stats. 1878*, c. 39, § 13; *Texas act 1879*, c. 127, § 5; *Mont. act, 1881*, p. 3, § 11.

Where a chattel mortgage given to secure several notes was released of record by the mortgagee, who had previously assigned the notes and supposed they had been paid, *held*, that such release would not discharge the mortgagee as to any unpaid notes in the hands of the assignee. *Martindale v. Burch*, 57 Iowa. 291.

3. *Elder v. Rouse*, 15 Wend. (N. Y.) 218; *Sterling v. Rogers*, 25 Wend. (N. Y.) 658; *Coleman v. Van Rensselaer*, 44

*How. Pr. (N. Y.)* 368. See *Jones v. Turck*, 33 Iowa, 246; *Hall v. Forqueron*, 2 Litt. (Ky.) 329.

But no action will lie unless the mortgage contains a specific agreement to pay the debt, or a distinct acknowledgment of it. *Culver v. Sisson*, 3 N. Y. 264; *Weed v. Covill*, 14 Barb. (N. Y.) 242.

The mortgagee may waive his claim under the mortgage and attach the property to secure his debt, without violating any of the mortgagor's rights. *Buck v. Ingersoll*, 11 Metc. (Mass.) 226.

Or, in case of apprehended danger or loss of the goods, he may apply to have a receiver appointed. *Rose v. Bevan*, 10 Md. 466.

4. Where the mortgage stipulates for continued possession by the mortgagor, but that the mortgagee may take possession on default or in case the former attempts to sell or remove the property, the mortgagee may bring replevin, although the debt is not due, if the mortgagor removes the property from the county. *Russell v. Butterfield*, 21 Wend. (N. Y.) 300; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333.

But there is no conversion of the property if there is no intent or act of placing it beyond the mortgagee's reach. *Metcalf v. McLaughlin*, 122 Mass. 84.

A mortgagor of chattels in possession, who mortgages the entire property to another without notice of the existing mortgage, and permits him to take possession, is liable to the first mortgagee in trover for a tortious conversion. *Millar v. Allen*, 10 R. I. 49.

After breach of condition the mortgagor's possession is adverse, and no demand need precede the mortgagee's suit for the goods. *Nordman v. Wilkins*, 28 Ark. 191.

A mortgagee of personal property of

title of the mortgagee is sufficient to enable him to bring trover or trespass against any third person who has unlawfully converted the chattels, or detinue or replevin to recover their possession.<sup>1</sup> And he may bring an action for damages to his reversionary in-

a decedent may, on default of payment, replevy the same from the widow, although it has been duly appraised and set off to her by the proper court. She may then redeem. *Recker v. Kilgore*, 62 Ind. 10.

The mortgagee has an equitable lien for the payment of the mortgage debt on the proceeds of a sale of the goods by the assignee of the mortgagor for the benefit of creditors. *Wilson v. Gray*, 2 Stockt. (N. J.) 323.

**Replevin against Purchaser.**—If the mortgagor of chattels mingles them, purposely or carelessly, with his own and sells the whole mass, the mortgagee can replevy the whole from the purchaser, in the absence of evidence by which the mortgaged goods can be distinguished from those not covered by the mortgage. *Adams v. Wildes*, 107 Mass. 123.

A stipulation in a chattel mortgage that the mortgagor shall remain in possession until breach of condition is personal to the mortgagor and cannot be assigned or transferred. The mortgagee is therefore not precluded from bringing trover for the property, before breach of the condition, against a purchaser from the mortgagor. *Ballune v. Wallace*, 2 Rich. (S. Car.) 80. See *McCandless v. Moore*, 50 Mo. 511. Compare *Hathaway v. Brayman*, 42 N. Y. 322; s. c., 1 Am. Rep. 524; *Bailey v. Godfrey*, 54 Ill. 507; *Skiff v. Solace*, 23 Vt. 279.

A mortgagee of chattels, one of which has been sold by the mortgagor to a *bona fide* purchaser for value, may be compelled to exhaust the others before resorting to the one sold; but he cannot be charged with laches by the purchaser, in case the mortgagor has converted the other property, unless the latter can show that the other property would have been sufficient, without that sold, to satisfy the mortgage. *High v. Brown*, 46 Iowa, 259.

1. *Holmes v. Sprowl*, 31 Me. 73; *Hotchkiss v. Hunt*, 49 Me. 213; *Pratt v. Harlow*, 16 Gray (Mass.), 379; *Gooding v. Shea*, 103 Mass. 360; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Howland v. Willett*, 3 Sandf. (N. Y.) 607; *Montgomery v. Kerr*, 1 Hill (S. Car.), 291; *Hopkins v. Thompson*, 2 Port (Ala.) 433; *Stamps v. Gilman*, 43 Miss. 456; *Brown v. Phillips*, 3 Bush (Ky.), 656; *Ashley v. Wright*, 19 Ohio St. 291; *McCandless v.*

*Moore*, 50 Mo. 511; *Worthington v. Hanna*, 23 Mich. 530.

No parol understanding between mortgagor and mortgagee respecting the possession of mortgaged chattels can afford any protection against the mortgagee's action of trover to third persons who have unlawfully converted the property. *Harvey v. McAdams*, 32 Mich. 472.

A mere naked trespasser sued by the mortgagee in trover for the conversion of the property cannot question the mortgagee's dealings with the mortgaged goods. *Broughton v. Atchison*, 52 Ala. 62.

Where the mortgagor of goods, of which the mortgagee had the right of immediate possession by a mortgage duly recorded, induced the mortgagee by false and fraudulent representations to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds paid over to the mortgagor, held, that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor and had no knowledge in fact of the existence of the mortgage. *Coles v. Clark*, 3 Cush. (Mass.) 399.

But a voluntary donee or bailee of the mortgagor may show payment of the mortgage debt, when sued in trover. *Sanders v. Knox*, 57 Ala. 80.

**Measure of Damages.**—If any third person unlawfully takes the property from the possession of the mortgagor, he is liable for more than merely nominal damages. *Tallman v. Jones*, 13 Kans. 438.

**Storage Charges.**—A mortgagee of chattels who does not authorize the mortgagor to store them cannot be made liable to one with whom the mortgagor stores them for storage charges. *Storms v. Smith*, 137 Mass. 201.

**Officer Levying Attachment.**—Whether the mortgagee can recover possession of the chattels from a sheriff or other officer who has attached them or levied on them under execution, will depend upon whether, under the circumstances, the mortgagor's interest was still subject to seizure and sale. See *Hull v. Carnley*, 11 N. Y. 501; *Shinners v. Brill*, 38 Wis.

terest although he has not a right to immediate possession.<sup>1</sup> When personal property is mortgaged to several persons to secure debts owing to them separately by the mortgagor, and by the terms of the mortgage the whole property is forfeited by a single default, it is forfeited to the holders of the mortgage jointly, and they become tenants in common of the whole property.<sup>2</sup>

**17. Mortgagee's Right to take Possession on Default.**—At common law, when the mortgagor of personal property makes default in the payment of the debt at maturity, the mortgagee has a right to take immediate possession of the property.<sup>3</sup> But he should take possession of the goods at once, upon maturity of the debt, or endeavor to do so with sufficient diligence; otherwise he will lose his lien.<sup>4</sup> The holder of a chattel mortgage securing a debt falling due at different times, or payable by instalments, is not

648; *Brayley v. Byrnes*, 20 Minn. 435; *Nelson v. Ferris*, 30 Mich. 497; *Worthington v. Hanna*, 23 Mich. 530.

If the mortgagee holds two mortgages made by the same debtor, each conveying different articles and to secure different demands, and all the property is attached in a suit against the mortgagor, a statement and demand, to the officer, sufficient as to one mortgage, will avail *pro tanto* though it be insufficient as to the other. *Simonds v. Parker*, 3 Metc. (Mass.) 144.

A mortgagee of goods not in possession cannot maintain trespass or trover against a creditor of the mortgagor levying an execution on the property. *Goulet v. Asseler*, 22 N. Y. 225. *Compare Long Dock Co. v. Mallery*, 1 Beasley (N. J.), 94.

1. *Googins v. Gilmore*, 47 Me. 9; *Forbes v. Parker*, 16 Pick. (Mass.) 462. See *Manning v. Monaghan*, 23 N. Y. 539; *Ferguson v. Thomas*, 26 Me. 499.

Where a chattel mortgage is given to secure a debt payable in instalments, the title of the mortgagee becomes as perfect upon default in the payment of an instalment as upon a default in the payment of the whole debt. *Halstead v. Swartz*, 1 Thomp. & C. (N. Y.) 559.

But a chattel mortgage payable on demand cannot become absolute until demand made. *Ely v. Carnley*, 19 N. Y. 496.

2. *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Howard v. Chase*, 104 Mass. 249.

A chattel mortgage appearing by its terms to have been given to a second indorser of two notes to secure their payment, may be shown by parol to have been intended as a security for all the indorsers, and may thereupon be enforced by the first indorser. *Bainbridge v. Richmond*, 17 Hun (N. Y.), 391.

3. *Talman v. Smith*, 39 Barb. (N. Y.) 390; *Brown v. Phillips*, 3 Bush (Ky.), 656; *Lacey v. Giboney*, 36 Mo. 320.

If possession of personal property be rightfully taken by the mortgagee, the failure to sell the property will not make the possession wrongful. *Bradley v. Redmond*, 42 Iowa, 452.

The mortgagee cannot be deprived of his possession under a subsequent levy of attachment on execution against the mortgagor. *Nelson v. Wheelock*, 46 Ill. 25.

But he cannot hold the property as pledgee if the mortgage proves to be void. *Janvrin v. Fogg*, 49 N. H. 340.

**Taking must be Peaceable.**—A mortgagee of personal property has no right to take it out of the mortgagor's possession by force or threats, although the law day has passed and the mortgage contains an express power authorizing him to taken possession on default. *Thornton v. Cochran*, 51 Ala. 415; *McClure v. Hill*, 36 Ark. 268.

But the mortgagor's permission is not necessary, if there is no breach of the peace. *Brayley v. Byrnes*, 21 Minn. 482; *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271.

In an action of trespass by mortgagor against mortgagee for entering on the mortgagor's premises and taking and carrying away the mortgaged chattels, it is a good defence that the money was past due at the time. *Nichols v. Webster*, 1 Chand. (Wis.) 203.

The mortgagee of personal property has an implied irrevocable license, after foreclosure, to enter in a peaceable and reasonable manner upon the premises of the mortgagor and take away the goods mortgaged. *McNeal v. Emerson*, 15 Gray (Mass.), 384.

4. *Travis v. McCormick*, 1 Mont. Ter.

bound to wait until the last payment matures before seizing and selling the mortgaged chattels.<sup>1</sup> A clause in a chattel mortgage providing that if the mortgagee shall at any time deem himself insecure he may take possession and sell the property, vests in him an absolute discretion, and his right so to take possession does not depend on his having reasonable grounds for deeming himself insecure.<sup>2</sup>

18. **Foreclosure.**—Although by a mortgage of chattels the legal title is vested in the mortgagee, subject to the mortgagor's right to perform the condition, and after default such legal title is said to become absolute, leaving a mere equity of redemption in the mortgagor, the title is only a legal title, and the equity can be disposed of only by an action in equity to foreclose, or by a sale under a power contained in the mortgage, or possibly by lapse of time.<sup>3</sup> And it is well settled that equity will take cognizance of a bill to foreclose a chattel mortgage.<sup>4</sup> A person to whom the chattel mort-

148; *Burnham v. Muller*, 61 Ill. 453; *Argall v. Seymour*, 4 McCrary (U. S. Cir.), 55.

What is a reasonable time within which to take possession, after default, depends on the situation of the parties and the circumstances of the case. *Arnold v. Stock*, 81 Ill. 407. See *Jones v. Turck*, 33 Iowa, 246.

A mortgagee of personal property which has never come into his possession is not bound, after garnishment by an attaching creditor of the mortgagor, to take possession of the property for the benefit of such creditor; and he cannot, in the absence of fraud or collusion, be held liable for the same though it exceeded in value the amount of his mortgage. *Curtis v. Raymond*, 29 Iowa, 52; *First Nat. Bank v. Perry*, 29 Iowa, 266.

1. *McConnell v. Scott*, 67 Ill. 274; *Barbour v. White*, 37 Ill. 164; *Chapin v. Whitsett*, 3 Colo. 315.

2. *Huebner v. Koebeke*, 42 Wis. 319; *Werner v. Bergman*, 28 Kan. 60; s. c., 42 Am. Rep. 152. Compare *Furlong v. Cox*, 77 Ill. 293. *Roy v. Goings*, 96 Ill. 361; s. c., 36 Am. Rep. 151.

Under such a clause he may take possession of the property before the maturity of the debt and sell it without demanding payment from the mortgagor or giving him notice of the sale. *Huggans v. Fryer*, 1 Lans. (N. Y.) 276.

His sense of insecurity must be based on facts arising since the mortgage. *Barrett v. Hart*, 42 Ohio St. 41; s. c., 51 Am. Rep. 801.

Under a clause in a chattel mortgage empowering the mortgagee to take possession whenever he should deem himself insecure, he would have good cause

for doing so if he had reason to think, and did think, that he had been overreached in regard to the value of the property; and there would be no conversion in taking it if the mortgagee's interest exceeded the value. *Botsford v. Murphy*, 47 Mich. 536.

A chattel mortgage for \$100 on a growing crop and a mare worth \$50 provided that if the mortgagee at any time should deem himself unsafe he might take possession and sell. Held, that the failure of the crop justified the taking possession of the mare. *Allen v. Vose*, 34 Hun (N. Y.), 57.

**Attempt to Sell.**—The filing by the mortgagor of a voluntary petition in bankruptcy is an "attempt to sell" within the meaning of the usual clause in chattel mortgages. *Moore v. Young*, 4 Biss. (U. S. Cir.) 128.

So is a seizure by distress. *Conkey v. Hart*, 14 N. Y. 22.

But not an attachment in due course of law. *Carpenter v. Town, Hill & Denio* (N. Y.), 72.

3. *Stoddard v. Dennison*, 38 How Pr. (N. Y.) 296; *Charter v. Stevens*, 3 Denio (N. Y.), 35; *Broadhead v. McKay*, 46 Ind. 595; *Kemp v. Westbrook*, 1 Ves. 278.

4. *Slade v. Rigg*, 3 Hare, 35; *Wayne v. Hanham*, 9 Hare, 62; *Kemp v. Westbrook*, 1 Ves. 278; *Briggs v. Oliver*, 68 N. Y. 336; *Davis v. Banks*, 2 Sweeney (N. Y.), 184; *Hall v. Bellows*, 11 N. J. Eq. 333; *Freeman v. Freeman*, 2 Green (N. J.), 44; *Farrell v. Bean*, 10 Md. 217; *Bryan v. Robert*, 1 Strobb. Eq. (S. Car.) 334; *Brown v. Greer*, 13 Ga. 285; *Blake-more v. Taber*, 22 Ind. 466; *Broadhead v. McKay*, 46 Ind. 595; *Dupuy v. Gibson*, 36 Ill. 197; *Packard v. Kingman*,

gagor has sold and delivered the goods is a proper party defendant to an action to foreclose the chattel mortgage; being in possession as owner, it is necessary to join him in order to foreclose his equity of redemption and to subject the property in his hands to sale.<sup>1</sup>

**19. Sale for Breach of Condition.**—If the mortgagee, in addition to his legal rights, desires to extinguish the mortgagor's equity of redemption after forfeiture, he must either resort to foreclosure proceedings (as above) or else make a *bona fide* sale of the property under the power contained in the mortgage.<sup>2</sup> But to be effective for this purpose the sale must be fair and in good faith, and not clandestine or collusive.<sup>3</sup> The mortgagee himself may purchase

11 Iowa, 219; Forepaugh v. Pryor, 30 Minn. 35; Smith v. Quartz Co., 14 Cal. 242.

Bills to foreclose chattel mortgages are entertained on the ground that the property may be sold under direction of the court, and that all the rights of the parties may be ascertained and enforced in one proceeding. Bryant v. Robert, 1 Strobb Eq. (S. Car.) 334.

A bill in equity may be maintained to foreclose a chattel mortgage where there are successive liens and incumbrances on the mortgaged property and various rights and interests to be adjusted; but if the amount is small, and there are no adverse claims or other liens or mortgages, the remedy by notice and sale of the property is sufficient. Dupuy v. Gibson, 36 Ill. 197.

After personal property under mortgage has been attached, and the mortgagee summoned as trustee, he cannot give notice and foreclose. Hobart v. Jouvett, 6 Cush. (Mass.) 105.

A notice of intention to foreclose a chattel mortgage given to secure a debt payable on demand is equivalent to a demand of payment of the debt, and constitutes a breach of condition of the mortgage and entitles the mortgagee to possession. Goodrich v. Willard, 2 Gray (Mass.) 203.

**Contents of Bill.**—A bill to foreclose a chattel mortgage should show of what the property consists, the mortgagor's title or claim of title to it, and that it is within the jurisdiction of the court. Chapman v. Hunt, 1 McCarter (N. J.), 149.

1. Trittip v. Edwards, 35 Ind. 467. Compare Sears v. Abrams, 10 Oreg. 499.

A mortgagor of a chattel who has parted with his interest and against whom no relief is demanded in a suit to foreclose, is not a necessary party to the suit. Farnsley v. Anderson Foundry Works, 90 Ind. 120.

Nor is the mortgagor of the holder of

another mortgage on the same property. Gregory v. Cable, 26 N. J. Eq. 178.

The personal representative of a deceased chattel mortgagee, and not his heir, should file the bill to foreclose. Harrison v. Harrison, 1 Call (Va.) 419.

2. Porter v. Parinly, 43 How. Pr. (N. Y.) 445; Stoddard v. Denison, 2 Sweeney (N. Y.), 54; Chapman v. Hunt, 13 N. J. Eq. 370; Hall v. Bellows, 11 N. J. Eq. 333; Wilson v. Brannan, 27 Cal. 258.

Where a chattel mortgage is made to two, to secure their separate claims, a sale for condition broken may be made by either creditor, and the purchaser, as owner of the vendor's undivided interest, would become a tenant in common with the other creditor. Wilson v. Brannan, 27 Cal. 258.

3. Bird v. Davis, 14 N. J. Eq. 467; Walker v. Stone, 20 Md. 195; Charter v. Stevens, 3 Denio (N. Y.), 35; Stoddard v. Denison, 2 Sweeney (N. Y.), 64; Chamberlain v. Martin, 43 Barb. (N. Y.), 607; Ashton v. Corrigan, L. R. 13 Eq. 76; Freeman v. Freeman, 2 Green (N. J.), 44; Williams v. Hatch, 38 Ala. 338.

The conduct and fairness of a sale of chattels by a mortgagee and the rights acquired under it, are always open to investigation at the instance of the mortgagor. On this account a sale under judicial sanction is safer, and where the amount is large, advisable. Freeman v. Freeman, 2 Green (N. J.), 44.

**Notice.**—In most of the States the mortgagee must give the mortgagor notice of the sale, either by mail, personally, by publication, or by posting, within a prescribed period before sale. See statutes generally.

When the mortgage itself provides specially how and upon what notice the mortgagee may sell, these express provisions preclude all implications on the subject and must be accurately followed. Flanders v. Chamberlain, 24 Mich. 305. Compare Whitaker v. Sigler, 44 Iowa, 419.

the chattel at a fair sale under the power contained in the mortgage. Such purchase is good at law, and if voidable in equity, it would only be so for unfair dealing, and only at the instance of interested parties.<sup>1</sup> A mortgagee of personal property who sells the same under a power of sale clause in the mortgage must account to the mortgagor for any surplus above the debt and expenses.<sup>2</sup>

**Public or Private Sale.**—A chattel mortgage provided that in case of default in payment, the mortgagee might sell the mortgaged property without specifying the mode of sale. It also provided that if he deemed himself unsafe at any time before payment, he might sell the property at public or private sale. *Held*, that upon default in payment the mortgagee could sell the property at private sale, and that the vendee's title would be perfect if the sale was fair and bona fide, although no notice of it was given to the mortgagor. *Chamberlain v. Martin*, 43 Barb. (N. Y.) 607; *Ballou v. Cunningham*, 60 Barb. (N. Y.) 425.

**Sale for Cash.**—The power of sale confers upon the mortgagee no right to barter the property or to dispose of it otherwise than for cash. *Edwards v. Cottrell*, 43 Iowa, 194. *Compare Williams v. Hatch*, 38 Ala. 338.

**Excessive Sales.**—A mortgagee's sale of the residue of the mortgaged chattels, after enough have been sold to pay the debt and costs, is a conversion of them for which he is liable to the mortgagor. *Griswold v. Morse*, 59 N. H. 211; *Beckley v. Munson*, 22 Conn. 299; *Charter v. Stevens*, 3 Denio (N. Y.), 33; *West v. Cary*, 47 N. Y. 423; *Stromberg v. Lindberg*, 25 Minn. 513; *Bellamy v. Dowd*, 11 Iowa, 285.

A chattel mortgage provided that goods seized under it should be sold at public auction after notice, and that the power of sale should be limited to so much of the property as the sale should show was needed to pay the debt. The mortgagee, however, retailed part of the goods at private sale. *Held*, that the mortgagor could elect to have the amount to be sold ascertained as in other cases, and, in suit on the mortgage note, the jury should have been charged to find the market value of the goods sold at private sale. *Botsford v. Murphy*, 47 Mich. 537. See *Alger v. Farley*, 19 Iowa, 518.

**Adjournment.**—In the exercise of a power of sale in a chattel mortgage, the mortgagee has a right, in the exercise of a reasonable discretion, to adjourn the sale from time to time, without doing so through the agency of a licensed auction-

eer or giving any new notice to the mortgagor. *Hosmer v. Sargent*, 8 Allen (Mass.), 97.

**Caveat Emptor.**—On a sale of chattels, announced as made by virtue of a mortgage, there is no implied warranty of title. *Harris v. Lynn*, 25 Kans. 281; s. c., 37 Am. Rep. 253.

Where a mortgaged chattel is advertised for sale, and sold subject to the mortgage, purchasers have sufficient notice of the mortgage to estop them from contesting it on the ground that it was not duly placed on file. *Kellogg v. Secord*, 42 Mich. 318.

1. *Olcott v. Railroad*, 27 N. Y. 546; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 100; *Charter v. Stevens*, 3 Denio (N. Y.), 35; *Black v. Hair*, 2 Hill Ch. (S. Car.) 622; *Lyon v. Jones*, 6 Humph. (Tenn.) 533; *Bean v. Barney*, 10 Iowa, 498; *Wright v. Ross*, 36 Cal. 414. See also *New Hamp. Gen. Laws* 1878, c. 137, § 21; *Mich. Stats.* § 6200; *Minn. act* 1885, c. 171; *Nebr. Comp. Stats.* pt. 1, c. 12, § 7; *Dak. act* 1885, c. 32. *Compare Pulver v. Richardson*, 3 Thomp. & C. (N. Y.) 436; *Buffalo Steam-engine Works v. Sun Ins. Co.*, 17 N. Y. 403; *Korns v. Shaffer*, 27 Md. 83; *Imboden v. Hunter*, 23 Ark. 622; *Beard v. Westerman*, 32 Ohio St. 29; *Pettibone v. Perkins*, 6 Wis. 616.

Where the mortgagee in a chattel mortgage buys the mortgaged property at a sale made at his instance for the amount of the debt and costs, and neither the mortgagor nor his creditors complain of any irregularity in the sale, the mortgagee cannot call in question its regularity, and the purchase by him is a payment of the mortgage debt. *Massey v. Hardin*, 81 Ill. 330.

2. *Flanders v. Thomas*, 12 Wis. 410; *Pettibone v. Perkins*, 6 Wis. 616; *Kohl v. Lynn*, 34 Mich. 360; *Korns v. Shaffer*, 27 Md. 83; *Moore v. Aylett*, 1 Hen. & M. (Va.) 29; *Bryan v. Robert*, 1 Strobb. Eq. (S. Car.) 342.

But he is not accountable for profits unless it appears that he received profits before the sale. *Moore v. Aylett*, 1 Hen. & M. (Va.) 29.

Where the mortgagor accepts, either expressly or by legal intentment, of the proceeds of the sale, he is thereby

**20. Rights of Second Mortgagees.**—Where two or more mortgages of the same chattels are made and recorded at the same time, the mortgagees are entitled to hold the property in proportion to the amounts of their respective claims.<sup>1</sup> An agreement by the parties thereto, that one of two mortgages executed at the same time shall be the prior lien, will be enforced as between the parties, although the mortgage postponed was first recorded.<sup>2</sup> A subsequent mortgagee of chattels to secure previous indebtedness, who has notice of a senior mortgage, is not a mortgagee in good faith so as to entitle him to attack the senior mortgage for fraud.<sup>3</sup> A second mortgagee with a right of possession is entitled to possession of the mortgaged property as against all persons except the first mortgagee, and as against all persons but the latter and those claiming under him, may maintain an action for any taking of it which is in conflict with his rights.<sup>4</sup> When the first mortgage is

estopped from denying the legality of the sale. *France v. Haynes*, 21 Repr. (Iowa), 43.

**Expenses of Sale.**—Where the mortgage provides for the payment of "all expenses for the sale" of the mortgaged property out of the avails of such sale, only such expenses are intended as are incurred in doing such things as form part of the proceedings of sale. *Ferguson v. Hogan*, 25 Minn. 135. And compensation to the mortgagee for his care is not included by implication. *Imboden v. Hunter*, 23 Ark. 622.

**Application of Proceeds.**—A chattel mortgagee has an absolute right to apply the proceeds of mortgaged property sold by consent to the payment of the mortgage debt, instead of another debt of the mortgagor to him. *Masten v. Cummings*, 24 Wis. 623.

If the debt secured is payable by instalments, the proceeds of the sale may be applied towards the payment of any instalments which may be due, at the option of the mortgagee. *Saunders v. McCarthy*, 8 Allen (Mass.), 42; *Locke v. Palmer*, 26 Ala. 312.

1. *Aldrich v. Martin*, 4 R. I. 520.

2. *Rigler v. Light*, 90 Pa. St. 235; *Corbin v. Kincaid*, 33 Kans. 649; *Chadbourn v. Rahilly*, 28 Minn. 394. See *Sanders v. Barlow*, 21 Fed. Repr. 836.

A mortgage of personal property to one party, expressed to be "subject to prior mortgages" to another, conveys to a mortgagee knowing their amount and terms only the right to redeem therefrom, and, although recorded first, takes no precedence thereof. *Pecker v. Silsby*, 123 Mass. 108; *Hoagland v. Shampayne*, 37 N. J. Eq. 588.

Where a debtor at the same time executes and causes to be recorded separate and independent mortgages of the same property to several of his creditors, without the knowledge of either, that mortgage which is soonest ratified will first have effect and will take precedence. *Oxnard v. Blake*, 45 Me. 602.

Where two parties have chattel mortgages on the same property, and they both permit the property to remain in the possession of the mortgagor an unreasonable length of time after the maturity of their respective mortgages, they cannot as against the claim of a third person enforce them; but as against each other, the one first acquiring possession of the property is entitled to priority of lien. *Atkins v. Byrnes*, 71 Ill. 326.

A purchase-money mortgage, made part of the sale, takes precedence. *Walker v. Vaughn*, 33 Conn. 577.

A statute forbidding a second mortgage without a reference in it to the first does not make the second mortgage void; for the statute is designed to secure the rights of the second mortgagee, and the parties are not *in pari delicto*. *Leach v. Kimball*, 34 N. H. 568.

3. *Tolbert v. Horton*, 18 Repr. (Minn.) 88. See *Baskins v. Shannon*, 3 N. Y. 310. Compare *De Courcey v. Collins*, 21 N. J. Eq. 357.

A second mortgagee of a chattel who takes it from the possession of the mortgagor, sells it, and receives the full consideration of the sale, without regard to the rights of the senior mortgagee, is liable to the latter in an action for the conversion of the chattel. *Lowe v. Wing*, 56 Wis. 31.

4. *Newman v. Tymeson*, 13 Wis. 172; *Treat v. Gilmore*, 49 Me. 34; *Gardner*

discharged or extinguished, the second mortgagee acquires all the rights of a first mortgagee.<sup>1</sup>

**21. Assignment of Mortgage.**—Although a chattel mortgage is not assignable or negotiable at law, yet a party taking an assignment of such an instrument acquires rights and an interest in the debt secured and the property pledged, which courts of law as well as of equity will recognize and protect.<sup>2</sup> But independently of the debt it was made to secure, a chattel mortgage has no assignable quality, and an assignment of the mortgage without the debt is a nullity.<sup>3</sup> In certain of the States assignments of chattel mortgages are not required to be recorded.<sup>4</sup>

**CHEAT.** (See also FRAUD.)—A *cheat*,<sup>5</sup> at common law,<sup>6</sup> is a fraud (not amounting to felony) accomplished<sup>7</sup> by any deceitful and illegal symbol or token which may affect the public at large<sup>8</sup> in some pecuniary interest, and against which common prudence cannot guard.

v. Morrison, 12 Ala. 547. Compare Ring v. Neale, 114 Mass. 111.

1. Daly v. Proetz, 20 Minn. 411.

2. Zeiter v. Bowman, 6 Barb. (N. Y.) 133; Sirrine v. Briggs, 31 Mich. 443.

A mortgagee of chattels, after their seizure and before the right of redemption is barred, has an assignable interest under the mortgage. Moody v. Ellerbe, 4 S. Car. 21.

The assignee of a *bona fide* mortgagee of chattels is entitled to the same protection as the mortgagee in an action of replevin brought by a claimant of the chattels. Mayer v. Soulier, 48 Mich. 411.

The assignee takes the mortgage subject to all equities between the original parties, but not subject to latent equities of third persons of which he had no notice. Langdon v. Buel, 9 Wend. (N. Y.) 80; Barbour v. White, 37 Ill. 164.

3. Polhemus v. Trainer, 30 Cal. 685; Hamilton v. Browning, 94 Ind. 242; Earle v. Stumpf, 56 Wis. 50.

Where a chattel mortgage is given to secure the payment of a debt by note, the assignment of the note and mortgage, whether the assignment is under seal or not, vests in the assignee the right of action on the mortgage. Gilchrist v. Patterson, 18 Ark. 575; Langdon v. Buel, 9 Wend. (N. Y.) 80.

The assignee of part of a debt secured by a chattel mortgage, with a right to sell, can only sell so much of the mortgaged property as will cover the assigned interest. Emmons v. Dowe, 2 Wis. 322.

4. Bigelow v. Smith, 2 Allen (Mass.), 264; Baxter v. Gilbert, 12 Abb. (N. Y.) 97.

**Authorities for Chattel Mortgages.**—Jones on Chattel Mortgages; Boone on

Mortgages; Herman on Chattel Mortgages; Pierce on Fraudulent Mortgages of Merchandise.

5. 2 East P. C. 818; 2 Wharton's Cr. Law, § 1116.

6. The common law as to cheats is mostly superseded by the legislation against FALSE PRETENCES, q.v.

7. There must be a prejudice received. Bouvier's Law Dict.; Rex v. Dale, 7 C. & P. 352; 2 Bishop on C. L. § 159.

8. A naked lie could not constitute a cheat at common law, which considered that it was folly in the injured party to be so deceived. Pinkney's Case, 2 East C. L. 818. But many lies to-day come under legislation relating to false pretences. Nor did merely writing the lie and signing one's own name to the paper (e.g., check on a bank) constitute a device or token; otherwise if the name of another was signed; though if in the latter case the act amounted to forgery, the cheat, a misdemeanor, was lost in the felony. Whether that is so to-day, the reasons for the merger having ceased, is more appropriately discussed in other parts of this work.

Wheatley, a brewer, sold 16 gallons of amber for 18. On indictment, Lord Mansfield, C. J., said: "It amounts only to an unfair dealing and an imposition on this particular man by which he could not have suffered but from his own carelessness in not measuring it; whereas fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud members, as false weights or measures, false tokens, or where there is a conspiracy." East C. L. 818.



## Definition.

Getting a promissory note by pretending wish to look at it, and then refusing to return it, was held to be a mere private fraud. *People v. Miller*, 14 Johns. (N.Y.) 371. See *Lambert v. People*, 5 Cowen (N.Y.), 578.

Channing, a miller, received three bushels of wheat to grind, and kept back forty-two pounds, not in the way of excessive toll, but simply as a private fraud. On indictment it was adjudged for defendant. 2 Stra. 793.

Eagleton contracted to supply to the poor of a certain borough, in accordance with arrangements made with the guardians of the poor, loaves of bread of a certain weight. He furnished parish loaves of a less weight. *Held*, that as no tokens or weights were used, the fraud was a private one, and not indictable. The defendant was convicted, however, of the statutory offence of attempting to obtain money, in that, after having thus defrauded the parishioners, he made return (fraudulent misstatement of antecedent fact) that he had sold a certain number of the specified loaves, whereby he obtained credit on the relieving-officer's book. *R. v. Eagleton*, 33 Eng. L. & Eq. 545; 6 Cox C. C. 559.

But a baker employed by the United States army marked 219 barrels of bread as weighing 88 lbs. each, though they only severally weighed 68 lbs. *Held*, that the marking constituted false token equivalent to false measure, and indictment was sustained. *Republica v. Fowell*, 1 Dallas (U. S.), 47.

For cheating effected by false weights and measures betokens a general design to defraud, and the offender is indictable therefor. 2 East C. L. 820.

So in all cases where false tokens having the semblance of public authenticity are used; as where cloth was sold with counterfeit seal thereon, or where false dice were used in gaming. 2 East C. L. 820.

But where Wilders, a brewer, sends to Hicks, a publican, vessels of ale marked as containing such a measure, when in fact they contained less; and wrote also a letter to Hicks assuring him that they did contain the measure as marked, indictment against the brewer was quashed. *R. v. Wilders*, cited by Lord Mansfield in *Bur.* 1128. This is doubtless explainable by the fact that the marks were put on the vessels in a way not evincing a general intent to defraud, but only to cheat a certain individual.

A person may make a token of himself. Thus an apprentice obtained a bounty by enlisting as a soldier, representing that

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there was no impediment. Appearing free, without his indentures and unaccompanied by any master, inquiry was averted. *Rex v. 2 Jones*, East P. C. 822.

**The Fraud must be Latent.**—For instance, handing back musty mixture of barley and oat in return for good barley received by a miller was held not indictable, though it might be otherwise in some kinds of general fraud. *R. v. Haynes*, 4 M. & S. 214.

So personating one's self for another, where there is nothing deceiving in the pretender's appearance or reputation, is not a cheat at common law. 2 East P. C. 1010.

But a minor, apparently of age, going about deceiving many,—2 Wh. C. L. § 1124,—likewise a married woman pretending to be single, may be indicted.

By 33 Hen. VIII. (a part of the common law of some American States) cheats are indictable as misdemeanors when effected by false tokens or counterfeit letters made in the name of another. A "privy token," within the meaning of this statute was held to denote some real visible mark or thing, as a key, a ring, etc., and not a mere affirmation or promise. This is really in affirmance of the old common law.

A check on a bank, where the drawee has no deposit, in the name of the deceiver, is not a token; another's check is. The deceiver's check is a token if there be no such bank, or if, being a bank, it is broken and he knows it. So with a bank-note unsigned or falsely signed. 2 East P. C. 827; *State v. Patillo*, 4 Hawks, 348.

**Private Cheats.**—Sometimes private cheats, for instance, misreading a deed to an illiterate person, and thereby causing the latter to execute it to his prejudice, or suppressing a will, have been denominated cheats. Yet in 2 East P. C. 823 it is shown that in the indictments in those cases several persons were convicted, thus indicating a charge for conspiracy rather than for cheat. For the rule at common law was that the fraud must be (1) latent, (2) addressed to the public at large.

**False News,** if the fraud be skillfully done so as to be latent, and addressed to the public at large, may be made the means of a cheat at common law. 2 Wh. C. L. 1121.

**Illegality of the Thing Pretended** will not, in prosecutions for cheats at common law, be a defence; as where a man counterfeited a false discharge. *R. v. Fawcett*, 2 East P. C. 862.

**Public Cheats.**—Besides the cheats al-

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**CHECKS.** (See also ALTERATION OF INSTRUMENTS; ASSIGNMENTS; BANKS AND BANKING; BILLS AND NOTES; EVIDENCE.)

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**1. Definition.**—A check is a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money, to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.<sup>1</sup>

ready mentioned against numbers of people, there are others deceiving the public in general, or by affecting the public trade or revenue, or being fraud against public justice. So taking advantage of official position may be indictable, though the same fraud in a private person would not. Thus in *Rex v. Bower* a private jeweller's exposing for sale worse gold than the standard was held not indictable; though had one of the Goldsmith Company done so he would have been. 1 Cowper, 323.

The word "cheat" is not actionable unless spoken of the plaintiff in relation to his profession or business. *Heard, Libel & Sl.* § 16. Or unless accompanied by other words or circumstances making it impute an indictable offence. *Chose v. Whitlock*, 3 Hill (N. Y.), 139; *Stevenson v. Hayden*, 2 Mass. 406; *Lucas v. Flynn*, 35 Iowa 9. See FALSE PRETENCES.

1. 2 Daniel on Neg. Inst. (3d Ed.) 583. This definition has been quoted with approval in *Blair & Hoge v. Wilson*, 28 Gratt. (W. Va.) 170. See generally *Billgerry v. Branch*, 19 Gratt. (W. Va.) 418; *Deener v. Brown*, 1 MacArthur (C. C.), 350; *Matter of Brown*, 2 Story (C. C.), 502; *Bowen v. Newell*, 8 N. Y. 195; *McIntosh v. Lytle*, 23 Minn. 336. A check has also been defined as, "in legal effect, an inland bill of exchange drawn on a banker, payable to bearer (or order) on demand." *Byles on Bills*, \*13 (7th Am. Ed.) 1. "A check," says Story, "is a written order or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment to another person, or to him or bearer, or to him or order,

a certain sum of money specified in the instrument." *Story on Promissory Notes* (7th Ed.), § 487.

A check has been said to be "a bill with some peculiarities, or a species of a bill." 2 Daniel on Neg. Inst. 584. But in the opinion of Mr. Morse "the differential traits decidedly preponderate." *Morse on Banking* (2d Ed.), 259. In *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 647, Mr. Justice Swayne, in pointing out the differences between a check and bill of exchange, says: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud."

A check purports to be drawn upon a deposit. See *Champion v. Gordon*, 70 Pa. St. 476; *Morrison v. Bailey*, 5 Ohio St. 13; *Espy v. Bank of Cincinnati*, 18

**2. Presentment and Notice.**—Until the check has been presented to the bank and payment refused, and notice of dishonor given to the drawer, the holder has no right of action against the drawer.<sup>1</sup>

If, however, the presentment and notice could be of no benefit to the drawer, they may be dispensed with.<sup>2</sup>

Wall. (U. S.) 620. In the hands of a bank or banker. See *Bowen v. Newell*, 8 N. Y. 195; *Deener v. Brown*, 1 MacArthur (C. C.), 350.

**The Amount of the Check.**—Where the amount stated in marginal figures differs from the words in the body of the check, the latter will govern. *Smith v. Smith*, 1 R. I. 398; *National Bank of Rockville v. Second National Bank*, 69 Ind. 479. In the latter case the body of the check was for "twenty-one and thirty-six in exchange dollars," while the margin contained the figures "2,136.00." *Held*, that the figures were controlled and contradicted by the words in the body of the check. The marginal figures may be used to explain the words in the body of the check. Thus, the words "five hundred" written in the body of the instrument, by reference to the dollar-mark in the margin, were held to mean five hundred dollars. *Corgan v. Frew*, 39 Ill. 31. In *Northrup v. Sanborn*, 22 Vt. 433, an order was drawn for "37.89" without any dollar-mark. *Held*, that the figures were used to express the currency of the United States.

1. *Purcell v. Allemong*, 22 Gratt. (W. Va.) 739; *Pollard v. Bowen*, 57 Ind. 232; *Judd v. Smith*, 3 Hun (N. Y.), 190; *Jaudon v. Read*, 32 How. Pr. (N. Y.) 190; *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Little v. Phoenix Bank*, 2 Hill (N. Y.), 430; *Harker v. Anderson*, 21 Wend. (N. Y.) 372; *Levy v. Peters*, 9 Serg. & Rawle (Pa.), 125; *Flemming v. Denny*, 2 Phila. Rep. 111; *Case v. Morris*, 31 Pa. St. 100; *Sherman v. Comstock*, 2 McLean (C. C.), 19.

In *Purcell v. Allemong*, 22 Gratt. (W. Va.) 739, the court say: "A check is an inland bill of exchange drawn on a bank or other house of deposit. The drawer undertakes that the bank will pay to the payee or holder the sum named in the check; and the payee having received the check, the drawer is not liable to pay it, if he drew it in good faith, until the holder has demanded and failed to obtain payment from the bank upon which it was drawn. If the bank refuses to pay, the holder, as a general rule, has no right of action against it, but must look to the drawer for payment. But the drawer may have his action against the bank for refusing to honor his check, but not

until the same has been presented and payment refused. It is consequently well settled, as a general rule, that the holder of a check has no recourse upon the drawer until the check has been presented to the bank and payment refused."

2. *Case v. Morris*, 31 Pa. St. 100; *Sterrett v. Rosencrantz*, 3 Phila. Rep. (Pa.) 54; *Hoyt v. Seeley*, 18 Conn. 353; *Judd v. Smith*, 3 Hun (N. Y.), 190; *Cromwell v. Lovett*, 6 Wend. (N. Y.) 369; *Frue v. Thomas*, 16 Maine, 36.

**When Presentment and Notice are Unnecessary.**—When the drawer has no funds, or has withdrawn them from the bank, or has stopped payment of the check, notice of its dishonor is unnecessary. *Wirth v. Austin*, L. R. 10 C. P. 689; *Carew v. Duckworth*, L. R. 4 Ex. 313; *Conroy v. Warren*, 3 Johns. Cas. 259; *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Flemming v. Denny*, 2 Phila. Rep. 111; *Eichelberger v. Finley*, 7 Har. & J. (Md.) 381; *True v. Thomas*, 16 Me. 36; *Franklin v. Vanderpool*, 1 Hall (N. Y.), 78; *Fitch v. Redding*, 4 Sandf. (N. Y.) 130; *Jacks v. Darrin*, 3 E. D. Smith (N. Y.), 557; *Purchase v. Mattison*, 6 Duer (N. Y.), 587. So also presentment is unnecessary when the drawer has no funds. *Bell v. Alexander*, 21 Gratt. (W. Va.) 1; *Foster v. Paulk*, 41 Me. 425. Or has withdrawn them from the bank. *Deener v. Brown*, 1 MacArthur (C. C.), 350; *Moody v. Mack*, 43 Mo. 210. Or the bank becomes insolvent within the time required for presentment. *Syracuse R. Co. v. Collins*, 3 Lans. (N. Y.) 29; *Warrensburg Assn. v. Zoll*, 83 Mo. 94.

In *Case v. Morris*, 31 Pa. St. 100, 104, the court say: "The general rule of law is, that the holder cannot resort to the drawer without proof of due presentment to the drawee for payment, and prompt notice of dishonor. *Little v. Phoenix Bank*, 2 Hill's N. Y. Rep. 430. But in *Bickerdike v. Bollman*, 1 T. R. 408, it was held that when the drawer had no effects in the hands of the drawee at the time the bill was drawn, notice was not necessary. It is sometimes said that this exception to the general rule is placed on the ground that it was a fraud to draw the bill when the drawer knew that it would not be paid. At other times it is said that the drawer's knowledge that it would be dishonored is tantamount to

*Time for Presentment.*—The holder, in order to charge the drawer in case of a dishonor, must present the check for payment within a reasonable time, otherwise the delay is at the peril of the holder.<sup>1</sup>

*What is a Reasonable Time.*—What is a reasonable time will depend upon circumstances, and will in many cases depend upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises.<sup>2</sup>

If the bank on which the check is drawn be in the same place where the payee received the check, it should be presented for payment within banking hours on the day it is received, or on the following day. If, in the mean time, the bank fails, the loss will be the drawer's.<sup>3</sup>

If the bank be not in the same place where the payee received

demand and notice. *Cory et al. v. Scott*, 3 B. & Ald. 619. But whatever may be the grounds for that decision, it is very certain that it introduced an exception to a plain and intelligible rule of commercial law, which many eminent and experienced judges have since regretted. It is adhered to on the principle of *stare decisis*, but it is not to be extended a single step. *Ort v. Maginnis*, 7 East, 362; *Legge v. Thorpe*, 12 East, 176; *Rucker v. Hiller*, 16 East, 43; 3 B. & P. 241; 3 Barn. & Ald. 619; 6 Bing. 623. Where the drawer has no effects in the hands of the drawee, and has no reason to expect any, or to believe that the bill will be paid, notice of the dishonor of it could do him no good, and may therefore be dispensed with."

In *Shaffer v. Maddox*, 9 Neb. 205, the drawers had no funds in the bank at the time the check was drawn and presented for payment. *Held*, that the drawers were not released from liability by reason of the failure of the holder to notify them.

**Withdrawal of Deposit Before the Bank Fails.**—In *Kinyon v. Stanton*, 44 Wis. 479, the holder failed to present the check, and eight days after its date the bank suspended payment. But just before the bank's failure the drawer withdrew his funds. The bank would have paid the check had it been presented for payment at any time up to the day of its failure. *Held*, that the drawer was liable. The court say: "The appellants could have escaped liability over only by leaving funds in the bank to meet the check from the day it was given until the failure of the bank. They cannot expect to draw all their funds from the bank before its failure, and then escape liability upon a check previously given, merely because the bank failed."

1. *Bell v. Alexander*, 21 Gratt. (W. Va.) 1; *Stewart v. Smith*, 17 Ohio St. 82; *Tay-*

*lor v. Sip*, 1 Vroom (N. J.), 284; *Morrison v. McCartney*, 30 Mo. 183; *Cork v. Bacon*, 45 Wis. 192; *Scott v. Meeker*, 20 Hun (N. Y.), 163; *Harker v. Anderson*, 21 Wend. (N. Y.) 372; *Daniels v. Kyle*, 5 Ga. 245; *Montalms v. Charles*, 76 Ill. 303; *Stevens v. Park*, 73 Ill. 387.

In *Daniels v. Kyle*, 5 Ga. 245, 251, the court say: "A check, unlike a bill of exchange, is generally designed for immediate payment, and not for circulation; and therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may, and if he does not, he keeps it at his own peril."

2. *Woodruff v. Plant*, 41 Conn. 344; *Taylor v. Sip*, 1 Vroom (N. J.), 284, 290.

3. *Simpson v. Pacific, etc., Ins. Co.*, 44 Cal. 139; *Veazie Bank v. Winn*, 40 Me. 60; *Wear v. Lee*, 87 Mo. 358; *Cawein v. Browinski*, 6 Bush (Ky.), 457; *Schoolfield v. Moon*, 9 Heisk. (Tenn.) 171; *Syracuse, etc., R. Co. v. Collins*, 3 Lans. (N. Y.) 29; s. c., 57 N. Y. 641; *Smith v. Miller*, 6 Rob. (N. Y.) 157; s. c., 43 N. Y. 171, 52 N. Y. 546; *Kelty v. Bank*, 52 Barb. (N. Y.) 328; *Bickford v. First Nat. Bank*, 42 Ill. 238; *Moule v. Brown*, 4 Bing. N. C. 268; *Bailey v. Bodenham*, 16 C. B. (N. S.) 288; *Boddington v. Schlencker*, 4 Barn. & Ad. 752.

Where the check is received on Saturday, the payee has until the close of banking hours on Monday to present it. *Mead v. Caswell*, 9 Mod. 60; *O'Brien v. Smith*, 1 Black (U. S.), 99.

The holder of a check upon a bank located in the town of his residence may present it for payment during business hours the day after it is drawn, and his omission to do so sooner is no defence to the drawer, unless the holder had information of its precarious condition. *First Nat. Bank v. Alexander*, 84 N. C. 30. See also *Cawein v. Browinski*, 6 Bush (Ky.), 457.

the check, then it must be forwarded by mail on the next secular day after it is received for presentment. If the person to whom it is forwarded presents it for payment on the day after it has reached him by due course of mail, it will be sufficient.<sup>1</sup>

1. *Middletown Bank v. Morris*, 28 Barb. (N. Y.) 616; *Smith v. Jones*, 20 Wend. (N. Y.) 192; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Taylor v. Sip*, 1 Vroom (N. J.), 284; *Griffin v. Kemp*, 46 Ind. 172, 176; *Himmelmänn, v. Hotaling*, 40 Cal. 111; *Woodruff v. Plant*, 41 Conn. 344; *Hare v. Henty*, 30 L. J. C. P. 302; *Werk v. Mad River, etc., Bank*, 8 Ohio St. 301.

In *Cox v. Boone*, 8 W. Va. 500, a party residing about four miles from the post-office received a check at supper time in mid-winter, on a Wheeling bank, on account of a debt. The only mail that left the post-office the next day closed at 7.30 A.M., and left at 8 A.M. *Held*, that the holder was not required to forward the check by that mail. The court observed that, to have sent the check by that mail, the plaintiff "would have been required to have gotten up in the night and rode to the post-office before daylight in the morning. To require this would be unreasonable.

A. received a small check at a lumber camp twenty miles from the bank, on Friday. His place of business was twenty miles in an opposite direction, and he deposited the check in a bank there on Monday, on which day the drawee bank failed. *Held*, that the delay was not unreasonable. *Freiberg v. Cody*, 55 Mich. 108.

In *Rickford v. Ridge*, 2 Camp. 537, the plaintiffs, bankers of Aylesbury, discounted for defendant on June 13th a check on bankers of London, and sent it to their London agent on the 14th for presentment. The agent received it on the 14th and sent it for presentment on the 15th, when payment was refused. *Held*, that the check was presented in time; the bank, receiving the check on the 13th, was not bound to send it off till the 14th; the agent, receiving it on the 14th, was not bound to present it before the 15th, on which day it was done. Lord Ellenborough said: "The rule to be adopted must be a rule of convenience; and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next. Is this practice consistent with the law merchant? It cannot alter it. Banks would be kept in continual fever if they were obliged to send out a check the moment it was paid in."

#### Reasonable Time is Question of Law.—

Whether a presentment is made within a reasonable time is a question of law for the court where there is no dispute about the facts. *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; *Himmelmänn v. Hotaling*, 40 Cal. 111.

The holder does not gain an extra day for presentment by depositing the check in bank for collection. It must be forwarded by the bank for presentment within the same time required of the holder. *Alexander v. Burchfield*, 1 Carr. & M. 75. See also *Moule v. Brown*, 4 Bing. N. Cas. 266.

In *Alexander v. Burchfield*, 1 Carr. & M. 75, the check was received by the plaintiffs on the 10th, and paid in to their bank on the 11th, and by them presented to the drawees, defendant's bankers, on the 12th, who stopped payment on that day. There was a verdict for defendant. *Tindal, C. J.*, in summing up, said: "If a party receive a check on a particular day, he may present it at any time during banking hours on the following day to that on which he received it. I am not aware of any decision which says that a person may keep it all the first day, and on the second day pay it in to his own bankers, and that they may present it on the third day. The cases which seem to bear upon this point relate only to the notice of dishonor, and not to the time of presentment. I cannot agree that, if a bill becomes due, say on the 1st of March the holder may pay it in to his bankers on the 2d of March, and that his banker will have till the following day, the 3d, to present it."

In *Moule v. Brown*, 4 Bing. N. Cas. 266, a check drawn March 28th, by F., on a banker at Bath, was cashed for defendant by a branch of the N. W. bank at Malmesbury, and the same day forwarded to its main office at Melksham, twelve miles from Bath, where it was presented on Friday, the 31st, and dishonored. *Held*, that the presentment was not in time to give the N. W. bank any claim against defendant. *Tindal, C. J.*, said: "The result of the cases, from *Rickford v. Ridge* (2 Camp. 539) to *Boddington v. Schlencker* (4 B. & Ad. 752), is, that the party receiving a check has till the following day to present it, where there are the ordinary means of doing so. Here, the plaintiffs resided in a post-town, and if

*Delay in Presentment and Notice.*—The drawer is not discharged by any laches of the holder in not making due presentment of the check, or in not giving him due notice of its dishonor, unless he has suffered some loss or injury thereby, as by the intermediate failure of his bank, and then only *pro tanto*.<sup>1</sup>

they had transmitted the check to Bath by the next day's post, it would have been presented on Thursday. If there was any sufficient reason for not pursuing that course, it lies on them to show it; but I think upon this state of facts they have been guilty of laches."

1. *Bell v. Alexander*, 21 Gratt. (W. Va.) 1; *Stewart v. Smith*, 17 Ohio St. 82; *Emery v. Hobson*, 63 Me. 32; *Taylor v. Slip*, 1 Vroom (N. J.), 284; *Cork v. Bacon*, 45 Wis. 192; *Howes v. Austin*, 35 Ill. 396; *Stevens v. Park*, 73 Ill. 387; *Heushaw v. Root*, 60 Ind. 220.

In *Hoyt v. Seeley*, 18 Conn. 353, the holder of a check did not present it to the bank for payment until after the lapse of more than two years from the time he received it, and omitted to give any notice to the drawer of its non payment. The drawer never had funds in the bank sufficient to pay it before it was protested, except at one time, and then such funds were immediately afterwards drawn out by himself. The bank was not insolvent, and the drawer sustained no loss or injury from the want of notice or delay in presentment. *Held*, that the drawer was liable. The court said that the general rule "does not apply to a case where the drawer has sustained no loss or injury. Were it otherwise, the drawer would profit by a neglect which did him no injury."

In *Smith v. Jones*, 2 Bush (Ky.), 103, the check was dated April 12, 1862, and was not presented at the bank in New Orleans until January 13, 1863. The city, meanwhile, had been captured by the United States army, and at the time the check was presented the drawer had no funds in bank. *Held*, that the drawer was not liable. *Robertson, J.* said: "Unlike a bill of exchange, a check does not require 'due diligence,' and apparent laches in presenting it for payment does not exonerate the drawer, unless by unreasonable delay he has suffered loss, and then he is entitled to relief *pro tanto*. But the evidence authorizes the deduction, that, for nearly a month after the date of the appellee's check, the appellants, if only reasonably provident and diligent, might have presented the check and received the amount of it."

In *Cork v. Bacon*, 45 Wis. 192, nine days after the date of the check and about

a week after plaintiff became the holder, the drawee suspended payment. During all of this time the drawer had sufficient funds in the drawee's hands to meet the check, which was not presented until the drawee became bankrupt. *Held*, that the check had not been paid through the laches of the holder, and the drawer was not liable.

In *Harry v. Wood*, 2 Miles (Pa.), 327, plaintiff issued an attachment execution against the defendant's deposit in the bank, and on the same day and after the service of the attachment a check drawn by defendant, dated several days before the service, was presented to the bank for payment. *Held*, that the holder of the check had been negligent in not presenting it to the bank, and was postponed to the attaching creditor, who was entitled to the fund.

If the maker has withdrawn from the bank his entire deposit against which the check is drawn he is not injured by any delay in presenting it or any lack of formal notice of its non-payment before action brought. *Emery v. Hobson*, 63 Maine, 32.

In *Scott v. Meeker*, 20\* Hun (N. Y.), 161, the defendant being indebted to the plaintiff on a promissory note, mailed to him his check on a bank for the amount thereof, on receipt of which the plaintiff returned the said note to defendant. On the morning of the day after the check was received it was accidentally burned and destroyed. The defendant on being informed of its destruction promised the plaintiff to pay him, but subsequently refused so to do. *Held*, that the destruction of the check made it impossible for plaintiff to present it for payment, that defendant was bound by his subsequent promise to pay it, and having suffered no loss from the omission to present it, he was liable.

In *Morrison v. McCartney*, 30 Mo. 183, A., on October 2, 1857, drew a check on B., a banker, in favor of C., who on the same day transferred the same for value to D. On October 3, about 2 P.M., the banking-house of B. suspended payment. On October 6, A., who had previously instituted suits by attachment against B. to recover the amount of his deposits, compromised the same and received his deposits. The check was not presented

until January 29, 1858, when payment was refused. The check was then duly protested and notice given. *Held*, in a suit by D., the holder, against the drawer, that the latter was not discharged by the delay.

**Verbal Agreement Not to Present.**—A verbal agreement between the payee and the drawer of a check, contemporaneous with its execution and delivery, that the former will not present it to the drawee for payment until a certain time, is a sufficient excuse for a delay in presenting it until the time specified. *Pollard v. Bowen*, 57 Ind. 232; *Barclay v. Weaver*, 19 Pa. St. 396.

**Drawer May Extend Time for Presentment.**—The necessity for presentment may be waived by the representations and conduct of the drawer. *Woodruff v. Plant*, 41 Conn. 344; *Compton v. Gilman*, 19 W. Va. 312, 316; *Holmes v. Roe* (S. C. of Mich. 1886), 28 Northwest Rep. 864.

**Burden of Proof as to Injury to the Drawer.**—Where there has not been due presentment and notice, the burden of proof is upon the holder of the check to show that the drawer has sustained no injury. *Little v. Phoenix Bank*, 2 Hill (N. Y.), 425; *Stevens v. Park*, 73 Ill. 387; *Ford v. McClung*, 5 W. Va. 166; *Planters' Bank v. Merritt*, 7 Heisk. (Tenn.) 177, 193. See also *Syracuse, etc., v. R. Co. v. Collins*, 3 Lans. (N. Y.) 29.

**Unreasonable Delay Discharges Indorser.**—As between the holder and an indorser, it seems that an unreasonable delay in presentment will discharge an indorser, even though he does not appear to have suffered any injury thereby. *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; s. c., 13 Wend. (N. Y.) 133; *Morse on Banking*, 286. See also *Gough v. Staats*, 13 Wend. (N. Y.) 549; *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Veazie Bank v. Winn*, 40 Me. 60. In *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304, a check was received in Schenectady on January 14, drawn on a bank in Albany, a distance of 16 miles from the former place, there being a daily mail between the places, and was not presented until February 6. The check would not have been paid had it been duly presented, as the drawer's account was overdrawn. *Held*, that the holder had been guilty of laches, and that the indorser was discharged.

In *Massachusetts*, however, the indorser is only entitled to have such presentment and notice as will save him from loss. *Small v. Franklin Mining Co.*, 99 Mass. 277. See also *Emery v. Hobson*, 62 Me. 578.

**Presentment by Mail.**—It is sufficient presentment and demand to send the check by mail to the bank on which it is drawn. *Hare v. Henty*, 10 C. B. (N. S.) 65; *Bailey v. Bodenham*, 16 C. B. (N. S.) 288; *Morse on Banking*, 281. See also *Indig v. National City Bank*, 80 N. Y. 101. In *Bailey v. Bodenham*, 16 C. B. (N. S.) 294, Erle, C. J., after stating that he considered a presentment by mail a good presentment, observed: "But unless the money was remitted by return of post, the absence of an answer should have been considered as a dishonor, and notice of such dishonor should have been given promptly." See, however, *Farwell v. Curtis*, 7 Bissell (C. C.), 162, where *Hopkins, J.*, says: "In these days, when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object."

In *Indig v. National City Bank*, 80 N. Y. 101, *Rapallo, J.*, said: "The defendant, instead of sending the note to an agent or correspondent at Louisville for presentment, sent it by mail directly to the respondent (the National City Bank), where it was payable. This appears to be an ordinary method of transacting such business, and the defendant was bound only to adopt the ordinary rule." *Compare Merchants' Nat. Bank v. Goodman*, 16 W. N. C. (Pa.) 513.

**Drawee Bank not a Suitable Agent for Collection.**—Where a bank receives on deposit a check on another bank, and forwards it to the drawee bank for collection, it will be liable to the depositor for resulting loss. The drawee bank is not a suitable agent for collection. *Merchants' Nat. Bank v. Goodman*, 14 W. N. C. (Pa.) 531; s. c., 16 W. N. C. 513, 109 Pa. St. 422; *Drovers' Nat. Bank v. Anglo-American, etc., Co.*, 117 Ill. 100; s. c., 57 Am. Rep. 855. In *Goodman v. Merchants' Nat. Bank*, 14 W. N. C. (Pa.) 534, the court say: "It was the duty of the defendant to transmit to a suitable agent to collect; and it seems to us that the Mississippi Valley Bank, on whom the check was drawn, was in no sense a suitable agent to demand payment against itself. Its interest plainly was to delay instead of speeding payment. The defendant put it in the power of the Mississippi Valley Bank to do what it pleased with the check, and that which it did please to do, on the eve of insolvency, was to cancel and surrender the check, and transmit—not money—but a worthless draft in payment. We think the principle may be stated as a true one,

that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce on behalf of another a claim against itself."

Where a bank receives a check on a bank at another place and intrusts it directly to that bank for payment, it is liable to the depositor for loss by the failure of the drawee.

*Drovers' Nat. Bank v. Anglo-American, etc., Co.*, 117 Ill. 100; s. c., 57 Am. Rep. 855. In this case the court say: "The same person cannot be both debtor and creditor at the same time, and in respect of the same debt. How then can he who is debtor be, at the same time and in respect of the same debt, the disinterested agent of the creditor? Can it be said to be reasonable care in selecting an agent, to select one known to be interested against the principal?—to place the principal entirely in the hands of his adversary?"

**Time within which Drawee must make Payment or Refuse.**—Upon presentation, "the drawee has a reasonable time to inspect his accounts and ascertain whether he is in funds to meet the demand." *Overman v. Hoboken City Bank*, 2 Vroom (N. J.), 565, per Beasley, C. J. And it has been said that such reasonable time is the space of twenty-four hours. *Belasis v. Hester*, 1 Ld. Raym. 280. See also *Northumberland Bank v. McMichael*, 106 Pa. St. 460.

In *Boyd v. Emmerson*, 2 Ad. & Ell. 184, it was held that where the check is drawn upon the persons who were bankers both for the drawer and the payee, the bankers were entitled to one day's time to determine whether they were in funds with which to pay the check, and that by giving notice of refusal on the following day they were relieved from liability for retaining the check. See also *Kilsby v. Williams*, 5 B. & Ald. 815.

If the bank credits a depositor with a check drawn on itself, it becomes liable to him for the amount thereof. *Oddie v. Nat. City Bank of N. Y.*, 45 N. Y. 735. But merely entering a credit for the amount in the pass-book will not render the bank liable. *Nat. Gold Bank v. McDonald*, 51 Cal. 64.

In *Overman v. Hoboken City Bank*, 2 Vroom (N. J.), 563, a check, dated October 29, drawn to the order of plaintiffs upon the defendants, was deposited in the Bank of Commerce in New York City, and by that bank transmitted to the Ocean Bank of the same city, to be sent to the defendants for payment. It was received by defendants on October 31, between twelve and one o'clock, and retained by

them till twelve o'clock, noon, of the following day, when it was returned to the Ocean Bank, marked "not good." On the following morning the Ocean Bank sent the check back to the Bank of Commerce, which immediately notified the plaintiffs of its dishonor. *Held*, that the mere retention of the check by the defendants did not constitute an acceptance by them, and plaintiff was not entitled to recover.

In *First Nat. Bank of Northumberland v. McMichael*, 106 Pa. St. 460, a check was sent by mail from one bank, whose customer had deposited it there for collection, to another bank on which it was drawn, with these instructions: "Do not hold collections; return promptly if not paid." The check was received on March 6, and held until March 10, when it was protested in consequence of notice from the drawer the day before, not to pay the check. During the whole time the drawer's account was sufficient to meet the check, but the bank was short of actual cash, and frequently obliged to borrow to meet current demands. The holder of the check brought suit against the drawee bank for the amount thereof, and the question whether the check had been accepted was left to the jury, who found a verdict for the plaintiff. *Held*, that the delay was entirely consistent with an acceptance, and that the question had been properly submitted to the jury. Mr. Justice Green said: "It is not pretended there was any refusal of the check at the time of its presentment, or for several days thereafter. The depositor's account was much more than good for the amount of the check during all that time. Both the holder and the collecting bank might well have inferred the check was or would be paid. The delay in actual payment was easily accounted for, both by the way in which the defendant bank usually paid such checks, and by the fact that it was short of money at that time. The delay, therefore, was entirely consistent with an acceptance, and was quite inconsistent with a refusal, since, if a refusal was intended, notice would naturally, and ought legally, to have been given at once, either on the same or, at the farthest, the next day. An acceptance was therefore the natural inference from all the facts, and the court was right in submitting, and the jury in finding, the fact of acceptance."

**Rights of Bona Fide Holder without Notice.**—A holder who takes a check in good faith and for value received, several days after it is drawn, takes it clear of equities of which he had no notice. *Ames*



**3. Ante-dated and Post-dated Checks.**—A check may be either ante-dated or post-dated. An ante-dated check is payable immediately. A post-dated check, or one which bears a date subsequent to that of its actual issue, is payable on or at any time after the day of its date.<sup>1</sup>

*v. Meriam*, 98 Mass. 294; *In re Brown*, 2 Story (C. C.), 502.

The lapse of two or three days after the date of a check is not sufficient to put a party who received the same for a valid consideration upon inquiry in regard to the consideration on which it is drawn. *Laber v. Steppacher*, 103 Pa. St. 81; *Walker v. Geisse*, 4 Whart. (Pa.) 256.

In *Lancaster Bank v. Woodward*, 18 Pa. St. 357, the maker of a check for \$600 paid that amount to the holder the day before the time named therein for payment. The check was not delivered up to the drawer, and more than a year after it was due was presented to the bank on which it was drawn and paid. The drawer had no funds in the bank when the check was drawn, and only about \$13 when it fell due and when it was paid. *Held*, that the circumstances were sufficient to put the bank on inquiry; that the check being long overdue, the bank must be presumed to have taken it on the credit of the indorser, and could not recover from the drawer.

**Order of Payment.**—Checks are not payable in the order of priority in which they are given, but in the order of their presentation for payment. The rule is, "first come, first served." *Bullard v. Randall*, 1 Gray (Mass.), 605; s. c., 61 Am. Dec. 433; *Laclede Bank v. Schuler*, 120 U. S. 511.

A check does not bind the fund in the hands of the bank until it has notice of the check by presentation for payment or otherwise. *Laclede Bank v. Schuler*, 120 U. S. 511 (reversing 27 Fed. Rep. 424). In this case plaintiff was the owner and holder of a draft or bank check, drawn on the Laclede Bank for the sum of \$11,250, dated October 20, 1885, which was duly presented on October 26, and payment refused on the ground that the drawers had on October 24 made an assignment under the laws of Texas for the benefit of creditors, of which the said bank had been advised by telegraph early on the morning of the 26th, before the check was presented. *Held*, that the assignment had priority, and the plaintiff could not recover.

**Part-payment of Checks.**—The bank is not obliged to make part-payment, if the funds of the drawer in its possession are

not sufficient to pay his check in full. *Murray v. Judah*, 6 Cow. (N. Y.) 490; *Dana v. Third Nat. Bank*, 13 Allen (Mass.), 445. In *Coates v. Preston*, 105 Ill. 470, 473, the court say: "If the drawer did not have a sufficient sum or deposit in defendant's bank with which to make full payment, so that it could take up and hold the check as a voucher, the bank was under no obligation to make a partial payment, and could rightfully refuse to pay the check, or any part of it, as it did." But in *Bromley v. Commercial Nat. Bank*, 9 Phila. Rep. (Pa.) 522, the payee of a check for \$725 presented it to the bank for payment. The teller was about to pay it, when he discovered there was but \$229.92 to the drawer's credit. The payee then demanded payment of this balance to him, which the bank refused. He then offered to deposit to the credit of the drawer a sum sufficient to make the check good if the bank would then pay it. This it also refused. *Held*, that it was the duty of the bank to pay it to him and indorse the amount paid on the check, and that the payee was entitled to the balance in the bank.

**Payment by Check.**—Where a creditor takes a check for a debt, the presumption is that it is only to be regarded as payment if cashed. *People v. Baker*, 20 Wend. (N. Y.) 602; *Smith v. Miller*, 43 N. Y. 171; *Small v. Franklin Mining Co.*, 99 Mass. 277; *Taylor v. Williams*, 11 Metc. (Mass.) 44; *Heartt v. Rhodes*, 66 Ill. 351; *Blair & Hoge v. Wilson*, 28 Gratt. (W. Va.) 165; *Marrett v. Brackett*, 60 Me. 527.

1. *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; s. c., 13 Wend. (N. Y.) 133; *Harker v. Anderson*, 21 Wend. (N. Y.) 372; *Godin v. Bank*, 6 Duer (N. Y.), 76. In the *Matter of Brown*, 2 Story (C. C.), 502; *Morse on Banking* (2d Ed.), 372.

If a post-dated check falls due on Sunday, or on a legal holiday, payment cannot be demanded until the day following, and if the bank pays it before that time, it acts at its peril. *Salter v. Burt*, 20 Wend. (N. Y.) 205.

A post-dated check is not entitled to days of grace. *Lawson v. Richards*, 6 Phila. Rep. (Pa.) 179; *Champion v. Gordon*, 70 Pa. St. 474.

**4. Certified Checks.**—The certification of a check by a bank is equivalent to an acceptance of a bill for that amount,<sup>1</sup> and binds the bank to hold sufficient funds of the drawer to meet the check.<sup>2</sup>

**Memorandum Checks.**—A memorandum check is defined by Putnam, J., in *Franklin Bank v. Freeman*, 16 Pick. (Mass.) 539, as "a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word 'memorandum' written or printed upon the check describes the nature of the contract with precision. It is an express waiver, on the part of the maker of the check, of any objection against the claim of a *bona fide* holder that it had not been presented for payment, or if it were presented and not paid that he had had no notice of the non-payment of the bank therein named."

As between the bank and the payee a memorandum check is just like an ordinary check. The bank is not bound to pay any attention to the word "memorandum" or the abbreviation "mem." written on the check, or to recognize any contract as implied by them between the maker and payee which gives to the check any peculiar character. *Morse on Banking*, 371 (2d Ed.). Chancellor Walworth in *Dykens v. Leather Manufacturers' Bank*, 11 Paige (N. Y.) 612, observes: "The alleged custom of Wall Street, that an ordinary check upon a bank is to be converted into something contrary to its legal effect by writing 'mem.' in one corner thereof, certainly amounts to nothing. Indeed, the weight of the testimony is that this memorandum amounts to nothing more than an indication of an understanding that the check is not to be presented immediately for payment, so as to destroy the drawer's credit with the bank when he has not provided funds to meet the draft." See generally *Cushing v. Gore*, 15 Mass. 69; *Ball v. Allen*, 15 Mass. 433; *Ellis v. Wheeler*, 3 Pick. (Mass.) 18; *Skillman v. Titus*, 3 Vroom (N. J.) 96; *American Emigrant Co. v. Clark*, 47 Iowa, 672.

1. *Barnes v. Ontario Bank*, 19 N. Y. 159; *Meads v. Merchants' Bank*, 25 N. Y. 146; s. c., 82 Am. Dec. 331; *Claffin v. Farmers', etc., Bank*, 25 N. Y. 297; *First Nat. Bank v. Leach*, 52 N. Y. 350; *Nolan v. Bank of N. Y.*, 67 Barb. (N. Y.) 33; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 648; *Simpson v. Pacific, etc., Ins. Co.*, 44 Cal. 139; *Hel-*

*wege v. Hibernia Nat. Bank*, 28 La. Ann. 520.

In *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 647, Mr. Justice Swayne says: "By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available, also, to him for all the purposes of money."

2. *Stevens v. Corn Exchange Bank*, 3 Hun (N. Y.) 151; *Willets v. Phoenix Bank*, 2 Duer (N. Y.) 121, 129; *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N. Y. 125; s. c., 69 Am. Dec. 678; *Rounds v. Smith*, 42 Ill. 245.

The practice of certifying checks is now so thoroughly established that its legality can no longer be questioned. In *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 647, the court say: "The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money. It is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred millions of dollars. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity."

In *First Nat. Bank v. Leach*, 52 N. Y. 350, the court say: "The theory of the

law is that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. . . . It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his."

A certificate that a check is "good" operates as an engagement of the bank to pay the debt as its own. *Meads v. Merchants' Bank*, 25 N. Y. 143; *Bickford v. First Nat. Bank*, 42 Ill. 238.

**Certification Discharges the Drawer.**—By certifying a check the bank becomes the principal debtor, and the drawer is discharged. *Andrews v. German Nat. Bank*, 9 Heisk. (Tenn.) 217; *Essex Co. Bank v. Bank of Montreal*, 7 Biss. (C. C.) 193; *First Nat. Bank v. Leach*, 52 N. Y. 350; *Freund v. Importers', etc., Bank*, 12 Hun (N. Y.) 537; *First Nat. Bank v. Whitman*, 94 U. S. 343, 345.

In *First Nat. Bank v. Leach*, 52 N. Y. 350, the court say: "The law will not permit a check, when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder without discharging the drawer."

But in Illinois it has been held that certifying a check to be "good" is nothing more than an acknowledgment that the drawer has funds on deposit to meet it, and a promise by the bank upon which it is drawn to pay it when presented, and the drawer is not thereby discharged. *Bickford v. First Nat. Bank*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Wood v. Surrells*, 89 Ill. 109. See also *Andrews v. German Nat. Bank*, 9 Heisk. (Tenn.) 218.

**How a Check may be Certified.**—No particular form of certification is necessary. Ordinarily the bank officer writes on the check the word "good" or its equivalent, and sometimes adds his name or initials. See *Barnet v. Smith*, 10 Fost. (N. H.) 256; *First Nat. Bank v. Whitman*, 94 U. S. 343, 345; *Rounds v. Smith*, 42 Ill. 245, 255; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Morse on Banking*, 315.

In *England* the statutes of 1 & 2 Geo. IV. c. 78, § 2, requires a distinct promise, which must be in writing and signed. *Dufaur v. Oxenden*, 1 M. & R. 90; *Corlett v. Conway*, 5 M. & W. 655.

**Verbal Acceptance.**—A check may be accepted by parol; and it seems that on the presentation of a check to the cashier of a bank, his statement that it is "good" will amount in law to an acceptance.

*Barnet v. Smith*, 10 Fost. (N. H.) 256; *National Bank v. National Bank*, 7 W. Va. 544; *Pope v. Bank of Albion*, 59 Barb. (N. Y.) 226; *Irving Bank v. Wetherald*, 36 N. Y. 335. See also *Espy v. Bank of Cincinnati*, 18 Wall. (U. S.) 604.

In *Pope v. Bank of Albion*, 59 Barb. (N. Y.) 226, 238, the court say: "Any language, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good and will be paid, estops the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same. This doctrine should be most rigidly applied as against the banks."

A promise made by a bank to the drawer to pay his checks, and communicated to the holder who takes the checks on the faith of the promise, is binding upon the drawee. *Nelson v. First Nat. Bank of Chicago*, 48 Ill. 36.

But the bank is not liable unless the holder has taken the check on the faith of such promise. *Carr v. Nat. Security Bank*, 107 Mass. 45; *First Nat. Bank v. Pettit*, 41 Ill. 492.

Where a check is sent to the bank for information, the response of the teller that the check is "good" will be limited to the signature of the drawer and the state of his account, and will not extend to the genuineness of the payee's name or the amount of the check.

*Espy v. Bank of Cincinnati*, 18 Wall. (U. S.) 604, 619. Mr. Justice Miller said: The bank "is held by the law to know the drawer's signature and the state of his account. He is no more bound to know or to answer beyond these two matters than the party who presents [the check] for information. . . . For such information as the bank was willing to give, and did give, it was, no doubt, responsible, because it had reason to believe that the other party would act upon it. But only to this extent and only on this principle is it liable." See also *Parke v. Roser*, 67 Ind. 500.

Where a check is drawn upon a bank by a drawer who has no funds on deposit to pay the check, the bank is not liable upon its verbal promise to pay; it is a promise to pay the debt of another, and void under the Statute of Frauds. *Morse v. Massachusetts Nat. Bank*, 1 Holmes (C. C.), 209.

**Statute of Limitations.**—The statute of limitations does not begin to run against a check marked "good" until payment has been actually demanded at the bank.

*What Certification Imports.*—It has been held, in *New York*, that certifying a check imports merely that the signature is genuine, and that it is good for the amount for which it is drawn, but the genuineness of the body of the check, either as to payee or amount, is not thereby guaranteed.<sup>1</sup>

ing-house and refused. The holder of such a check does not stand in a different position from that of an original depositor. Presenting a check and having it certified is not a demand for the money deposited. *Girard Bank v. Bank of Penn. Township*, 39 Pa. St. 92; s. c., 80 Am. Dec. 507.

In the case just cited, the check was certified Oct. 7, 1852; the drawer's funds were drawn out Oct. 10, 1854, and the check was not presented for payment until Sept. 3, 1859. *Held*, that the bank was liable. See also *Bank of British No. America v. Merchants' Nat. Bank*, 91 N. Y. 106.

1. *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67; s. c., 17 Am. Rep. 305; *Clews v. Bank of New York, etc.*, 89 N. Y. 418; *Security Bank v. Nat. Bank*, 67 N. Y. 458; s. c., 23 Am. Rep. 129; *White v. Continental Bank*, 64 N. Y. 316; *Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n*, 46 How. Pr. (N. Y.) 378; s. c., 55 N. Y. 211; 14 Am. Rep. 232; *Willets v. Phoenix Bank*, 2 Duer (N. Y.), 121, 129. See also *Espy v. Bank of Cincinnati*, 18 Wall. (U. S.) 604; *Parke v. Roser*, 67 Ind. 500. *Compare Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189; s. c., 26 Am. Rep. 921.

In *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67, the plaintiff certified a check which had been altered by changing the date, name of payee, and raising the amount, and subsequently paid the same to defendant. *Held*, that the amount could be recovered back as for money paid by mistake.

In *Clews v. Bank of New York, etc.*, 89 N. Y. 418, the court say: "When the defendant certified the check to be good, it assumed a liability like that of an acceptor of a draft. By the certification it guaranteed the genuineness of the drawer's signature, and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged that those funds should not be withdrawn from it by the drawer, to the prejudice of any bona fide holder of the check; and the certification did not impose upon the defendant any further or greater responsibility. It did not import that the body of the check was genuine or that the funds on deposit with it were

absolutely applicable to the payment of the precise check certified. When, therefore, a check has been raised by some person without authority before certification, the certifying bank cannot be called upon in consequence of its certification to pay the amount of the raised check; and when a bank has thus certified a raised check by mistake and subsequently pays the money thereon without any culpable negligence on its part, it can recover the amount thus paid as money paid by mistake."

The amount paid by mistake upon a raised check may be recovered where the alteration is made after certification, unless the holder has suffered in consequence of the mistake. *Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n*, 55 N. Y. 211; *Clews v. Bank of New York, etc.*, 89 N. Y. 418.

See, however, *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189, where it was held that a bank is liable to pay to a subsequent bona fide purchaser the amount of a check, which it has certified, notwithstanding the check was fraudulently raised from a smaller amount, if raised before certification.

As the certification imports a guaranty of the drawer's signature, the bank will be liable to a bona fide holder of a certified check which turns out to be a forgery. *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N. Y. 125; *Hagen v. Bowery Nat. Bank*, 64 Barb. (N. Y.) 197; s. c., 6 Lans. (N. Y.) 490; *Commercial, etc., Nat. Bank v. First Nat. Bank*, 30 Md. 11.

In *Hagen v. Bowery Nat. Bank*, 64 Barb. (N. Y.) 197, the defendant certified a check drawn upon it as being good. The plaintiff took the check in the ordinary course of business, for value, and in good faith. The check proved to be a forgery. *Held*, that the bank was liable. An advertisement of the forgery of a check, if not brought home to the holder, can have no effect whatever upon his right to recover thereon. *Hagen v. Bowery Nat. Bank*, 64 Barb. (N. Y.) 197.

*Checks Certified by Mistake.*—If the bank certifies the check to be good by mistake, under the impression that the drawer had funds on deposit, and notifies the holder in sufficient time to prevent any loss in consequence of the error, it

**5. Forged Checks.—Forgery of Signature.**—The bank is bound to know the signature of its depositor, and if it pays out money on a forged check it cannot charge the depositor with the amount, but as against him must bear the loss itself.<sup>1</sup>

seems the bank may be discharged from liability on its certificate. *Irving Bank v. Wetherald*, 36 N. Y. 335; s. c., 34 Barb. (N. Y.) 323; *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128; s. c., 34 Am. Rep. 300. See also *Meredith v. Haines*, 14 W. N. C. (Pa.) 364.

1. *Price v. Neal*, 3 Burr. 1355; *Bass v. Cline*, 4 Maule & S. 13; *Smith v. Mercer*, 6 Taunt. 76; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Laborde v. Consolidated Assoc.*, 4 Rob. (La.) 190; s. c., 39 Am. Dec. 517; *Weissner v. Denison*, 10 N. Y. 68; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; *Commercial, etc., Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Bernheimer v. Marshall*, 2 Minn. 78; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393; *First Nat. Bank v. Ricker*, 71 Ill. 439; *People's Savings Bank v. Cuppa*, 91 Pa. St. 315.

In *Price v. Neal*, 3 Burr. 1355, decided in 1762, the drawee had accepted and paid two bills of exchange, which had been forged by one Lee, who, as the reporter observes, "has been since hanged for forgery." The drawee sued the holder to recover back the money paid. *Held*, that the plaintiff could not recover. Lord Mansfield said: "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it; but it was not incumbent upon the plaintiff to inquire into it. . . . The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged, and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side."

In *Hardy v. Chesapeake Bank*, 51 Md. 562, 585, the court, after stating the well settled rule that the relation between banker and customer is that of debtor and creditor, and that the money received on deposit becomes the funds of the bank, say: "There is no question of trust, therefore, between the parties, but their relation is purely a legal one; and if the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by

the bank, for it acts at its peril, and pays out its own funds, and not those of the depositor. It is in view of this relation of the parties, and of their rights and obligations, that the principle is universally maintained, that banks and bankers are bound to know the signatures of their customers, and that they pay checks purporting to be drawn by them at their peril."

In *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393, the bank paid three checks purporting to be signed by the plaintiff, which had, however, been forged by his clerk. The forgery was committed on a blank form, taken from the depositor's check-book, which was lying about in his office during the day, and the checks were stamped with plaintiff's hand stamp. The clerk was allowed to fill up checks, and had been introduced by plaintiff to the bank as a proper person to receive money on his checks. *Held*, that these facts did not exempt the bank from liability for the loss. See also *Bank of Ireland v. Trustees, etc.*, 5 H. L. Cas. 410.

**Identification.**—A bank is also bound to ascertain that the party presenting the check is the one entitled to receive payment, under penalty of refunding the amount either to the party really entitled or to the drawer. *Millard v. Nat. Bank of the Republic*, 3 McArthur (C. C.) 54; *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483; s. c., 13 Am. Rep. 751; *Johnson v. First Nat. Bank of Hoboken*, 6 Hun (N. Y.) 124; *Welsh v. German Am. Bank*, 73 N. Y. 424; *Thomson v. Bank of British N. America*, 82 N. Y. 1.

In *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483, a check was drawn to Cook; Barnes, his clerk, indorsed Cook's name without his authority and received the money. The bank deducted the amount of the check from the drawer's account and settled with him on that basis. *Held*, that Cook could recover the amount of the check from the bank.

**Effect of Paying Forged Check to bona-fide Holder.**—If a bank pays a forged check to a holder without fault, who, in ignorance of the fraud, pays value for it, the money cannot be recovered back. *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Nat. Bank of Commerce v. Grocers' Nat. Bank*, 35 How. Pr. (N. Y.) 412; *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. (N. Y.)

Where, however, the loss can be traced to the fault or negligence of the drawer (or holder) it will be fixed upon him.<sup>1</sup>

101; *First Nat. Bank v. Ricker*, 71 Ill. 439; *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141; *Bernheimer v. Marshall*, 2 Minn. 78. See also *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Weisser v. Denison*, 10 N. Y. 75. where this rule is recognized.

In *Commercial, etc., Bank v. First Nat. Bank*, 30 Md. 11, H., a stranger of respectable appearance, opened an account with the former bank, and deposited a check on the latter bank for \$4600, purporting to have been drawn by A. to the depositor's order. On the following day it was sent through the clearing-house, and the drawee bank pronounced the check genuine and charged it to A.'s account. H., two days after opening his account, called at the Commercial Bank with his bank-book, filled up a check for \$4500, payable to his order, which was paid by the teller after inquiry as to his identity and the state of his account. One week afterwards the check deposited by H. was discovered to be a forgery, and notice thereof was given to the Commercial Bank and repayment of the money demanded. Upon refusal the First National Bank, having refunded to A. the amount of the forged check, sued the Commercial Bank to recover the amount thus paid. *Held*, that the bank was bound to know its depositor's signature, and that the plaintiffs were not entitled to recover. The court say: "There is no reason why the loss as between parties thus equally innocent and equally deceived, but where one is bound to know and act upon his knowledge, and the other has no means of knowledge, should be thrown upon the latter in exoneration of the former. The safest rule for the commercial public, as well as that most consistent with justice, is to allow the loss to remain where by the course of business it has been placed."

1. *De Ferret v. Bank of America*, 23 La. Ann. 310; *Smith v. Mechanics' Bank*, 6 La. Ann. 610; *First Nat. Bank v. Ricker*, 71 Ill. 439. 446; *Hardy v. Chesapeake Bank*, 51 Md. 585; *National Bank of North America v. Bangs*, 106 Mass. 441; *Young v. Grote*, 4 Bing. 253.

A forged check payable to the order of a merchant in Texas was presented by him to the bank for payment. He was in good standing and well known to the bank, and having indorsed the check, it was paid. The merchant had once before received a check signed by the same

party, but with a different name, and did not communicate this fact to the bank. As soon as the party whose name had been forged examined his bank statement—about five or six weeks afterwards—the forgery was discovered and the payee immediately notified. *Held*, that the payee had been guilty of negligence in not informing the bank of the suspicious circumstances attending the execution of the check, and that the bank could recover from him the amount thereof. *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610.

In *First Nat. Bank v. Ricker*, 71 Ill. 439. the holder of a forged check, which he had received innocently, afterwards acquired knowledge of facts which threw suspicion upon the genuineness of the drawer's signature, and demanded payment without disclosing such facts. The teller informed him he did not certainly know the signature to the check, and would only pay it upon condition that the holder would indorse it. The holder accordingly indorsed it and received the money thereon, and within a few hours the bank discovered the forgery. *Held*, that the bank could recover the money thus paid, and that it was the holder's duty to have communicated to the bank suspicions he may have had as to the spurious character of the check.

In *De Ferret v. Bank of America*, 23 La. Ann. 310, the plaintiff had a bookkeeper who kept his cash accounts, had charge of his bank-book, and made his deposits. The bookkeeper drew a check on the bank for \$2500, to which he forged plaintiff's signature. As the amount exceeded plaintiff's deposit, the bank notified him of that fact. Upon being shown the check, he said he had not signed it, but did not say it was a forgery, and continued the bookkeeper in his employment until a week afterwards, when the bookkeeper drew another check on the bank for \$1700, forging the plaintiff's signature, which the bank paid on presentation. Plaintiff upon discovering the second forgery denounced the act, and brought suit to recover the balance of his bank account, including these checks. *Held*, that the act of the plaintiff in ratifying the forgery of the first check exonerated the bank from liability for having paid it, and that by afterwards keeping the bookkeeper in his confidential employ he misled the bank and threw it off its guard, and excused it for paying a subsequent check similarly drawn, and that

the plaintiff must bear the loss. The court say: "The peculiar facts and circumstances of this case, taken together, must relieve the bank from the stringent rule that the depository must take care to pay none but the checks or drafts of the depositor himself or his acknowledged special agent, and this is a proper case to apply the equitable principle that where one of two innocent parties must suffer, it should be he who was the cause or occasion of the confidence and consequent injury of the other."

In *Gloucester Bank v. Salem Bank*, 17 Mass. 33, 41, Parker, J., says: "If the loss can be traced to the fault or negligence of either party, it should be fixed on him. Generally, where no fault or negligence is imputable, the loss has been suffered to remain where the course of business has placed it." See also *National Bank v. Tappan*, 6 Kan. 466.

Where plaintiff's clerk received checks from certain debtors, payable to their order, and forged their indorsements and negotiated them, and they were paid by the defendant, plaintiffs, on a subsequent discovery of the forgery, brought suit against the defendant, and were held entitled to recover. *Johnson v. First Nat. Bank of Hoboken*, 6 Hun (N. Y.), 124.

In *Levy v. Bank of United States*, 4 Dall. (Pa.) 234; s. c., 1 Binn. (Pa.) 27, the plaintiff deposited in the bank a check purporting to be drawn by one of its customers, which was entered on his bank book as cash, and passed to his credit on the books of the bank. Later in the day the check was discovered by the bank to be a forgery, and the plaintiff was notified thereof and asked to make the amount good. In a suit by the depositor to recover the sum, *held*, that entering the check as cash was equivalent to payment, and the bank must bear the loss.

In *Minnesota*, it has been held that, upon payment of a forged draft, the drawee and holder both being chargeable with negligence, and both acting in good faith, the loss must fall upon the drawee. *Bernheimer v. Marshall*, 2 Minn. 78.

But in *Ohio* the rule has been laid down that where the parties are equally in fault, and money is paid upon a mutual mistake of facts, in respect to which both were equally bound to inquire, it may be recovered back. *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628.

**Rule in Pennsylvania.**—The law that a voluntary payment of a check to a *bona fide* holder for value cannot be demanded back, has been changed in Pennsylvania by the act of April 5th, 1849 (Pamphlet Laws, 426), and in that State a bank pay-

ing money on a forged check can recover it back. *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. St. 435; *Chambers v. Union Nat. Bank*, 78 Pa. St. 205; *Corn Exch. Bank v. Nat. Bank of the Republic*, 78 Pa. 233; *Union Nat. Bank v. Chambers*, 9 Phila. 131.

It has been held in *Massachusetts* that where the payee takes a check, drawn payable to his order, from a stranger or other third person without inquiry, although in good faith and for value, and gives it credit by indorsing it before receiving payment on it, the bank may recover back the money paid to him, if it proves to be a forgery. *Nat. Bank of North America v. Bangs*, 106 Mass. 441.

In *Young v. Grote*, 4 Bing. 253, the customer of a banker delivered to his wife certain printed checks signed by himself, but with blanks for the sums, and requested her to fill up the checks according to the exigency of his business in his absence. She filled a check up so carelessly as to be easily changed by her husband's clerk from £50 to £350. The bank having paid the check, it was held the customer must bear the loss, the court saying: "If it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again."

**Discovery and Notice of Forgery.**—To entitle the drawee to recover back money paid on a forged check, the forgery must be discovered within a reasonable time, and notice of the forgery given as soon as discovered. *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628; *First Nat. Bank v. Tappan*, 6 Kans. 456; *Bank of Commerce v. Union Bank*, 3 Coms. (N. Y.) 230, 236. See also *Weiser v. Denison*, 6 Seld. (N. Y.) 68, where Allen, J., says: "Mere lapse of time in the abstract, however long, will not bar the rights of the party to allege the forgery, provided he does it within a reasonable time after it is discovered." Notice on the day next succeeding the discovery of the forgery is within a reasonable time. *Third Nat. Bank of St. Louis v. Allen*, 59 Mo. 310. In *Chambers v. Union Nat. Bank*, 78 Pa. St. 205, the forgery was not discovered for two weeks after payment, when notice was at once given by the bank and payment demanded. *Held*, that the demand was in time. Two months' delay in giving notice after discovering the forgery has been held to prevent the drawee from recovering. *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141. See also *Cocks v. Masterman*, 9 Barn & C. 92; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Frank v. Chemical Nat.*

**Fraudulent Alterations after Signature.**—A fraudulent alteration in a material particular made in the body of the check after signature constitutes a forgery, and vitiates the check even in the hands of a *bona fide* holder for value.<sup>1</sup>

**6. Damages for Wrongful Dishonor of Checks.**—The wrongful dishonor by the bank of its depositor's check is a breach of duty, and entitles him to bring an action against the bank for damages.<sup>2</sup>

Bank, 45 N. Y. Sup. Ct. 452; Welsh v. German-American Bank, 73 N. Y. 424; United States v. Nat. Park Bank, 6 Fed. Rep. 852; Redington v. Woods, 45 Cal. 406.

If the drawee bring suit against the party to whom he has paid the check without giving him notice of the forgery, he will not be entitled to recover. United States v. Central Nat. Bank, 6 Fed. Rep. 134. And the drawee must also return or offer to return him the check, otherwise he cannot recover. Redington v. Woods, 45 Cal. 406.

1. Wade v. Withington, 1 Allen (Mass.) 561; Belknap v. Nat. Bank of North America, 100 Mass. 376; Mahaiwe Bank v. Douglass, 31 Conn. 170; Vance v. Lowther, 1 Ex. Div. 176; 16 Moak's Eng. Rep. 583.

**Raised Checks.**—As between the bank and the depositor, payment of a check which has been fraudulently altered in amount is the loss of the bank, unless the check has been so carelessly drawn as to afford opportunity for alteration. Young v. Grote, 4 Bing. 253; Smith v. Mercer, 6 Taunt. 76; Hall v. Fuller, 5 Barn. & C. 750; Coles v. Bank of England, 10 Ad. & Ell. 449; Bank of Ireland v. Trustees, 5 H. L. C. 410; Mahaiwe Bank v. Douglass, 31 Conn. 170; Wade v. Withington, 1 Allen (Mass.), 561; Belknap v. Nat. Bank of N. A., 100 Mass. 376.

In Hall v. Fuller, 5 Barn. & Co. 750, the check of a depositor was fraudulently altered from £3 to £200 after issue, and was paid by the bank at the latter amount. Held, that the bank was only entitled to charge £3 to the depositor.

Bayley, J., said: "If, unfortunately, the banker pays money belonging to the customer upon an order which is not genuine, he must suffer; and to justify the payment he must show that the order is genuine, not in the signature only, but in every respect. The bank, however, is not bound to know the handwriting in the body of the check, and if it pays by mistake a raised or altered check, the excess over the true amount may be recovered back. Redington v. Woods, 45 Cal. 406; Third Nat. Bank v. Allen, 59 Mo.

310; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Nat. Park Bank v. Ninth Nat. Bank, 55 Barb. (N. Y.) 87; s. c., 46 N. Y. 77; Coghill v. American Ex. Bank, 1 N. Y. 113; Bank of Commerce v. Union Bank, 3 Coms. (N. Y.) 230; Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n, 55 N. Y. 211; Merchants' Bank v. Exchange Bank, 16 La. 457.

**Alteration in Date.**—The change in the date of a check, whereby the time of payment is accelerated, is a material alteration, and when made without the consent of the drawer, destroys its validity. Crawford v. West Side Bank, 100 N. Y. 50; Vance v. Lowther, L. R. 1 Exch. Div. 176.

**Forged Indorsements.**—The bank in paying a check is only bound to know the signatures of the drawer and the person who presents it for payment, and if it be shown that the signatures of the indorsers preceding that of the one receiving payment are forgeries, the bank cannot on that account be held to a second payment. Levy v. Bank of America, 24 La. Ann. 220; s. c., 13 Am. Rep. 124. See also Vanbibber v. Bank of Louisiana, 14 La. Ann. 481; Dodge v. Nat. Exchange Bank, 20 Ohio St. 234; Morgan v. Bank, 1 Duer (N. Y.), 434.

The holder by indorsing the check warrants the genuineness of all prior indorsements. Turnbull v. Bowyer, 40 N. Y. 456. See also Harris v. Bradley, 7 Verg. 310; Jones v. Ryde, 5 Taunt. 488.

2. Buchall v. Third Nat. Bank, 15 W. N. C. (Pa.) 174; Saylor v. Bushong, 100 Pa. St. 23; National Machine Bank v. Peck, 127 Mass. 298; Fogarties v. Bank, 8 Am. L. Reg. (O. S.) 93; Viets v. Union Nat. Bank, 101 N. Y. 563; Citizens' Nat. Bank v. Importers' Nat. Bank, 44 Hun (N. Y.), 386; Rolin v. Stewart, 14 C. B. 595; Marzetti v. Williams, 1 Barn. & Ad. 415.

In National Machine Bank v. Peck, 127 Mass. 298, Gray, C. J., said: "So long as the balance of account to the credit of the depositor exceeds the amount of any debt due and payable by him to the bank, the bank is bound to honor his check, and is liable to an action by him if it does not."



*Measure of Damages.*—The depositor, by proving special loss, may recover special damages from the bank for its breach of duty; but if unable to do so, he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained.<sup>1</sup>

**7. Check-holder's Right to Sue the Bank.**—Whether the check-holder may sue the bank upon its refusal to pay the check, although holding sufficient funds of the drawer, is a question upon which there is a conflict of authority. The weight of authority, however, seems to be against the check-holder's right of action.<sup>2</sup>

An agent who has improperly obtained and deposited in his private account funds of an undisclosed principal may recover damages from the bank for refusal to honor his check upon them. *Tassell v. Cooper*, 9 C. B. (67 Eng. C. L. Rep.) 509.

1. *Rolin v. Stewart*, 14 C. B. (78 E. C. L. R.) 595; *Boyd v. Fitt*, 14 Irish Common Law (N. S.), 43; *Larios v. Bonany y Gurety*, L. R. 5 P. C. 346; *Prehn v. Royal Bank of Liverpool*, L. R. 5 Exch. 92. See also *Birchall v. Third Nat. Bank*, 15 W. N. C. (Pa.) 174; s. c., 19 Central L. j. 390, and note by Eugene McQuillin, Esq.

In *Marzetti v. Williams*, 1 Barn. & Ad. 415, plaintiff drew a check on his banker, who refused to pay it, although sufficient funds had been deposited to meet the check four hours before it was presented. The check was paid on the following day. *Held*, that the plaintiff was entitled to nominal damages, although no actual damage was proved.

In *Rolin v. Stewart*, 14 C. B. 595, three checks of plaintiffs were refused payment by their banker when they had sufficient funds in his hands to meet them. There was no evidence that plaintiffs had sustained any special damage. Lord Campbell, C. J., charged the jury that they ought not to limit their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonor of their checks. Verdict for plaintiffs for £500, which was reduced by agreement to £200. *Held*, that the jury had not been misdirected. Williams, J., said: "I think it cannot be denied that, if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer's in his hands sufficient to meet it, and special damage were alleged and proved, the plaintiff would be entitled to recover substantial damages. And when it is alleged and proved that

the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract; just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage."

In *Birchall v. Third Nat. Bank*, 15 W. N. C. (Pa.) 174, plaintiff drew two checks on the bank defendant, which were refused payment through an error of defendant's clerk in balancing plaintiff's account. There was no proof of special damage. Hare, P. J., in charging the jury, said: "Inasmuch as the bank has the use of the money, it undertakes a duty. When there is evidence that there is enough deposit to meet a check drawn, and such check was not paid on presentation, and no sufficient explanation is given for non-payment, there is sufficient for a jury. The difficulty is not so much whether the bank is liable, but as to the measure of damages. If there was anything to indicate that the conduct of the bank was wilful, or that it delayed to make the reparation, such as it could make, there, undoubtedly, another element would arise for the jury to mulct the bank; but there is no such case here. . . . The mere fact that plaintiff was obliged to bring suit, if he ought to obtain any compensation; the mere fact that he was disturbed in his business—might be reason to apply to the jury to give him compensation for it; but the serious question is: What is this injury, the real harm he suffered? It has been said that the smaller the check, the greater the injury. I confess it does not strike me in that light; it is altogether a question of circumstances." Verdict for plaintiff for \$1000, which the court subsequently reduced to \$600.

2. It is held, on the one hand, that there is no right of action in such case, because there is no privity of contract

between the check-holder and the bank until the check is presented and accepted. This doctrine seems to be supported by the weight of authority, and is maintained by the supreme court of the United States and the courts of *Pennsylvania*, *New York*, *Massachusetts*, *New Jersey*, *Indiana*, and several other States. It is also the settled rule in *England*. Bank of the Republic *v.* Millard, 10 Wall. (U. S.) 152; First Nat. Bank *v.* Whitman, 94 U. S. 343; Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483; Saylor *v.* Bushong, 100 Pa. St. 23; Chapman *v.* White, 6 N. Y. 412; *Etina Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; Duncan *v.* Berlin, 60 N. Y. 151; Carr *v.* National Security Bank, 107 Mass. 45; Creveling *v.* Bloomsburg Nat. Bank, 46 N. J. Law. 255; Nat. Commercial Bank *v.* Miller, 77 Ala. 168; Case *v.* Henderson, 23 La. Ann. 49; National Bank of Rockville *v.* Second Nat. Bank, 69 Ind. 479; s. c., 35 Am. Rep. 236; Griffin *v.* Kemp, 46 Ind. 172; Harrison *v.* Wright, 100 Ind. 515; Bank *v.* Merritt, 7 Heisk. (Tenn.) 177; Bank *v.* Keese, 7 Heisk. (Tenn.) 200; Colorado Nat. Bank *v.* Boettcher, 5 Col. 185; Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325; Bush *v.* Foote, 58 Miss. 5; Merchants' Nat. Bank *v.* Coates, 79 Mo. 168; Dickinson *v.* Coates, 79 Mo. 250; Coates *v.* Doran, 83 Mo. 337; Hopkinson *v.* Foster, 19 Eq. Cas. L. R. 74; Wharton *v.* Walker, 4 Barn. & Cress 163; Warwick *v.* Rogers, 5 Mann. & G. 374; Schroeder *v.* Central Bank, 34 L. T. R. (N. S.) 735.

The doctrine upon which this class of decisions is founded is well stated in Bank of the Republic *v.* Millard, 10 Wall. (U. S.) 156, where Mr. Justice Davis says: "On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it; but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that

bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted."

There are cases, on the other hand, which assert a contrary doctrine upon the ground of an implied promise by the bank to the check-holder, arising from the well-known usages of the banking business. That the check-holder may sue the bank for improperly dishonoring the check is the rule in *Illinois*, *Iowa*, and *South Carolina*. Munn *v.* Burch, 25 Ill. 35; Brown *v.* Leckie, 43 Ill. 497; Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 308; Union Nat. Bank *v.* Oceana Co. Bank, 80 Ill. 212; Ridgely Nat. Bank *v.* Patton, 109 Ill. 479, 485; Nat. Bank of America *v.* Indiana Banking Co., 114 Ill. 483; Merchants' Nat. Bank *v.* Ritzinger, 20 Bradwell (Ill.), 27; Roberts *v.* Corbin, 26 Iowa, 315; Fogarties *v.* State Bank, 12 Rich. Law (S. Car.) 518; s. c., 78 Am. Dec. 468. See also Lester *v.* Given, 8 Bush (Ky.), 357; McGrade *v.* German Sav. Inst., 4 Mo. App. 330; Zelle *v.* German Sav. Inst., 4 Mo. App. 401; McGregor *v.* Loomis, 1. Disney (Ohio), 247, 255; Ancona *v.* Marks, 7 Hurl. & N. 686; Senter *v.* Continental Bank, 7 Mo. App. 532.

In Munn *v.* Burch, 25 Ill. 35, 40, Caton, C. J., says: "Universal custom shows us what the contract of all the parties is. It shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them; and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit. . . . Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker on the one side, and the receiving of the check for value and presenting it on the other."

In Union Nat. Bank *v.* Oceana Co. Bank, 80 Ill. 212, payment was refused because the drawer of the check had ordered the bank not to pay it. Held, that the bank was liable to the holder for the amount of the check.

**CHEMIST—CHEROKEE—CHEVISANCE—CHICORY.**

**CHEMIST.** See note 1.

**CHEROKEE.**—The name of a tribe of Indians now settled in the Indian Territory.<sup>2</sup>

**CHEVISANCE.**—A bargaining or perfecting of a bargain. A bargain or contract. An unlawful or usurious bargain or contract.<sup>3</sup>

**CHICORY.**—A plant whose root is used as an adulterant of coffee.<sup>4</sup>

Scott, C. J., said: "The principle of all the cases in this court on the subject is, that when a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and that a transfer of the check carries with it the title to the amount named in the check to each successive holder. After the check has passed to the hands of a *bona fide* holder it is not in the power of the drawer to countermand the order of payment."

**Implied Acceptance.**—If the bank impliedly promise to pay the check, the holder may sue if payment be refused. Thus, where a depositor settled his account with the bank, and left the exact amount of an outstanding check for its payment, and the bank tacitly retained the money and settled on that basis, it was held liable to the holder on the implied acceptance. *Saylor v. Bushong*, 100 Pa. St. 23.

Placing a check on the cancelling fork by the cashier of the bank is not such an acceptance as will prevent him from correcting the mistake and declining to pay the check upon discovering that the drawer's funds are insufficient. *Nat. Bank of Rockville v. Second Nat. Bank*, 69 Ind. 479.

**Authorities for Checks.**—Morse on Banking (2d Ed.); Daniel on Negotiable Instruments; Bolles on Banks.

1. In an action for penalties under 55 G. 3, c. 194, s. 20, for practising as an apothecary, by attending, advising, and furnishing medicines without certificate, the defence was that defendant was a chemist and druggist, and therefore protected by sec. 28, which enacts that nothing in the statute shall affect the business of a chemist and druggist in "the buying, preparing, compounding, dispensing, and vending drugs, medicines," etc.; but all persons using, or who shall use, that business may use, exercise, and carry on the same as fully and amply as the same was used, etc., by chemists and druggists be-

fore the passing of the act. *Held*, that defendant, to bring himself within this clause (if available), was bound to show by evidence that druggists and chemists did in fact attend, advise, and furnish medicines before the statute was passed. And a verdict found for the defendant on the ground that no evidence had been given on this point by plaintiffs was set aside on motion for new trial. *Semles per Coleridge, J.*, and *held* by Patterson-J., that the words of sec. 28 do not exempt druggists and chemists intending to practise as apothecaries. *Apothecaries Co. v. Greenough*, 1 Ad. & El. N. S. (41 E. C. L. R.) 799.

2. Land described as "Cherokee land" is not necessarily land ceded to the Cherokee nation of Indians by the treaty of December, 1835. *Ephraim v. Garlick*, 10 Kan. 280.

3. Burrill's L. D.: "An end or order set down between a creditor and creditor; an indirect gain in point of usury." *Repalje & Lawr. L. D.*

"Now I take it that any dealing by chevisance [used in the Bankrupt Act of 13 Eliz. c. 7] was really and truly the same thing as the business of a scrivener, so far as dealing in money was the object of the trade of a scrivener; that is, a person who dealt in money and was called a money-broker. The statute 21 Jac. I. uses the words 'trade or profession of a scrivener.' The old word 'chevisance' being then out of use, it had become doubtful whether scrivener was included in the act, and therefore these words were introduced." *In re Warren*, 2 Sch. & Lef. 423.

4. Under an act imposing a duty on ground chicory, it is not error for the court to say to the jury that ground chicory is the same thing as burnt chicory, as chicory root cannot be ground until it is burnt, and burnt chicory is not an article of commerce until it is ground. Whether or not an article imported is something other than ground chicory, is a question for the jury. *Arthur v. Herald*, 10 Otto (U. S.), 75.

**CHIEF.**—Highest in rank or office; principal.<sup>1</sup>

**CHILD—CHILDREN.** (See also **ADOPTION OF CHILDREN; BASTARDY; DEVISE; LEGACY; PARENT AND CHILD; SEDUCTION; WILLS.**)—The living offspring of human parents, either before or after birth.<sup>2</sup> A young person of either sex. The limits of the age of childhood are undefined.<sup>3</sup> A descendant in the first

1. Webster, e.g., Chief Justice, Chief Baron, etc.

Under an act requiring an affidavit verifying the return of issues of unstamped bills and notes by bankers, a manager of a bank is within the term "chief clerk." "Both in a joint-stock and in a private bank, every one employed, whether he is called manager or secretary, in reality is nothing more than a clerk, and the heads of the separate departments may properly be called chief clerks." *The Queen v. Greenland*, L. R. 1 C. C. R. 65.

The business of calico-printing consists of four processes: bleaching, printing, dyeing, and finishing. Three of these, viz., bleaching, dyeing, and finishing, were carried on at one branch of an establishment, and the printing at another. It was held that the former was an "establishment where the chief process of printing was carried on," within the meaning of a statute regulating the labor of children. They both made up one establishment, the principal object of which was printing, the other processes being incidental. *Hoyle v. Oram*, 12 C. B. (N. S.) 124.

2. In Statutes.—*Concealment of Birth or Child-murder.*—"This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. . . . No specific limit can be assigned to the period when the chance of life begins, but it may perhaps be safely assumed that under seven months the great probability is that the child would not be born alive." *Erle, J.*, in *Reg. v. Berriman*, 6 Cox C. C. 388. Whether the child had been alive was left to the jury as a question of fact in *Reg. v. Hewitt*, 4 F. & F. 1101. But *Martin, B.*, "saw nothing to limit the word 'child' in the statute to a child likely to live or likely to die; but that as soon as the foetus had the outward appearance of a child it was sufficient." *Reg. v. Colmer*, 9 Cox C. C. 506; *Bishop on Statutory Crimes*, 772.

*Procuring or Attempting Abortion.*—"Quick with child" means having conceived: "with quick child" is when the child has quickened. *Reg. v. Wycherly*,

8 C. & P. 262 and n. But it is said that the term "quick with child" means that the woman has felt the child alive and quick within her; and where a woman in the fourth month of her pregnancy swore that she had not felt the child move within her, she was held not to have been quick. 3 Camp. 76; *Comm: v. Parker*, 9 Metc. (Mass.) 263. And the distinction made in *Reg. v. Wycherly* was distinctly repudiated in *State v. Cooper*, 2 Zab. (N. J.) 52, where it was said: "The terms are synonymous, both importing that the child had quickened in the womb and that the period had arrived when the life of the infant, in contemplation of law, had commenced."

The expression "pregnant with child" in a statute applies to every stage of pregnancy from earliest conception to actual expulsion from the womb. *State v. Howard*, 32 Vt. 400. And a "woman with child" is equivalent to a "pregnant woman." *Eckhardt v. People*, 22 Hun, 525; s. c., 83 N. Y. 462.

3. A female ceases to be a "child" and becomes a "woman" within the meaning of an act prescribing punishment for rape, at the age of puberty. Hence a female seventeen years old is a woman, not a child. *Blackburn v. State*, 22 Ohio St. 102.

In an act defining aggravated assault, "child" is not synonymous with minor. It means one of tender years, and is to be taken in the sense in which it is understood in common language, reference being had to the comparative size and strength of the assaulted and assaulter. A boy fourteen years old, weighing 125 pounds, is not a child. *McGregor v. State*, 4 Tex. App. 599; *Allen v. State*, 7 Tex. App. 298.

*Poor Children.*—A person over twenty-one years of age is not a "poor child" within an act relating to the binding out of such. *The King v. Inhabitants of St. John Bedwardine*, 5 B. & Ad. 169.

A devise in trust "for feeding, clothing, and educating the poor children belonging to the congregation of St. Peter's, etc.," was held void for uncertainty in *Dashiell v. Atty-Gen.*, 5 H. & J. (Md.) 392; s. c., 9 Am. Dec. 572.

degree, of either sex,<sup>1</sup> born in lawful wedlock,<sup>2</sup> of human parents. The word "children" is usually confined to immediate descend-

1. "Children has a legal signification, . . . never permitting the term 'sons' to be substituted for it, unless such shall be the plain intention of a testator in his will in favor of sons to the exclusion of daughters." *Weatherhead's Lessee v. Baskerville*, 11 How. 329.

2. **Bastards are Not Children.**—As a general rule, bastards are not within the meaning of the terms "child" and "children" when used in a will. *Hill v. Crook*, L. R. 6 H. L. 265; *Paul v. Children*, L. R. 12 Eq. 116; *Ellis v. Houston*, L. R. 10 Ch. Div. 236; *Cartwright v. Vawdry*, 5 Ves. 530; *Bell v. Phyn*, 7 Ves. 453; *Heater v. Van Auker*, 14 N. J. Eq. 159; *Van Voorhis v. Brintnall*, 23 Hun (N. Y.), 260; *Gardner v. Heyer*, 2 Paige (N. Y.), 11; *Shearman v. Angell*, 1 Bail. Eq. (S. Car.) 351; C. C. La. 3556.

This rule is subject to exception only when it is absolutely necessary to construe the words "child" or "children" to include illegitimate children, in order to effectuate the intention of the testator, or where there is an obvious intention to be gathered from the will itself that the terms should include illegitimates. *Hill v. Crook*, L. R. 6 H. L. 265; *Palmer v. Horn*, 84 N. Y. 516.

Accordingly, where a legacy was left in trust for the child or children of A., the illegitimate children of A. took nothing, though he had none others. *Harris v. Lloyd*, 1 T. & R. 310. And this is the case although the testator knew that there were none others, it being possible that children coming properly within the description should be born. *Godfrey v. Davis*, 6 Ves. 44; *Dorin v. Dorin*, L. R. 7 H. L. 568. And so long as there are legitimate children to take, bastards can never come under the designation "children." *Ellis v. Houston*, L. R. 10 Ch. Div. 236; *Bagley v. Mollard*, 1 Russ. & M. 581; *Collins v. Hoxie*, 9 Paige (N. Y.), 81. And this holds good where the parents of the bastard married after her birth, and concealed her illegitimacy from her and the world, but had other children subsequently. *Cartwright v. Vawdry*, 5 Ves. 530; *Heater v. Van Auker*, 14 N. J. Eq. 159. In the last case the court said: "Under a devise or bequest to 'children' as a class, natural children are not included, unless the testator's intention to include them is manifest, either by express designation or necessary implication." *Collins v. Hoxie*, 9 Paige (N. Y.), 11.

Extrinsic evidence is not admissible

to show the testator's intention to include bastards in the general designation. *Gardner v. Heyer*, 2 Paige (N. Y.), 11; *Shearman v. Angell*, 1 Bail. Eq. (S. C.) 351; s. c., 23 Am. Dec. 166. In *Shearman v. Angell*, the legitimate half-brothers and sisters of the testator, who was himself a bastard, took to the exclusion of his full sister, also a bastard.

A manifest intention to include illegitimates in the designation of "children" was held to appear in a case where the mother of the children mentioned had only illegitimate children, she having gone through the ceremony of marriage with the husband of her deceased sister, and having had all her children by him. *Hill v. Crook*, L. R. 6 H. L. 265.

Bastards are generally admitted to take as a class where they are the only children and have acquired the name of children by reputation. *Beachcroft v. Beachcroft*, 1 Madd. 430; *Hill v. Crook*, L. R. 6 H. L. 265. And it seems also where there are legitimate children and the mother is named. *Wilkinson v. Adam*, 1 V. & B. 422. A bastard cannot acquire such a reputation before birth. Under a bequest "to such child or children as A. may happen to be *enroute* of by me," a child of which she was at the time pregnant cannot take; *non constat* that it was "by him." *Earle v. Wilson*, 17 Ves. 528.

The term "children" embraces those born out of lawful wedlock who are legitimized by the subsequent marriage of their parents, or by a statute which provides that the children of a marriage null in law shall be legitimate. *Carroll v. Carroll*, 20 Tex. 731. And see *Drain v. Violet*, 2 Bush (Ky.), 155.

Where a testator left property "to my beloved wife C., and after her death to my surviving children;" and after his death a woman J. claimed to have been married to him before C., and brought suit for dower and recovered: *held*, the term "children" in the will only included those by C., and not those by J. *Gelston v. Shields*, 16 Hun, 143; s. c., 78 N. Y. 275. See 2 Jarman on Wills, c. 31.

In statutes of descents and distribution the words "child" and "children" are held to mean legitimate children only. *Blacklaws v. Milne*, 82 Ill. 505; *Porter's Heirs v. Porter*, 7 How. (Miss.) 106; s. c., 40 Am. Dec. 55. *Contra*, *Heath v. White*, 5 Conn. 228; *Dickinson's App.*, 42 Conn. 491. And in *Kentucky* it has been decided that in such a statute the word "children" is

ants—those of the first generation; it does not include grandchildren or more remote descendants.<sup>1</sup> It is consequently, when

not confined to those born in lawful wedlock, but includes all who are by law capable of inheriting; and that a bastard recognized by his father and made capable of inheriting by an act of the legislature came within the term. *Drain v. Violet*, 2 Bush (Ky.), 155. So an illegitimate is not within an act making provision for a child or children, whose parent has neglected or omitted to provide for them in his will. *Kent v. Barker*, 2 Gray (Mass.), 535. *Contra*, *Est. of Wardell*, 57 Cal. 484. A bastard is not a child within an act giving an action for damages to children for the death of a parent. *Dickinson v. N. E. R. Co.*, 2 H. & C. 735.

In an act providing for the descent of the property of bastards, where it is enacted that "in case of the death of any such illegitimate person, leaving no widow, surviving husband, or descendants, then the property shall descend to and vest in the mother and her children," etc. "Children" includes illegitimates. *Rogers v. Weller*, 5 Bis. (C. C.) 166.

In an order under a poor law, adjudicating upon the settlement of a woman and her children, specifying a bastard among children is a misdescription. *The Queen v. Overseers of Birmingham*, 8 Q. B. 410.

In *Connecticut* the common law on this subject has been completely overthrown, and bastards are held to be children. *Heath v. White*, 5 Conn. 228; *Hughes v. Knowlton*, 37 Conn. 423; *Dickinson's App.*, 42 Conn. 491.

**1. Grandchildren are Not Children.**—*Children*, both in common and legal parlance, does not include grandchildren, but embraces only the first generation of offspring of the ancestor named. *Radcliffe v. Buckley*, 14 Ves. 576; *Ingraham v. Meade*, 3 Wall. Jr. (C. C.) 32; *Adams v. Law*, 17 How. (U. S.) 417; *McGuire v. Westmoreland*, 36 Ala. 594; *Willis v. Jenkins*, 30 Ga. 167; *Walker v. Williamson*, 25 Ga. 549; *Wharton v. Silliman*, 22 La. Ann. 343; *Taylor v. Mosher*, 29 Md. 458; *Churchill v. Mosher*, 2 Metc. (Ky.) 466; *Phillips' Devises v. Beall*, 9 Dana (Ky.), 1; *Sheets v. Grubb*, 4 Metc. (Ky.) 339; *Yeates v. Gill*, 9 B. M. (Ky.) 204; *Hughes v. Gill*, 12 B. M. (Ky.) 121; *Hopson v. Com to Use of Shipp*, 7 Bush (Ky.), 641; *Brokaw v. Peterson*, 15 N. J. Eq. 174; *Feit's Ex'rs v. Vanatta*, 21 N. J. Eq. 84; *Jackson v. Staats*, 11 Johns. (N. Y.) 337; s. c., 6 Am. Dec. 376; *Marsh v. Hague*, 1 Edw. (N. Y.) 174; *Tier v. Pen-*

*nell*, 1 Edw. (N. Y.) 354; *Mowatt v. Carow*, 7 Paige (N. Y.), 328; *Ward v. Sutton*, 5 Ired. Eq. (N. C.) 421; *Mordecai v. Boylan*, 6 Jones Eq. (N. C.) 366; *Boylan v. Boylan*, Ph. Eq. (N. C.) 160; *Dickinson v. Lee*, 4 W. (Pa.) 82; *Hallowell v. Phipps*, 2 Wh. (Pa.) 376; *Castner's App.*, 88 Pa. St. 478; *Stinton v. Boyd*, 19 Ohio St. 30; s. c., 2 Am. Rep. 369; *Tillinghast v. D'Wolfe*, 8 R. I. 69; *Thompson v. Ludington*, 104 Mass. 193. But in wills the word "children" may include grandchildren in two cases: "First, the case of necessity, where the will would remain inoperative, unless the sense is extended; next, where the testator has clearly shown by other words that he does not use the word 'children' in the proper sense, but means it in a more extensive signification." *Radcliffe v. Buckley*, 10 Ves. 195; *Reeves v. Brymer*, 4 Ves. 692; *Royle v. Hamilton*, 4 Ves. 437; *Scott v. Nelson*, 3 Port. (Ala.) 452; s. c., 29 Am. Dec. 266; *Osgood v. Lovering*, 33 Me. 464; *Churchill v. Lovering*, 2 Metc. (Ky.) 466; *Phillips' Devises v. Beall*, 9 Dana (Ky.), 1; *Hughes v. Beall*, 12 B. M. (Ky.) 121; *Dunlap v. Shreve*, 2 Duv. (Ky.) 334; *Brokaw v. Peterson*, 15 N. J. Eq. 174; *Prowitt v. Rodman*, 37 N. Y. 42; *Denny v. Clossie*, 4 Ired. Eq. (N. C.) 102; *Mowatt v. Carow*, 7 Paige (N. Y.), 328; *Dickinson v. Lee*, 4 W. (Pa.) 82; *Castner's App.*, 88 Pa. St. 478; *Tipton v. Tipton*, 1 Coldw. (Tenn.) 253; *Walker v. Williamson*, 25 Ga. 549.

The exceptions are stated more in detail in *New Jersey* and *New York*, where it is held that "children" may include more remote descendants, "where it appears there are no persons in existence who would answer to the description of children, in the primary sense of the word, at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown by the use of other words that he used the word 'children' as synonymous with descendants, or issue, or to designate or include . . . grandchildren." *Feit's Ex'rs v. Vanatta*, 21 N. J. Eq. 84; *Palmer v. Horn*, 20 Hun. 70; s. c., 84 N. Y. 516; *Matter of Patton*, 41 Hun. 497. "It can acquire a more extensive meaning only from the context in which it occurs, or from its use in a case where the person using it must know that there neither then is nor can afterwards be any person within the first gen-

used in a deed or will, a word of purchase.<sup>1</sup>

eration to whom it can be applied." *Willis v. Jenkins*, 30 Ga. 167.

It has been accordingly said that the word "children" cannot include grandchildren, "when there are persons to answer the description of children, unless there be some ambiguity in the language rendering it necessary, or unless the testator's intent expressed in other parts of the will could not otherwise be satisfied." *Tillinghast v. D'Wolf*, 8 R. I. 69.

It is even held, that so long as there are children, grandchildren cannot take under that designation. *Ward v. Sutton*, 5 Ired. Eq. (N. C.) 421; *Mordecai v. Boylan*, 6 Jones Eq. (N. C.) 366; *Boylan v. Boylan*, Ph. Eq. (N. C.) 160. And conversely that they can where there are no children. 2 Washburn on R. E. 655.

In statutes of descents and distribution, the words "child" and "children" do not include grandchildren or other descendants more remote than the first degree. *Est. of Curry*, 39 Cal. 529; *Bigelow v. Moring*, 103 Mass. 287; *Poang v. Gadsden*, 2 Bay (S. C.), 293; *Burgess v. Hargrave*, 64 Tex. 110. But it was said in the last case that these words might be differently construed, in order to give effect to a clear intention of the legislature. "Illegitimate child" in an act giving such a right of inheritance from the mother does not include grandchildren. *Curtis v. Hewins*, 11 Metc. (Mass.) 294. But the term "children" in a statute providing that advancements made to children during the life of an intestate shall be deducted from the shares of such children, does include grandchildren. *Storey's App.*, 83 Pa. St. 89.

"Children" in 43 Eliz. c. 2, s. 7, making children liable for the maintenance of their poor parents, does not apply to grandchildren. *Maund v. Mason*, L. R. 9 Q. B. 254. But it does include grandchildren, in pension acts, where children are to receive the pension in case there is no widow. *Walton v. Cotton*, 19 How. (U. S.) 355. And also in an act providing that in case of the death of a settler before he receives a patent, his interest in the land taken up shall go to his wife and children or heirs. *Cutting v. Cutting*, 6 Sawy. 396; s. c., 6 Fed. Rep. 259.

In a life-insurance policy in which the beneficiaries are "Mrs. M. R. and children," the last word does not include grandchildren. *Russell v. Russell*, 64 Ala. 500; *Cont. L. I. Co. v. Webb*, 54 Ala. 688. And it is equally exclusive of grandchildren when used in the by-laws

of a benevolent association to designate beneficiaries. *Winsor v. O. F. Benev. Assoc.*, 13 R. I. 149.

As used in the Louisiana Code of 1875, the term "children" is defined as follows: "Under this name are comprehended not only the children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line. Natural children, even though recognized, make no part of the children properly so called, unless they have been legitimated." C. C. § 3556.

**Step-children.**—The term "children" in a will does not include step-children. It is confined to persons of the blood of the testator or the one named as parent. This rule may be controlled by a manifest intention to the contrary. *In re Hallett*, 8 Paige (N. Y.), 375; *Barnes v. Greenzabach*, 1 Edw. (N. Y.) 41; *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252.

**Adopted Children.**—A devise to children does not include adopted children, although the parent named had none other. *Schafer v. Enew*, 54 Pa. St. 304. It was held otherwise in *Sewall v. Roberts*, 115 Mass. 262, where an adopted child was held to come within the word children used in a deed made many years before the adoption, a statute having endowed such a child with all the "legal consequences and incidents of the natural relation of parent and child." And an adopted child is entitled to the proceeds of a life-policy payable to the wife of the insured, if she survive him, otherwise to their children. *Martin v. Aetna L. Ins. Co.*, 73 Me. 25.

1. The word "children," being confined to issue in the first degree, consequently, when used in a deed or will, applies, primarily, to a specific and determinable class; it is a *designatio personarum*, and indicates, not heritable succession, but individual acquisition. It is a word, not only of limitation, but of purchase. *Wild's Ca.* 6 Co. 17; *Bussar v. Bradford*, 2 Atk. 220; *Oates v. Jackson*, 2 Str. 1172; *Dewitte v. Dewitte*, 11 Sim. 41; *Ginger v. White, Willes*, 348; *Hampton v. Holman*, L. R. 4 Ch. D. 183; *Dunn v. Davis*, 12 Ala. 135; *Furlow v. Merrill*, 23 Ala. 705; *Est. of Utz*, 43 Cal. 201; *Beacroft v. Strawn*, 67 Ill. 28; *Johnson v. Johnson*, 2 Metc. (Ky.) 331; *Turner v. Patterson*, 5 Dana (Ky.), 295; *Anable v. Patch*, 3 Pick. 360; *Tucker v. Stites*, 39 Miss. 196; *Fales v. Currier*, 55 N. H. 392; *Stokes v. Tilly*, 9 N. J. Eq. 130; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503; *In re Sanders*, 4 Paige (N. Y.), 293; *Murphy*

## Definition.

*v. Harvey*, 4 Edw. (N. Y.) 131; *Chrystie v. Phyle*, 19 N. Y. 344; *Taylor v. Gould*, 10 Barb. 388; *Armstrong v. Moran*, 1 Bradf. (N. Y.) 514; *Guthrie's App.*, 37 Pa. St. 9; *Chew's App.*, 37 Pa. St. 23; *Schafer v. Enew*, 54 Pa. St. 304; *Daley v. Koons*, 90 Pa. St. 246; *Affolter v. May*, 19 W. N. C. (Pa.) 44; 11 Eastern Rep. 654; *Perry v. Calhoun*, 8 Humph. (Tenn.) 551; *Stubbs v. Stubbs*, 11 Humph. (Tenn.) 43; *Bowers v. Bowers*, 4 Heisk. (Tenn.) 293; *Moon v. Stone's Ex'r*, 19 Gratt. (Va.) 130.

To this rule there is no exception in the case of deeds. *Melsheimer v. Gross*, 58 Pa. 412; *Wolford v. Morgenthau*, 91 Pa. St. 30. But in a will it may be construed a word of limitation equivalent to "issue," "heirs" or "heirs of the body," where there is a clear intent to so use it—to be gathered from the words of the testator himself. "Conjectures, doubt, and even equilibrium of apparent intention are not sufficient." The intention must be rendered clear by the words of the testator. *Guthrie's App.*, 37 Pa. St. 9; *In re Sanders*, 4 Paige (N. Y.), 293; *Wild's Ca.*, 6 Co. 17.

"Children" was accordingly held to be a word of limitation in *Grigg v. Bradley*, 16 East, 299; *Jones v. Davies*, 4 B. & Ad. 43; *Parkman v. Bowdoin*, 1 Sumn. (C. C.) 359; *Echols v. Jordon*, 39 Ala. 24; *Dunlap v. Shreve*, 2 Duv. (Ky.) 334; *Moran v. Dillihay*, 8 Bush (Ky.) 434; *Lachland v. Downing*, 11 B. M. (Ky.) 32; *Jordan v. Roach*, 32 Miss. 482; *Jones's Ex'r v. Jones*, 13 N. J. Eq. 236; *Halderman v. Haldeman*, 40 Pa. 29; *Merryman v. Merryman*, 5 Munf. (Va.) 440; *Smith v. Fox*, 11 Va. L. J. 375.

"Children" was held to mean "issue," where it was used interchangeably with that word. *Voller v. Caster*, 4 E. & B. 173; s. c., 28 Eng. L. & Eq. 267; *Wyth v. Blackman*, 1 Ves. Sr. 196; *Dalzell v. Welch*, 2 Sim. 319.

In a bequest to A. and his children, where A. had no children either at the time the will was made or when it went into effect, "children" was held to be a word of purchase. *Vanzant v. Morris*, 52 Ala. 285. See, generally, 1 Roper on Legacies, 68 sq.; 2 Jarman on Wills, c. 30; and 2 Wash. on R. E. 654.

An allegation that certain named persons "are his only legitimate children" is not a sufficient averment that they are the *only heirs at law* of the decedent. *Martin's Heirs v. Martin*, 22 Ala. 86.

In a clause of a will providing that an amount of money be paid to the wife of testator for the support of herself and children until the final division of the es-

## CHILD.

## Definition.

tate, "children" means all the children, including those who have married and ceased to be members of the family as well as those who have remained such. *Hollingsworth v. Hollingsworth*, 65 Ala. 321.

**Child and Children.**—Under a power to appoint to the use of "such child and children, etc.," an exclusive appointment to one child is good. *Swift v. Gregson*, 1 T. R. 432.

**A Child's Part.** in an interstate act which gives a widow such a share, imports as large a share as any child has. *Davis v. Duke*, C. & N. 361.

**Any Child** in a statute is not confined to any particular class of children. Overseers of Manchester *v. Guardians of St. Pancras*, L. R. 4 Q. B. D. 409.

**Benefit of Children.** See BENEFIT.

**Eleven Children.**—Where property was left by will to "my eleven children," and at the testator's death one of the eleven was dead, her children took her share. *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252.

**Family of Minor Children.**—A guardian of one minor child is a guardian of a family of minor children under a State constitution and laws giving to such a one a homestead. *Rountree v. Dennard*, 57 Ga. 629; s. c., 27 Am. Rep. 401.

**Our Child or Children.**—Testator left it to his widow how and in what manner she might think proper to dispose of the estate in reference to our child or children. He left one child. *Held*, that he was sufficiently named within an act requiring the naming or providing for children in wills. *Beck v. Metz*, 25 Mo. 70.

**Pregnant with a Child.**—Testator, contemplating death, devised his estate to his wife for life, remainder to his nephews, with the condition that "in case my said wife should at my decease be pregnant with child or children," then the property was to go to such child or children. He lived for twenty years, and in the mean time a child was born to him. It was decided that this child did not take by implication under the will. *Blakiston v. Haslewood*, 10 C. B. 544.

**Seventh or Youngest Child.**—Where there was a bequest to the seventh or youngest child of A., and between the date of the will and the testator's death A.'s seventh child died and an eighth and several others were born, the youngest and not the eighth took. *West v. Ld. Primate of Ireland*, 3 Brown Ch. 148.

**Three Children.**—Where a legacy of a specific sum was left to each of the *three* children of A., and A. had four children, all born before the date of the will, each of



**CHILDISH—CHINESE—CHOCOLATE—CHOICE—CHOOSE.**

**CHILDISH.**—Like a child; of weak mind.<sup>1</sup>

**CHINA.**—Porcelain.<sup>2</sup>

**CHINESE.**—Pertaining to China.<sup>3</sup> (See also **INTERNATIONAL LAW.**)

**CHIP.**—A piece of wood, stone, or other substance separated by an axe, chisel, or any cutting instrument; <sup>4</sup> a fragment; a small piece.<sup>5</sup>

**CHOCOLATE.**—A paste composed of the roasted kernel of the *Theobroma cacao*, ground, and mixed with other ingredients—usually a little sugar, cinnamon, or vanilla.<sup>6</sup>

**CHOICE.**—The voluntary art of selecting or separating from two or more things that which is preferred; the determination of the mind in preferring the thing to another; election; the thing chosen.<sup>7</sup>

**CHOOSE.**—To make choice of; to select; to take by way of preference from two or more things offered; to elect.<sup>8</sup>

the four was held to be entitled to the amount specified. *Garvey v. Hibbert*, 19 Ves. 125.

**Younger Children.**—In a family settlement where primogeniture prevails, a daughter, though first born, is within the term "younger children," if there is a son. *Beale v. Beale*, 1 P. Wms. 244; *Heneage v. Hunlock*, 2 Atk. 457. An only surviving younger child may take under a bequest to younger children; and a second child, having become the eldest by the death of the first, is excluded. *Ld. Lincoln v. Pelham*, 10 Ves. 166.

1. "The term 'childish' certainly expresses a degree of reasoning intelligence." A childish person may make a good deed. *Mulloy v. Ingalls*, 4 Neb. 120.

2. Pictures painted by hand on porcelain are to be classified under acts imposing import duties, not as decorated china or porcelain, but as paintings. *Arthur v. Jacoby*, 13 Otto (U. S.), 677.

3. "Chinese subjects visiting or residing in the United States," as used in a treaty with China, means "those traveling for instruction or from curiosity, or engaging in some legitimate avocation, and whose ingress may not be lawfully prohibited by reason of some objection personal to themselves, and not dependent upon their nationality." It does not include lewd women, who are forbidden to land in a State, without reference to nationality. *Ex parte Ah Fook*, 49 Cal. 402.

4. Webster.

5. **Chip—Cheap—Chipping**—signifies the place to be in a market town, as Chipperham, Chipping-Norton, Chipping-Wicomb. Wharton.

6. Webster.

**In Statute—Distinction between "Chocolate" and "Confectionery."**—For tariff purposes Congress has at all times since the act, May 2, 1792, intended to preserve the distinction between "chocolate" and "confectionery." Under the act June 6, 1872 (17 Stat. 231), § 1, chocolate, *eo nomine*, is dutiable at the rate of five cents per pound, and although put up in a particular form and sold as "confectionery," is not subjected to the duty imposed on the latter article by act June 30, 1864, § 1 (13 Stat. 202). *Arthur v. Stephani*, 6 Otto, 125.

7. Webster.

**In Wills.**—Where in a will a testator bequeathed "to my son John the choice of one of my two tracts of land, and the other tract to be sold and the money to be divided between my two daughters," it was held that the son took a fee, amongst other reasons, because the testator intended a preference to the son, giving him a choice. *Clake v. Mikell*, 3 Dessaus. (S. Car.) 168; *State v. Thompson*, 14 S. & R. (Pa.) 100.

8. Webster.

**In Wills.**—Under a devise to a party of premises for life, provided he chooses to reside therein, and then to A. B. in fee, it is not necessary to complete A. B.'s right to the premises, on the death of the devisee for life, that such devisee should have actually resided in the premises; the intention to reside there being evidence that such intention would have been carried into effect had circumstances permitted, is sufficient. *Sampson v. Donn*, 2 Chit. Rep. 529.

**In Statute—Chosen to Office.**—Where in a statute providing that "if any person

## CHOSE—CHOSEN FREEHOLDERS—CHOSSES IN ACTION.

**CHOSE.**—A thing, suit, cause; personal property.<sup>1</sup> It is a chattel personal, and is either in possession or in action. It is used in divers senses, of which the four following are the most important:<sup>2</sup>

*Chose local*,<sup>3</sup> a thing annexed to a place, as a mill, etc.

*Chose transitory*, that which is movable, and may be taken away, or carried from place to place.

*Chose in action.* See CHOSE IN ACTION.

*Choses in possession*,<sup>4</sup> where a person has not only the right to enjoy, but also the enjoyment of the thing.

**CHOSEN FREEHOLDERS.**—A board of county officers in New Jersey, having charge of the finances of the county, and composed of persons chosen by and representing the several town, or townships of the county. (See also COUNTY, OFFICERS.)

**CHOSSES IN ACTION.** (See also ASSIGNMENTS; DONATIO CAUSA MORTIS; EXECUTION; HUSBAND AND WIFE; MARRIED WOMEN.)

*Definition, 235.*

*Basis of the Right, 235.*

*Form of the Action, 236.*

*Assignment, 236.*

**1. Definition.**—A chose in action is a right of proceeding in a court of law to procure the payment of a sum of money.<sup>5</sup> Promissory notes, bills of exchange, debts, policies of insurance,<sup>6</sup> and annuities<sup>7</sup> are examples. The term is used in contradistinction to choses in possession, which are chattels, of which one is in possession or control, such as coin, wheat, books, and the like.

**2. Basis of the Right.**—One view has restricted the term to rights of action for money arising under contracts;<sup>8</sup> but while it comprehends these, whatever the contract, it is undoubtedly of much broader significance, and includes the right to recover pecu-

*chosen* or appointed to office . . . dies, . . . the court may declare the office vacant," and appoint a person to perform the duties of the office, a person dies after he has been chosen an officer at an election, but before the votes are counted, the court has authority to declare the office vacant, and to fill the vacancy. *State v. Hunt*, 54 N. H. 431.

**In Indictment.**—Where a statute provided that an indictment should state that the grand jurors were "*chosen*, selected, and sworn," and the word "*chosen*" was omitted, it was held that the omission was not fatal. The words "*chosen*" and "*selected*" having in common parlance the same meaning, the omission of "*chosen*" was of no practical importance. *Renget v. State*, 1 Neb. 365.

1. Webster.

2. Wharton.

3. This answers probably to the *res immobilis* of the civil law.

4. Taxes and customs are a chose in

possession if paid, a chose in action if unpaid. The king acquires and the subject loses as property in them the instant they become due. 2 Black. Comm §408. Patents, copyrights, trade-marks, and similar rights are generally classed as incorporeal personal property. Rapalje.

5. Rap. & Lawrence's Law Dict. 206. See also *Haskell v. Blair*, 3 Cush. (Mass.) 534; *Gillett v. Fairchild*, 4 Denio (N. Y.), 80; *People v. Tioga C. P.*, 19 Wend. (N. Y.) 75; *Ramsey v. Erie R. Co.*, 57 Barb. (N. Y.) 398; 1 Chit. Gen. Pr. 99.

6. *Ex parte Ibbetson*, 8 Ch. D. 519.

7. 2 Bl. Com. 389; Hargrave's note to Co. Litt. 144 b.

But not a deed for land. *Sheldon v. Sill*, 8 How. (U. S.) 441.

8. 1 Bouv. Dict. 311, where a chose in action is defined to be a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action, citing Com. Dig,

niary damages for a wrong inflicted either upon the person or property.<sup>1</sup>

**3. Form of the Action.**—It does not matter what the form of the action, legal or equitable, which is necessary to maintain the right. While it was otherwise considered once, it is now said to be a chose in action, even though the remedy is to be obtained only from equitable sources. Thus the right to sue for a trust fund misapplied by the trustee is an equitable chose in action.<sup>2</sup>

**4. Assignment.** (See also the general heading ASSIGNMENTS.)—With the exception of negotiable instruments, choses in action are not, at the common law, assignable so as to give the assignee the legal and equitable rights of the assignor.<sup>3</sup> He cannot sue in his own name,<sup>4</sup> though equity early allowed him to sue in the name of the assignor,<sup>5</sup> and this is now a rule both in courts of law and equity.<sup>6</sup> He takes the chose in action, unless it be a negotiable instrument, subject to the defences of the debtor at the time of notice of the assignment to the latter,<sup>7</sup> but not to those subsequently arising;<sup>8</sup> and in the United States, where the debtor, after notice of the assignment, expressly or impliedly agrees with the assignee to pay him the claim, the latter may institute suit upon it in his own name.<sup>9</sup>

Statutes have, however, been enacted in many States of the Union enlarging the number of assignable choses in action as well as the rights of the assignee; and in England the matter is regulated by the Judicature Act of 1873, c. 25, § 6, by virtue of which an absolute assignment of a legal chose in action, followed by notice in writing to the debtor or other person from whom the

1. *Gillett v. Fairchild*, 4 Denio (N. Y.), 80; *McKee v. Judd*, 12 N. Y. 622; *Wms. Pers. Prop.* 4.

2. *Wms.* 6.

3. *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Thalhimer v. Brinckerhoff*, 20 Johns (N. Y.) 380.

4. *Greenby v. Wilcox*, 2 Johns. (N. Y.) 1; *Lenox v. Roberts*, 2 Wheat. (U. S.) 373.

5. *Buck v. Swazey*, 35 Me. 41, 52; *Welch v. Mandeville*, 1 Wheat. (U. S.) 236; *Caldwell v. Meshew*, 44 Ark. 564.

6. *Skinner v. Somes*, 14 Mass. 107; *Jessel v. Ins. Co.*, 3 Hill (N. Y.), 88; *Bispham's Equity*, 226.

An assignor cannot prevent the assignee from suing in the assignor's name. *The Leona*, 62 Tex. 35.

7. *Bishop v. Holcomb*, 10 Conn. 444; *Warren v. Copelin*, 4 Metc. (Mass.) 594; *Beebe v. Bank of New York*, 1 Johns. (N. Y.) 529; *Murphy v. Bowery Bank*, 30 Hun (N. Y.), 40; *Bush v. Lathrop*, 22 N. Y. 535; *Brashear v. West*, 7 Pet. (U. S.) 608; *Kamena v. Huelbig*, 8 C. E. Greene (N. J.), 78; *Martin v. Richardson*, 68 N. Car. 255; *Boardman v. Payne*, 29

Iowa, 339; *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119; *Barney v. Grover*, 28 Vt. 391; *Lane v. Smith*, 103 Pa. St. 415; *Andrews v. McCoy*, 8 Ala. 920; *Kleeman v. Frisbie*, 63 Ill. 482; *Marshall v. Cooper*, 43 Md. 61.

Where a party agrees to give his attorney a part of a claim, no matter how collected, and subsequently assigns it to a party ignorant of his agreement, who compromises it, the assignee is bound by the agreement. *Fairbanks v. Sargent*, 9 N. East. Repr. (N. Y.) 870.

8. *Stewart v. Kirkland*, 19 Ala. 162; *Reservoir Co. v. Chase*, 14 Conn. 123; *Bartlett v. Pearson*, 29 Me. 9; *Webb v. Steele*, 13 N. H. 230; *Blake v. Buchanan*, 22 Vt. 548; *Mowry v. Todd*, 12 Mass. 281; *Fay v. Jones*, 18 Barb. (N. Y.) 340; *Small v. Browder*, 11 B. Mon. (Ky.) 212; *Miller v. Kreiter*, 76 Pa. St. 78; *Conant v. Bank*, 1 Ohio St. 298.

9. *Tiernan v. Jackson*, 5 Pet. (U. S.) 597; *Currier v. Hodgdon*, 3 N. H. 82; *Skinner v. Somes*, 14 Mass. 107; *Clark v. Thompson*, 2 R. I. 146; *Barger v. Collins*, 7 H. & J. (Md.) 213; *Bucklin v. Ward*, 7 Vt. 195.

choses in action is due, has the effect of passing the legal right to the same to the assignee from the date of the notice, subject to any equities affecting it. And promissory notes, bills of exchange, and bank checks are by the law merchant, as well as by numerous statutory enactments, made an exception, to a very great extent, to the foregoing rules. These the holder may assign before maturity to a *bona fide* purchaser by generally recognized modes, with the effect of freeing the same from the equities existing between the original parties, and of conferring both the legal and equitable title on the purchaser. (See also BANK CHECKS; BILLS OF EXCHANGE; PROMISSORY NOTES; AND NEGOTIABLE INSTRUMENTS.)

An assignment of a chose in action will not be sanctioned either in a court of law or equity where it is opposed to any rule of law, sound morals, or public policy.<sup>1</sup>

So mere personal actions which do not survive the person are not assignable,<sup>2</sup> though they are where they do survive, even though they be for a tort committed.<sup>3</sup> The mode of the assignment is not material. No particular form is essential, and it may

1. *Milwaukee & Minnesota R. v. Milwaukee & Minnesota R.*, 20 Wis. 183; *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Marshall v. Means*, 12 Ga. 61; *Dayton v. Fargo*, 45 Mich. 153; *Prosser v. Edmunds*, 1 Younge & Coll. Exch. Rep. 481; *Albright v. Teas*, 37 N. J. Eq. 171.

**Right to Sue to Set Aside Trustee's Sale.**—A right to prosecute a suit in equity to set aside a trustee's sale on the ground of fraud is not assignable. *Jones v. Babcock*, 15 Mo. App. 149.

**Part of Debt.**—Though not good at law, an assignment of a part of a fund or debt will be enforced in equity. *James v. City of Newton*, 23 Cent. Law Jour. (Mass. Case) 489 and note; *Peugh v. Porter*, 112 U. S. 737; *Fordyce v. Nelson*, 91 Ind. 447; *Canty v. Latterner*, 31 Minn. 239. Compare *Geist's Appeal*, 104 Pa. St. 351.

**Future Earnings.**—Wages to be earned under an existing contract are assignable, even though the contract be indefinite as to time and amount. *Wade v. Bessey*, 76 Me. 413; *Rio Grande Extension Co. v. Coby*, 7 Colo. 299.

But an assignment of all the wages the assignor may earn in the future, without limit as to time or amount, is invalid when the assignor is not engaged in any employment, or even under contract for employment. *Lehigh Valley R. Co. v. Woodring*, 9 Atl. Rep. (Pa.) 58; *Kennedy v. Tiernay*, 14 R. I. 528.

**Expectancies.**—An assignment by a son of his expectancy in his father's estate, freely and voluntarily made for a good consideration, is valid. *Steele*,

*Admr., v. Frierson*, 3 S. West. Repr. (Tenn.) 649. *Contra, Alves v. Schlesinger*, 81 Ky. 290.

**Contract with Public Officials.**—A contract made by bridge commissioners of a county to pay a certain sum of money for a bridge described therein, and for the erection thereof upon the completion of such bridge as fast as the money is collected by the tax collector, is assignable. *Smith v. Hubbard*, 2 S. West. Repr. (Tenn.) 569.

**Mechanics' and Other Liens.**—A mechanic's lien, although inchoate, is assignable. *McDonald v. Kelly*, 14 R. I. 335.

So is an attorney's for services on a judgment. *Sibley v. Pine Co.*, 31 Minn. 201.

2. *Comegys v. Vasse*, 1 Pet. (U. S.) 213; *Devlin v. Mayor*, 63 N. Y. 15; *Lattimore v. Simmons*, 13 S. & R. (Pa.) 184; *Smith v. Sherman*, 58 Mass. 408.

An unliquidated claim for a personal injury is not assignable. *Stewart v. Houston & Texas Cent. R. Co.*, 62 Tex. 246. Nor is one for slander. *Miller v. Newell*, 20 S. Car. 123.

3. *North v. Turner*, 9 Serg. & R. (Pa.) 244; *Lazard v. Wheeler*, 22 Cal. 142; *Jordon v. Gillen*, 44 N. H. 424; *Grant v. Ludlow*, 8 Ohio St. 37; *Williams v. Ingersoll*, 89 N. Y. 508; *Louisville, etc., R. Co. v. Goodbar*, 88 Ind. 213.

A right of action for infringements of a patent is assignable. *Shaw v. Colwell Lead Co.*, 20 Blatchf. C. Ct. 417. And so is one for injury to cattle. *Galveston, etc., R. Co. v. Freeman*, 57 Tex. 156.

be either by writing or words indicating such an intention when founded upon a sufficient consideration;<sup>1</sup> and indeed it is held that acts merely, as the delivery of written evidence of a debt, may be sufficient.<sup>2</sup>

**CHRISTIAN.**—One who professes to believe or is assumed to believe in the religion of Christ; especially one whose inward and outward life is conformed to the doctrines of Christ. One who is born in a Christian country or of Christian parents. Pertaining to the Church.<sup>3</sup>

**CHRISTIANITY.** See RELIGIOUS SOCIETIES.

1. *Pass v. McCrea*, 36 Miss. 143; *Kimball v. Donald*, 20 Mo. 577; *Ford v. Stuart*, 19 Johns. (N. Y.) 342; *Kessel v. Albetis*, 56 Barb. (N. Y.) 362; *Laimon v. Smith*, 7 Gray (Mass.), 150; *Dunn v. Snell*, 15 Mass. 481; *Grover v. Grover*, 24 Pick. (Mass.) 261; *Gage v. Dow*, 59 N. H. 383; *Tingle v. Fisher*, 20 W. Va. 497; *Garnsey v. Gardner*, 49 Me. 167; *Wiggins v. McDonald*, 18 Cal. 126; *Patten v. Wilson*, 34 Pa. St. 299; *McWilliams v. Webb*, 32 Iowa, 577; *Spiker v. Nydegger*, 30 Md. 315; *Noyes v. Brown*, 33 Vt. 431; *Shannon v. Hoboken*, 37 N. J. Eq. 123; *Thompson v. Spies*, 13 Sim. 469; *Burn v. Carvalho*, 4 My. & Cr. 690; *Cook v. Black*, 1 Hare, 390; *Chowne v. Baylis*, 31 Beav. 351; *Row v. Dawson*, 1 Vesey, 331; *Gurnell v. Gardner*, 9 Jurist (N. S.), 1220; *Riccard v. Pritchard*, 1 K. & J. 277, 279; *Field v. Megaw*, 4 L. R. (C. P.) 660.

A writing in form, "For value received I hereby sell, assign, transfer, and set over unto A B all my right, title, and interest in and to the balance due me on sale of goods, etc., to C D in the sum of \$2558.80, less a payment of \$144.98, leaving due from C D to me the full sum of \$2413.84," is an absolute assignment. *Wallingford v. Burr*, 17 Neb. 137.

A owed B on account, and B owed C on account, and desired further credit. The three agreed that what A owed B should be paid by him to C on B's account, and then C trusted B on further account. *Held*, that this was an oral assignment to C of B's debt against A, with constructive delivery and sufficient consideration to satisfy the law. *White v. Kilgore*, 77 Me. 571.

But a sight draft, directing the drawee to charge the amount to a certain account, does not constitute an assignment of the fund. *Whitney v. Eliot Bank*, 137 Mass. 351; s. c., 50 Am. Rep. 316. See also *Lewis v. Traders' Bank*, 30 Minn. 134.

2. *Mowry v. Todd*, 12 Mass. 281;

*Jones v. Witter*, 13 Mass. 304; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; *Clark v. Rogers*, 2 Me. 147; *Lacey v. Lacey*, 7 Pa. St. 251; *Futt v. Couzins*, 50 Mo. 152; *Noyes v. Brown*, 33 Vt. 431; *Shannon v. Hoboken*, 37 N. J. Eq. 123; *Taft v. Bowker*, 132 Mass. 277.

But an agreement to pay a collector a certain part of a sum for collecting it is not an equitable assignment, and gives the collector no right of action against the debtor. *Plater v. Meag*, 30 Fed. Rep. 308.

Nor is an order not accepted, and not in the hands of a banker, an assignment. *Poole v. Carhart*, 32 N. W. Repr. (Iowa) 16.

3. Webster.

It is used in an ecclesiastical sense—Christian church, Christian doctrine. *Christianitatis curia*, the court Christian, or ecclesiastical judicature, as opposed to the civil court or lay tribunal. *Burrill*.

In *Constitution*.—In *New Hampshire* it has been held that the term Christian in the constitution of the State is used in its ordinary sense, and designates one who believes or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament. It includes Protestants and Roman Catholics, but not Mahometans, Jews, Pagans, or Infidels. The political or conventional use of the word, denoting one who assents to the truth of the doctrines of the religion of Christ, or who, being born of Christian parents or in a Christian country, does not profess any other religion or belong to any of the other religious divisions of men, is the sense in which the word is ordinarily used in constitutions and statutes and legal documents, and refers to those commonly known as nominally Christians, rather than to those professing the faith of some particular church, who are termed Christians in the theological or sacred sense of the term. *Hale v. Everett*, 53 N. H. 9.

*CHRISTIAN NAME—CIDER—CIPHER—CIRCUIT.*

**CHRISTIAN NAME.**—The name given at the font, distinct from the surname. It has been said from the bench that a Christian name may consist of a single letter.<sup>1</sup>

**CHUCK-A-LUCK.**—The name given to a game of chance in Kentucky.<sup>2</sup>

**CHURCH.** See RELIGIOUS SOCIETIES.

**CIDER.**—A drink made from the juice of apples.<sup>3</sup>

**CIPHER.**—To use figures or to practise arithmetic. To designate by character; to represent.<sup>4</sup>

**CIRCUIT.**—A division of the country appointed for a particular judge to visit for the trial of causes or for the administration of justice.<sup>5</sup>

1. Wharton.

A person can have but *one* Christian name, and an indictment containing two Christian names was quashed. *Rex v. Newman*, 1 *Ld. Raym.* 562.

2. *Montee v. Comm.*, 3 J. J. Marsh. (Ky.) 132.

3. Webster.

**In Contracts.**—Where a contract was made between A and B, whereby A having a quantity of apples agreed to sell his cider to B at a certain price per hogshead, to be delivered at T. at a future time, and to lend such pipes as he had for the use of the cider to be manufactured on his, A's, premises and to be paid for before it was removed, and A in pursuance delivered a quantity of juice expressed from the apples to a servant hired by B to manufacture the cider on A's premises, and before the cider was completely manufactured it was seized by the excise officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as B's property, together with the casks, and in *assumpsit* for goods sold and delivered brought by A against B it appeared that the word *cider*, at the place where the contract was made, meant the juice of the apples as soon as it was expressed; it was thereupon held that the contract must be construed to have been for the sale of cider in that sense of the word, and that the property passed to B as soon as the apple-juice was delivered to his servant. *Studdy v. Sanders*, 5 B. & C. 628.

**In Statute.**—The effect of a statute of Illinois declaring that spirituous, vinous, and malt liquors were intoxicating was to render it unnecessary to prove it on a trial; but "*cider*" not being a fluid belonging to either of the classes mentioned, is not intoxicating by the legislative enactment, and in a prosecution for selling cider as an intoxicating liquor, proof

should be made that such fluid is intoxicating. *Feldman v. City of Morrison*, 1 Bradw. (Ill.) 460.

Where a statute declares that "ale or cider and all wines shall be considered intoxicating liquors, within the meaning of this act," sales of unfermented cider may be indicted and punished as sales of "intoxicating liquor." An averment of the sale of intoxicating liquor is sustained by proof of the sale of unfermented cider. *Comm. v. Dean*, 14 Gray (Mass.), 99. The provision of St. 1868 (Mass.), c. 14, § 21, that the term "intoxicating liquor" in said statute shall be construed to include cider applies to an indictment under the Gen. Stats. c. 87, § 7, for keeping a liquor nuisance. *Comm. v. Smith*, 102 Mass. 144.

4. Webster.

**"To Cipher", Not Equivalent to the General Rules of Arithmetic.**—Where a statute requires that when a child shall be bound out by the overseer of the poor "the indenture shall contain an agreement on the part of the person to whom such child shall be bound that he will cause such child to be instructed . . . in the general rules of arithmetic," an indenture containing a clause that the master "will teach the child or cause it to be taught . . . to cipher" is not a sufficient compliance with the stipulation of the statute. *People v. Hoster*, 14 Abb. Prac. (N. S.) (N. Y.) 414.

5. Bouvier Law Dict.

**In England**, circuits are divisions of the country for judicial business. There are seven, formerly eight, of these judicial circuits, namely, the Northern, North-eastern, Midland, Southeastern, Oxford, Western, and North and South Wales (the last being divided into two divisions), into which the judges went originally twice a year, viz., in the vacations after Hilary and Trinity Terms. In recent

## CIRCULAR—CIRCUMSTANCES—CITATION.

**CIRCULAR.**—A circular letter, or paper, often printed, copies of which are addressed to various persons; as a business circular, a political circular.<sup>1</sup>

**CIRCUMSTANCES.**—The condition of things surrounding or accompanying an act, event, or transaction; relative facts, as distinguished from a principal fact of which they may be corroborative or the reverse.<sup>2</sup>

**CIRCUMSTANTIAL EVIDENCE.** See EVIDENCE; PRESUMPTIVE EVIDENCE.

**CITATION.**—A summons to appear, applied particularly to process in the spiritual, probate, and matrimonial courts;<sup>3</sup> a

times the judges go oftener, and at no precisely fixed periods. Two judges go on each of the circuits and hold court. Wharton, 3 Bla. Comm. 58; 3 Steph. Com. 221. County-court circuits were created by 8 & 9 Vict. c. 95.

**In the United States.**—Circuit court is in many of the States a name for a court of general original jurisdiction, clothed with power to try by judge and jury the issues of fact in ordinary actions, but subject to a review of its determinations in the supreme court of the State or other appellate tribunal. Abbott. The English custom is still retained in some of the States, as in *Massachusetts*, where the judges sit in succession in the various counties of the State, and by the arrangement of terms the full bench of the supreme court makes a circuit of the State once a year.

1. Webster Dict.

**Circular Notes.**—Similar instruments to "letters of credit." They are drawn by resident bankers upon their foreign correspondents in favor of persons traveling abroad. The correspondents must be satisfied of the identity of the applicant before payment; and the requisite proof of such identity is usually furnished upon the applicant's producing a letter with his signature by a comparison of the signature. Brown L. Dict.

**Circulating Medium.**—This term is more comprehensive than "money," as it is the medium of exchanges, or purchases and sales, whether it be in gold or silver coin or any other article. Rapalje & L. L. Dict.

2. Rapalje & Lawrence Law Dict.

**Insolvent Circumstances.**—By "insolvent circumstances" is meant that a person is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. Bayly v. Schofield, 1 Man. & Sel. 350.

**Circumstances Raising a Presumption**

**of a Grant of Land.**—Time may be a circumstance, independent or disconnected, on which the presumption of a grant may be raised. *Campbell v. Smith*, 3 Hals. (N. J.) 151. See this case for comment on Lord Ellenborough's reported *dicta* in *Bentley v. Shaw*, 6 East, 208, that less than twenty years' enjoyment may or may not afford a presumption of a grant according as it is attended with circumstances to support or rebut the right.

**In Statute—Circumstances of Terror.**—Where a statute concerning forcible entries and detainer denounces all entries into premises, at the time in the actual peaceable possession of another, if made with violence and strong hand, whether such entry be by the actual breaking into the house situate on the premises, or by any kind of violence or "circumstances of terror," and a large number of men were employed to take possession of premises in the possession of another, though he had no house on them and was not personally present, and they entered hurriedly at daylight, tore down one fence and put up another and a shanty, and fired off a pistol-shot to celebrate its completion; *held*, that there were sufficient "circumstances of terror" to make the entry a forcible one. *Gray v. Collins*, 42 Cal. 152.

3. Wharton.

**In Ecclesiastical Law.**—Citation is the beginning and foundation of the whole cause, and an invalid citation can produce no effect (unless cured by the appearance of the impugnant in person, or his lawful proctor). Gail reduces the requisites of a good citation to six, viz., the insertion of the name of the judge, of the promovent, of the impugnant, of the cause of suit, of the place, and of the time of appearance; to which may be added, the affixing the seal of the court, and the name of the register or his deputy. 1 Brown Civ. & Adm. Law, 453, 454.

reference to authorities in support of an argument, opinion of a court, or other legal document.<sup>1</sup>

**CITE.**—To call or summon. Therefore, first, to notify a party of a proceeding against him or call him to appear and defend; and, second, to quote or refer to authorities in support of a proposition in jurisprudence.<sup>2</sup>

It is the judicial act by which the defendant is commanded to appear in the suit. 1 Phillim. Ecc. L. 1253, 1280.

**In Other English Practice.**—The process issued in divorce, probate, admiralty, and other actions. It is usually the original process, wherever used, and is somewhat analogous to the writ of *capias* or summons at common law or the *subpoena* in chancery. It is also used to call upon a person who is not a party to an action or proceeding to appear before the court in that action or proceeding. Abbott Law Dict.; Rapalje & Lawrence's Law Dict.

**In Scotch Practice.**—The calling of a party to an action by an officer of the court, under a proper warrant. Bell Dict.

**In American Practice.**—A process used in orphans', surrogates', probate, and sometimes in other courts to secure the attendance of parties and persons having an interest in the proceedings. It has been defined "an official call or notice to appear in court," and as a general rule it is issued and served upon a particular individual, who is thereby made a party to the proceedings. This is so in the case of citations to minors, to the creditors of poor debtors, to trustees, executors, and administrators, and to persons who have fraudulently concealed or embezzled the estate of insolvent debtors, and in other instances. Arnold v. Sabin, 1 Cush. (Mass.) 529.

It is also used to remove causes in certain instances into the United States supreme court on writ of error.

**1. Citation of Authorities.**—The quoting, production, or reference to constitutional provisions, acts of legislatures, decisions of courts, or text-books of law for the purpose of sustaining a proposition or rule of law contended for.

**Method of Citation.**—In the United States the laws of the general government are generally cited by their date, as Act of Sept. 24, 1789, § 35, or Act 1819, c. 170; 3 Story U. S. Laws, 1722; or by

the section of the Revised Statutes of 1878 or its supplements. The same practice prevails in most of the States, especially when the date is important. Where it is not, reference is frequently made to the revised code of laws or the official publication of the laws, as Va. Rev. Code, c. 26; N. Y. Rev. Stat. (4th Ed.) 400. Bouvier. Books of reports and text-books are generally cited by the number of the volume and page, as 3 Am. & Eng. Enc. of Law, 217; or where the paragraphs are numbered or the book divided into sections, by reference to the number of the paragraph or section, as Bishop's Statutory Crimes, § 514; reports being cited either by name of the reported or the number of the series, as 11 Ont. 150, or 107 Pa. St. 150. The civilians on the continent of Europe, in referring to the Institutes, Code, and Pandects or Digest, usually give the number not of the book but of the law, and the first word of the title to which it belongs. The American writers give the number of the book, title, law, and section. For example, Inst. 4, 15, 2 signifies Institutes, book 4, title 15, and section 2; Dig. 41, 9, 1, 3, means Digest, book 41, title 9, law 1, section 3; Dig. *pro dote* or *ff pro dote* signifies section 3, law 1, of the book and title of the Digest or Pandects entitled *pro dote*. The code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph; for example, Nov. 185, 2, 4 for Novella Justiniani 185, capite 2, paragrapho 4. Novels are also quoted by the collation, the title, chapter, and paragraph, as follows: In 'Authentico Collatione, titulo 1, cap. 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed; for example, *Authentica cum testator, Codice ad legem fascidian*. Bouvier; Mackelvey Civ. Law, § 65; Domat Civ. Law, Cush. Index.

2. Abbott's Law Dic.



**CITIZENSHIP.** (See also ALIENS; CONFLICT OF LAWS; CONSTITUTIONAL LAW; NATURALIZATION, etc.)

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*Rights of Citizens of States, under the United States Constitution, in other States than that of their Domicile, 252.*

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**1. Definition.**—Citizenship is the state of being vested with the rights and privileges of a citizen.<sup>1</sup>

A citizen is a person, native or naturalized, who has the privilege of voting for public officers, and who is qualified to fill offices in the gift of the people; also, any native-born or naturalized person of either sex, who is entitled to full protection in the exercise and enjoyment of the so-called private rights.<sup>2</sup> One who under the constitution and laws of the United States has a right to vote for representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people. Any person born in the United States, or naturalized person born out of the same, who has not lost his right as such—including men, women, and children.<sup>3</sup> A citizen is one who owes to government allegiance, service, and money by way of taxation, and to whom the State in turn grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defence, and security in person, estate, and reputation.<sup>4</sup>

**2. Citizenship Acquired by Birth.**—Natural citizenship is created by birth within the jurisdiction of the United States.<sup>5</sup> In *England*, if the parent be under the actual obedience of the king, and

1. Webster's Dict.

2. Webster's Dict.

3. 1 Bouvier's L. Dict.

4. *Amy v. Smith*, 1 Litt. (Ky.) 332.

In monarchical governments, by subject is meant one who owes permanent allegiance to the sovereign. 2 Bouvier's L. Dict.

5. Fourteenth Amendment to the Federal Constitution. *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 584, 639; *In re Look Tin Sing*, 21 Fed. Rep. 905; s. c., 17 Chicago Leg. News, 57.

Before the adoption of the Fourteenth Amendment to the United States Constitution, *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 584, 639, was the leading case,

that held that birth within the jurisdiction of the United States created citizenship. In this case the complainant was born in 1819 in New York, of alien parents, during their temporary sojourn in said State. In the first year of her age her parents left this country, taking her with them, and never returned. It was held that the complainant was a citizen of this country by birth. This decision was based on the fact that this was the doctrine of the common law with respect to all persons born within the king's allegiance, and was therefore the law of the colonies, and then became the law of each State when independence was declared, and so continued until the adop-

tion of the United States constitution; after the adoption of the constitution the exclusive jurisdiction of this subject of citizenship passed to the United States government, and the same doctrine has there remained, and thus became the common law of the United States when the union was consummated; that it is the common-law rule of the United States, and not of the individual States separately considered; this doctrine is national, and not for the individual States; that it is general under the United States constitution, a system of national jurisprudence.

Consonant with this doctrine is the decision of *In re Look Tin Sing*, 21 Fed. Rep. 905; s. c., 17 Chicago Leg. News, 57, on the question of citizenship. The decision was rendered by Justice Field of the United States supreme court, sitting as circuit judge in the ninth circuit. Sawyer, U. S. circuit judge, Sabin, and Hoffman, U. S. district judges, concurred. The learned justice construes the words in the Fourteenth Amendment to the Federal constitution, "subject to the jurisdiction thereof," and holds that the previous doctrine, before the amendment, except as applied to Africans and their descendants, was, that birth within the dominion and jurisdiction of the United States, of itself created citizenship; that the Fourteenth Amendment to the Federal constitution was adopted as an authoritative declaration of this doctrine as to the white race, and also to do away with the exceptions as to the negroes and their descendants. He decides that a Chinese, born of alien parents within the dominion and jurisdiction of the United States, who resides therein, and not engaged in any diplomatic official capacity under the Chinese government, is a citizen of the United States.

The facts in this case were these: The petitioner belonged to the Chinese race, and was born in California in 1870. In 1879 he went to China, and returned to San Francisco in 1884, and sought to land in said city, claiming that he was a natural-born citizen of the United States. His parents resided in California, and had lived there twenty years, and have always been subject to the commands of the Chinese government. His father sent the son to China with the intention of his returning. His father was a merchant, and not in any diplomatic or other official capacity under the Chinese government. The petitioner had no certificate, as required by the acts of 1882 and of 1884; and so the United States district-attorney, on behalf of this government, ob-

jected to his landing in the United States for want of said certificate. The learned justice concludes: "And no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of Congress. The petitioner must be allowed to land, and it is so ordered." It was decided in this case that jurisdiction excepts from citizenship children born of ambassadors, whose residence, by a fiction of public law, is regarded as a part of their own country.

Children capable of becoming citizens are citizens. The nationality of the parents is never a question. The question is, May the parents be naturalized? *State v. Clarborn*, 1 Meigs (Tenn.), 331.

One born in a foreign country is a citizen, if at the time of his birth his father was a citizen of the United States. *Oldtown v. Bangor*, 58 Maine, 353.

The United States supreme court hold that the main object of the opening sentence of the Fourteenth Amendment to the Federal constitution was to settle the question, upon which there has been a difference of opinion throughout this country and in the United States courts, as to citizenship, and to put it beyond a doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any other power, should be citizens of the United States, and of the State in which they reside. That this section of the amendment contemplates two sources of citizenship, and only two: Birth and naturalization; that "subject to the jurisdiction thereof" means completely subject to the political jurisdiction of the United States, and owing them direct and immediate allegiance. *Elk v. Wilkins*, 112 U. S. 94; *Slaughter-house Cases*, 16 Wall. (U. S.) 36; *Strander v. W. Virginia*, 100 U. S. 303.

The United States supreme court was asked to decide whether children born within the United States, of alien parents, were citizens, and the court refused to answer, though this was not the question in point. *Minor v. Happersett*, 21 Wall. (U. S.) 162.

A person born in Massachusetts before the Revolution, who withdrew into other parts of the British provinces before independence was declared, but returned during the war, still held his citizenship. Had he remained away until after the treaty of peace, he would have been a British subject, because there was but one allegiance before the Revolution.

the place of the child's birth be within the king's obedience as well as in the dominion, the child becomes a subject of the realm.<sup>1</sup>

(a) *Rights of Children Born out of the Jurisdiction of the United States*.—All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States.<sup>2</sup>

(b) *Effect of Alien Women Marrying Citizens*.—Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.<sup>3</sup>

Phipp's Case, 2 Pick. (Mass.) 394. note; McIlvain v. Coke, 4 Cranch (U. S.), 209; Gardner v. Ward, 2 Mass. 244; Kilham v. Ward, 2 Mass. 236; Martin v. Comm., 1 Mass. 347; Comm. v. Chapman, 1 Dall. (Pa.) 53; Cagnet v. Pettit, 2 Dall. (Pa.) 234.

Contrary to this doctrine, it was held that a person born before independence and before that time voluntarily withdrew to other parts of the British dominion, was a citizen of Massachusetts, even if he never returned, because his allegiance accrued to the State in which he was born, which was the lawful successor of the king, which made him a subject by birth. Ainslie v. Martin, 9 Mass. 454.

The nationality of the parent is held as the test of the child's citizenship by some authorities. Ludlam v. Ludlam, 26 N. Y. 356; Cockburn's Nationality, c. 1, sec. 4. p. 13; c. 6, sec. 2, pp. 187, 188.

In *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. (U. S.) 99, it was held that two things usually create citizenship: first, birth locally within the jurisdiction of the United States; and secondly, birth within the protection and obedience of the sovereign. In speaking of Ainslie v. Martin, 9 Mass. 454, the court held that it was not authority—not even in its own State.

These principles were established:

1. If the defendant was born before July 4, 1776, he is an alien, and hence disabled from taking real estate by inheritance.

2. If he was born after July 4, 1776, and before September 15, 1776, at the time when the British took possession of New York, he would be a citizen.

3. If he was born after the British took possession of New York, and before the evacuation on November 25, 1783, he would be an alien.

4. If the grand assize shall find that

the father and his son, the demandant, did, in point of fact, elect to become and to continue British subjects, and not American citizens, the demandant is an alien, and of course cannot inherit real estate. The following cases sustain the doctrine of this decision: Orser v. Hoag, 3 Hill (N. Y.), 79; Jackson v. White, 20 Johns. (N. Y.) 313; Shanks v. Dupont, 3 Pet. (U. S.) 242; 1 Harp. Eq. (S. Car.) 5; Palmer v. Downer, 2 Mass. 179, note; Kilham v. Ward, 2 Mass. 236; Inhabitants, etc., v. Inhabitants, etc., 16 Mass. 230; Trimble v. Harrison, 1 B. Mon. (Ky.) 140; Moore v. Wilson, 10 Verg. (Tenn.) 406.

The doctrine of election of persons to become citizens of annexed territory, or to return to the mother-country, is recognized and adopted in *Jones v. McMasters*, 20 How. (U. S.) 8; *McKinney v. Saviego*, 18 How. (U. S.) 235; *Quintana v. Tomkins*, 1 New Mexico, 29; *Carter v. Territory*, 1 New Mexico, 317; *State v. Primrose*, 3 Ala. 546; *Horrold's Case*, 1 Clark (Pa.), 214; *Dubois' Case*, 2 Mart. (La.) 185.

By the Declaration of Independence, inhabitants of other parts of the British dominion, as to the United States, became alien enemies. *Com. v. Bristow*, 6 Call (Va.), 60.

1. Calvin's Case, 7 Co. 1.

2. U. S. Rev. Stat. sec. 1993; *Ludlam v. Ludlam*, 26 S. Y. 356; *Oldtown v. Bangor*, 58 Maine, 353; *State v. Adams*, 45 Iowa, 100.

3. U. S. Rev. Stat. sec. 1994. If the husband at the time of the marriage is an alien and then becomes naturalized, his wife also becomes a citizen. *Leonard v. Grant*, 6 Saw. C. C. 603; *White v. White*, 2 Met. (Ky.) 185; *Kelley v. Owen*, 7 Wall. (U. S.) 496; *Burton v. Burton*, 1 Keyes (N. Y.), 559. These last two decisions were made in conformity to the

(c) *Indians*.—Indians, born members of any of the Indian tribes within the United States, which still hold their tribal relations, are not citizens. They are not citizens even if they have separated themselves from their tribe and reside among white citizens of a State, but have not been naturalized, or taxed, or recognized as citizens by the United States, or by any of the States.<sup>1</sup>

act of Congress, February 10, 1885, sec. 2, which provides that if any woman who might be lawfully naturalized under the existing laws should marry or should be married to a citizen of the United States, shall be deemed and taken to be a citizen. 10 U. S. Stat. at Large, p. 604, sec. 2. The court, in *Kelley v. Owen*, 7 Wall. (U. S.) 496, say that this act is construed liberally to mean that the husband need not be a citizen at the time of the marriage, but that any free white woman already married to an alien becomes a citizen by the naturalization of her husband. If she subsequently marries an alien her status is discussed in *Pequignot v. City of Detroit*, 16 Fed. Rep. 211.

By act of 1804, March 26, it was provided that if any alien who had taken the first steps as required by act of 1802 dies before he has taken out his final papers of naturalization, his widow and children shall be considered as citizens.

In *Shanks v. Dupont*, 3 Pet. (U. S.) 242, it was held that the marriage of a *feme sole* with an alien produced no dissolution of her native allegiance. Same doctrine expressed in *Inglis v. Trustees*, etc., 3 Pet. (U. S.) 99.

In England the nationality of the wife follows that of her husband, and changes when his changes. 33 Vict. c. 14, 10; Cockburn's Nationality, c. 6, sec. 4, p. 211.

Before the passage of the act of Congress of Feb. 10, 1885, it was held that a marriage where both husband and wife were aliens, and the husband afterwards became an American citizen, but the wife never came to this country, she could not have dower. *Greer v. Sankston*, 26 How. Pr. (N. Y.) 471.

In some of the States a non-resident widow at the time of her husband's death is not entitled to dower. *Pratt v. Tefft*, 14 Mich. 191; *Bennett v. Harms*, 51 Wis. 251; Wisconsin Stat., sec. 2160. But generally the rule is the residence of a widow in another State of the Union at the time of her husband's death will not divest her of dower right. *Jones v. Gerock*, 6 Jones Eq. (N. C.) 190.

1. *Elk v. Wilkins*, 112 U. S. 94; s. c., 17 Chicago Leg. News, 72.

In this case an Indian brought suit in the circuit court of the United States for the district of Nebraska, against the registrar of one of the wards of the city of Omaha, for refusing to register him as a voter therein. The plaintiff based his action on the first clause of the first section of the Fourteenth Amendment to the constitution of the United States, which says "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside;" and on the Fifteenth Amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The court held that though the plaintiff surrendered himself to the jurisdiction of the United States, the United States government had not accepted his surrender. He had never been naturalized, or in any way recognized or treated as a citizen, either by the State or national government. "Subject to the jurisdiction thereof," means completely subject to the political jurisdiction of the United States, and owing them direct and immediate allegiance. Indians born within the territorial limits of this government, owing immediate allegiance to their respective tribes, are no more born within the United States and "subject to the jurisdiction thereof," within the meaning of the Fourteenth Amendment of the Federal constitution, than the children of subjects of foreign nations, born within the dominion of those governments, or the children born within the United States of ambassadors or other public ministers of foreign nations. The complainant not being a citizen by birth, can only become a citizen in the second way, that is, by naturalization by or under some treaty or statute. The action was dismissed.

It has generally been held that Indians are not citizens. They being within the territorial limits of the United States, are not really foreigners; but they are alien nations, distinct political communities, with whom the United States deal as they see fit, either by treaty

### 3. Citizenship Acquired by Naturalization.—Congress has sole power to establish uniform rules of naturalization.<sup>1</sup> The acquirement of

made by the President and Senate, or by act of Congress in the ordinary forms of legislation. They are in a state of pupillage, resembling that of a ward to his guardian. General acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them. *Cherokees v. Georgia*, 5 Pet. (U. S.) 1; *Worcester v. Georgia*, 6 Pet. (U. S.) 515; *U. S. v. Rogers*, 4 How. (U. S.) 567; *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *New York Indians Case*, 5 Wall. (U. S.) 761; *Cherokees' Tobacco Case*, 11 Wall. (U. S.) 616; *U. S. v. Whiskey*, 103 U. S. 44; *Crow Dog's Case*, 109 U. S. 556; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693; *Hastings v. Farmer*, 4 N. Y. 293.

The alien and independent condition of the Indians cannot be put off at their own will, without the consent of the United States. To become citizens they must comply with some treaty providing for their naturalization, or by some statute authorizing individuals of special tribes to assume citizenship by due process of law. *Wilson v. Wall*, 6 Wall. (U. S.) 83; *Karrahoo v. Adams*, 1 Dill. C. C. 344; in 1855 treaty the Wyandotta, 10 Stat. 1159; in 1861 and 1866, with the Pottawatomies, 12 Stat. 1192; in 1862, with Ottawas, 12 Stat. 1237; in 1839, act of Congress Brothertown Indians. Treaties containing powers for the naturalization of some of the Indians were made with the Delawares in 1886, in 1867 with various tribes in Kansas and with the Pottawatomies, and in April, 1868, with the Sioux. 14 Stat. 794; 15 Stat. 513. A treaty provided for the naturalization of members of the Ottawa, Miami, Peoria, and other tribes and their families. 15 Stat. 517. By act of Congress of July 15, 1870, c. 296, sec. 10, it is provided that if at any time thereafter any of the Winnebago Indians in the State of Minnesota should desire to become citizens, they could do so by complying with the provisions. In New York in 1876 an Indian was allowed to vote. He was born in New York, one of the remnants of a tribe which had ceased to exist as a tribe in the State. By a statute of the State, a native Indian might purchase, take, hold, and convey lands; and whenever he should have become a freeholder to the value of one hundred dollars, should be liable to taxation and to the civil jurisdiction of the courts, in the same manner and to the same extent as a citizen. N. Y. stat.

1843, c. 87. As to condition of the remnant of tribes in Massachusetts, see *Danzell v. Webquish*, 108 Mass. 133; *Pells v. Webquish*, 129 Mass. 469; Mass. Stat. c. 184; 1869, c. 463.

An Indian born a member of an independent political community and Indian tribe is not subject to the jurisdiction of the United States, nor born in its allegiance. *McKay v. Campbell*, 2 Sawyer C. C. 118.

The Indians in Oregon, not being born subject to the jurisdiction of the United States, are not citizens thereof. *U. S. v. Osborne*, 6 Sawyer C. C. 406.

It is admitted that an Indian is a competent witness against a white man. *Coleman v. Doe*, 4 Sm. & M. (Miss.) 40.

By act of Congress of March 3, 1843, c. 101, it is provided for a division of lands belonging to the Stockbridge Indians in Wisconsin to be divided among them individually, and patents to be issued to such individuals in severalty and in fee. Such Indians are then deemed citizens of the United States, with all the privileges and duties attached thereto, and the powers and usages of those Indians as a tribe thenceforth to cease.

A person half-white and half-Indian blood has been denied citizenship. *In re Camille*, 6 Sawyer C. C. 511.

In the case of *Elk v. Wilkins*, 119 U. S. 94, Justices Harlan and Woods dissented from the majority opinion, and argued that the plaintiff was born in the territory of the United States, under the dominion and within the jurisdictional limits thereof; that he had acquired a residence in one of the States with her consent, was subject to taxation and other duties imposed upon citizens, and was a citizen. If he did not acquire national citizenship, then the Fourteenth Amendment to the Federal constitution had failed to protect the Indian race. "There is still in this country a despised and rejected class of persons, with no nationality whatever, who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community, nor entitled to any of the rights, privileges, or immunities of citizens of the United States." This was the conclusion of their dissenting opinion.

1. At one time it was a question whether this power of naturalization be-

uniformity excludes legislation by the States on naturalization. It is competent for Congress, after establishing uniform rules, to give to the State courts jurisdiction under them.<sup>1</sup>

(a) *United States Statutes Regulating Naturalization—Their Provisions and Procedure Thereunder.*—The provisions of the United States statutes are: Any alien, except Chinese, may be naturalized and become a citizen of the United States on the following conditions:

1. The applicant shall declare on oath or affirmation before some State court of record, having a seal and clerk, and having common-law jurisdiction, or before a United States district or circuit court, or before a clerk of any of the said courts, two years at least before his admission, that it is his intention to become a citizen of the United States, and to renounce forever his allegiance to his own sovereignty, which must be in peace with the United States at the time.

2. At his final admission to citizenship he shall declare on oath or affirmation before some of the courts aforesaid that he will support the United States constitution, and that he renounces all allegiance to any foreign sovereign, and especially to his own, whereof he was a subject before his application for citizenship.

3. He must prove by at least two witnesses who are citizens that he has resided within the United States five years at least, and within the State or Territory where the court is located at least one year; that during that time he has been a good moral person, attached to the principles of this government, and is well disposed in this regard.

4. He must also renounce all titles to nobility, if he has any.

5. Any alien [except a Chinese] who is a minor, who shall have resided within the United States three years next preceding his arriving at his majority, and who shall continue to reside therein to the time of making application for citizenship, may, after reaching his majority, and having resided in the United States at least five years, including the three years of his minority, be given citizenship without any preliminary declaration.

6. Any alien [except a Chinese] who is twenty-one years of age or over, enlisting in the armies of the United States, either in the regular or the volunteer, and who shall be honorably discharged therefrom, can be admitted to citizenship without the preliminary declaration of his intentions, but he must prove one year's residence in the United States.

longed exclusively to Congress, and whether the States did not possess concurrent authority. While the State cannot exclude those citizens naturalized by the act of Congress, yet the States may adopt citizens upon easier terms than Congress does. *Collett v. Collett*, 2 Dall. (Pa.) 294.

This doctrine is, however, no longer held. The power of naturalization oper-

ates exclusively as soon as it was exercised by Congress. *U. S. v. Villato*, 2 Dallas (Pa.), 370; *Chirac v. Chirac*, 2 Wheat. (U. S.) 269.

This power belongs exclusively to Congress, on the ground of there being a direct incompatibility in the exercise of it by the States. *Houston v. Moore*, 5 Wheat. (U. S.) 1.

1. *State v. Penney*, 10 Ark. 621.

7. The children of parents duly naturalized, being under the age of twenty-one years at the time of such naturalization, shall, if residing in the United States, be considered as citizens.

8. If an alien who shall have declared his intentions shall die before he is actually naturalized, his widow and children shall be considered citizens on taking the oath prescribed by law.

9. No alien who shall be a citizen, denizen, or subject of any country, state, or sovereign with whom the United States shall be at war at the time of his application shall be then admitted to be a citizen of the United States.<sup>1</sup>

1. U. S. Rev. Stat., title 30.

By act of Congress of 1872, sec. 29, 17 Stat. at Large, 268, any alien seaman may become naturalized. He must declare his intentions before a competent court, and then serve three years on a merchant vessel of the United States. Then he will receive the protection of the United States as a citizen from the time of filing his declaration.

A court of record without a recording officer is not competent to receive an alien's preliminary declaration to become naturalized. *Ex parte Cregg*, 2 Curtis C. C. 98; *State v. Whittemore*, 50 N. H. 245.

The clerk may receive the preliminary declaration of intention, as it is a ministerial duty. *Butterworth's Case*, 1 Wood, B. & M. C. C. 323.

To admit to citizenship is a judicial act, and cannot be delegated to the clerk. *Clark's Case*, 18 Barb. (N. Y.) 444; *The Acorn*, 2 Abb. U. S. 434; *McCarty v. Marsh*, 1 Seld. (5 N. Y.) 263.

As to what constitutes a record of naturalization, see *In re Coleman*, 15 Blatchf. C. C. 406.

A married woman may be naturalized without the consent of her husband. *Priest v. Cummings*, 16 Wend. (N. Y.) 617.

The residence and good moral character of the applicant cannot be proved by affidavits taken out of court; the witnesses must be present in court for examination. *In re —*, an alien, 7 Hill (N. Y.), 137.

The naturalization of the father *ipso facto* makes the son, then residing in the United States and a minor, a citizen. *State v. Penney*, 10 Ark. 621.

The mode to be pursued to become naturalized is substantially as follows:

The applicant exhibits his certificate of having made the preliminary oath to the clerk of the court. The clerk then prepares a written deposition for the witnesses, setting forth their knowledge of the applicant's residence and of his good moral character, also a deposition for

the applicant, which provides and sets forth that he renounces all allegiance to every foreign sovereignty, and especially that of his native country, and that, if he has any titles of nobility, he renounces them, and that he will support the constitution of the United States. Then the judge of the court examines each of them under oath. If the examination proves satisfactory, the judge makes an order in writing for the admission to citizenship of the applicant. The depositions are subscribed and sworn to publicly in court before or in the presence of the judge. All these papers, including the certificate of the intention, constitute the record of the proceedings. The final certificate under the seal of the court, signed by the clerk, is given the applicant, setting forth his naturalization according to the law of the land. This certificate is conclusive evidence of his admission as a citizen. In case of a minor the previous declaration is dispensed with; otherwise the mode is the same.

A person duly naturalized is entitled to all the privileges and immunities of natural-born subjects, except that a residence of seven years is required to enable him to hold a seat in Congress, and no person except a natural-born citizen is eligible to the office of governor in some of the States, or President of the United States. 2 Kent Com. 66.

A naturalized person can hold and receive lands as a citizen. His naturalization takes away any defect of blood, and he may inherit as if native-born. It has no retroactive effect that will enable him to take, as heir, lands, the descent of which was cast before his admission to citizenship. *Vaux v. Nesbit*, 1 McCord Ch. (S. Car.) 372; *People v. Conklin*, 2 Hill (N. Y.), 67; *Heeney v. Trustees*, etc., 33 Barb. (N. Y.) 360. Or vest an estate. *Keenan v. Keenan*, 7 Rich. (S. Car.) 345.

Naturalization will confirm a title previously acquired by purchase or devise.

(b) *Rights of Former Slaves—The Thirteenth, Fourteenth, and Fifteenth Amendments—The Civil Rights Act.*—The former slaves have been emancipated by the Thirteenth Amendment to the Federal constitution, which provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."<sup>1</sup> They were enfranchised by the Fourteenth Amendment to the Federal constitution; the first clause of the first section reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."<sup>2</sup> The first section of the Fifteenth Amendment to the Federal constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States on account of race, color, or previous condition of servitude."<sup>3</sup> The Civil Rights Act provides that all persons born within the United States and not subject to any former power are citizens, excluding Indians not taxed.<sup>4</sup>

Jackson *ex dem.* of Doran *v.* Green, 7 Wend. (N. Y.) 333; Harley *v.* State, etc., 40 Ala. 689.

Unless naturalization is complete, and final papers issued, it confers no right of inheritance. A mere declaration of intention to be a citizen is not sufficient. *McDaniel v. Richards*, 1 McCord (S. Car.), 187.

In *England* there are natural-born subjects, denizens, and aliens. A denizen is a person who has obtained letters-patent to make him an English subject. He holds a kind of middle position between an alien and a natural-born subject, and partakes of both of them. He acquires the privileges of a natural-born subject pursuant to 7 and 8 Vict. c. 66. He cannot be of the Privy Council or either house of Parliament, or have any office of trust, civil or military, or have any grant of lands, etc., from the crown. 2 Step. Com. 417; 1 Bl. Com. 374; Stat. 12 W. III., c. 3.

The English naturalization law of 1870, 33 Vict. c. 14, amended by 35 and 36 Vict. c. 39, provides: 1. That aliens shall have the capacity of British subjects to hold and inherit real and personal property within the realm; 2. That naturalized aliens may divest themselves of their *status* as British subjects, and resume their original nationality; 3. That British subjects may renounce their allegiance. By the law of Parliament, affirmed in resolution of the House of Commons in 1691, it was resolved that no alien, not being denizen or naturalized, hath any right to vote in elections of members of

Parliament. Westminster Election, 12 Commons Journal, 367.

An alien who obtains letters-patent giving him the *status* of a denizen becomes a subject as to his freedom, but he cannot inherit. He cannot vote, even though qualified in other respects, at elections of members of Parliament. No alien or denizen can be elected a member of Parliament. *Lex Parliamentaria*, 182; *Mitchell's Case*, 3 O'M. & H. 19.

A naturalized subject can be elected to Parliament if qualified by an act of Parliament. *Ferriere's Case*, 3 O'M. & H. 86.

The crown can confer a title of knighthood upon an alien. *Forsyth's Const. Law*, 329.

In *England* it was established in 1774:

1. That a country conquered by English arms became a dominion of the king;
2. That the conquered inhabitants, once received under the king's protection, became subjects, and are to be so considered, and not as enemies. *Chapman v. Hall*, Cowper. 204.

1. 13 U. S. Stat. at Large, 775; proclaimed ratified Dec. 18, 1865.

2. 15 U. S. Stat. at Large, 706; proclaimed ratified July 28, 1868.

3. 16 U. S. Stat. at Large, p. 1131; proclaimed ratified March 30, 1870.

4. U. S. Rev. Stat. sec. 1992; act of Congress of April 9, 1866.

The Thirteenth and the Fourteenth Amendment to the United States constitution raised the colored race from the condition of inferiority and servitude in which most of them had previously



(c) *Treaties and Legislation Affecting Chinese.*—A person born within the dominion and jurisdiction of the United States, of Chinese parents, is a citizen;<sup>1</sup> but no alien Chinese can become naturalized citizens of the United States.<sup>2</sup>

**4. Rights of States to Legislate Regarding Citizenship.**—If the States choose to exercise the power of naturalization as an original one, they must abide by the rule which Congress makes.<sup>3</sup> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction

stood, into perfect equality and rights with all the other persons within the jurisdiction of the States.—*Ex parte Virginia*, 100 U. S. 339.

The pervading purpose of the amendments was to establish the freedom of the slave race, their protection as citizens; to prohibit discrimination against any race. *Slaughter-house Cases*, 16 Wall. (U. S.) 36; *Strander v. West Virginia*, 100 U. S. 303.

With respects to citizenship and civil rights the colored race is placed upon a level with the white, as provided by the United States constitution and sections 1977 and 1978 of the United States Statutes. *Virginia v. Rives*, 100 U. S. 313.

The Civil Rights Act (14 Stat. 27) was intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude. *U. S. v. Cruikshanks*, 92 U. S. 542.

The purpose of these amendments would seem to apply to all races as well as to the colored race. They forbid all class legislation, and insure an equal protection by the law of the land. *Ah Kow v. Nunan*, 5 Sawyer C. C. 552; *Parrott's Chinese Case*, 6 Sawyer C. C. 349; *In re Ah Chong*, 6 Sawyer C. C. 451. Compare *State v. Ah Chew*, 16 Nev. 50.

2. *In re Look Tin Sing*, 21 Fed. Rep. 905.

1. By act of May 6, 1882, the right of Chinese laborers to come to the United States was suspended for ten years. By the same act the State and the United States courts are forbidden to admit Chinese to citizenship. Before this statute it was held that an alien Chinese could not be naturalized and admitted to citizenship. *In re Ah Yup*, 5 Sawyer C. C. 155. Who are Chinese laborers, is a question difficult of solution. As to this question, see *In re Ah Lung*, 18 Fed. Rep. 28, which decision is diametrically opposed to *United States v. Douglas*, 17 Fed. Rep. 634.

The Chinese Restriction Act of Congress of July 5, 1884, amending the act of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," has this provision: That every Chinese person other than a laborer, entitled to enter the United States under the treaty between our government and China, or under that act, shall obtain from the Chinese government or of the government of which he is a subject, its permission to come within the United States, authenticated by its certificate containing various particulars of himself and family, so as to clearly identifying him; and whilst such certificate is only *prima facie* evidence against the United States, it is made the sole evidence permissible on the part of the person producing it to establish his right to enter into the United States. Chap. 220, sec. 6; Stat. 1883-4, 115.

As to Chinese rights in the United States, see *Ah Kow v. Nunan*, 5 Sawyer C. C. 552; *Parrott's Case*, 6 Sawyer C. C. 349; *In re Ah Chong*, 6 Sawyer C. C. 451; *In re Look Tin Sing*, 21 Fed. Rep. 905.

3. *Ex parte Knowles*, 5 Cal. 300.

Before the present constitution of the United States was adopted, several of the States exercised the power to naturalize and admit to citizenship. *Goodell v. Jackson*, 20 Johns. (N. Y.) 693; *State v. Managers, etc.*, 1 Bail. (S. Car.) 215; *State v. Ross*, 7 Yerg. (Tenn.) 74.

This power of naturalization now lies exclusively with Congress, and deprives the States individually of the power of naturalizing aliens according to their own will and pleasure, and thereby give them the rights and privileges of citizens in every other State. If each State could naturalize upon one year's residence, when the act of Congress requires five, of what use is the act of Congress, and how does it become a uniform rule? 1 Kent Com. 424. See further on this subject, note 1, page 246.

the equal protection of its laws.<sup>1</sup> The right of citizens of the United States to vote shall not be denied or abridged by the United States or any of the States on account of race, color, or previous condition of servitude.<sup>2</sup>

1. Second clause, sec. 1, of the Fourteenth Amendment to the Federal constitution.

2. Sec. 1, Fifteenth Amendment to the Federal constitution.

Sovereignty, for protection of the rights of life and personal liberty within the respective States, rests alone with the States. The Fourteenth Amendment to the Constitution of the United States prohibits a State from depriving any person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the law, but it adds nothing to the rights of one citizen as against another. *United States v. Cruikshanks*, 92 U. S. 542.

The United States and State governments are distinct from each other, and each has citizens of its own who owe it allegiance, and whose rights within its jurisdiction it must protect. The right of citizenship under the United States government is different from that under the State, and *vice versa*. *Slaughter-house Cases*, 16 Wall. (U. S.) 36.

The Fourteenth Amendment to the Federal constitution secures to the emancipated race all the rights that any race enjoys in the jurisdiction of the United States. It gives protection of the United States in the enjoyment of such rights whenever they should be denied by any of the States. The amendment gave citizenship and its privileges to persons of color, and denied to the State the power to withhold from them its protection. It confers the right to exemption from unfriendly legislation against the colored race. Any State statute which denies to colored citizens the right and privileges of participating in the administration of the law as jurors, because of their color, though qualified in other respects, is a discrimination which is forbidden by the amendment. *Strander v. W. Virginia*, 100 U. S. 303.

The act of Congress (18 Stat. part iii. 336) says no citizen shall be excluded from jury duty on account of race, color, or previous condition of servitude, which statute is sustained by the Thirteenth and the Fourteenth Amendments.

The Fifteenth Amendment forbids the States or the United States from giving preferences to one citizen of the United States over another on ac-

count of race, color, or previous condition of servitude. Before its adoption a State could exclude citizens of the United States from voting on account of race, color, or previous condition of servitude. If citizens of one race have certain qualifications, are permitted to vote, then if another race have the same qualifications they must be allowed to vote. The Fifteenth Amendment does not confer the right of suffrage, but invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and empowers Congress to enforce that right by appropriate legislation. Congress can punish only when there is a wrongful refusal to receive the vote of a qualified elector at such election because of his race, color, or previous condition of servitude. This amendment has invested the citizens of the United States with a new constitutional right, which is exemption from the discrimination in the exercise of the elective franchise, on account of race, etc. The right to vote in the States comes from the States, but the right from the prohibited discrimination comes from the United States. *U. S. v. Reese*, 92 U. S. 214; *Minor v. Happersett*, 21 Wall. U. S. 162.

A trial by jury in suits at common law pending in State courts is not a privilege or immunity of national citizenship which the States are forbidden to abridge by the Fourteenth Amendment. *Walker v. Sauvinet*, 92 U. S. 90.

A mixed jury in a particular case is not essential to the equal protection of the laws. This is a right to which any colored man is entitled—that in the selection of jurors to pass upon life and liberty there shall be no exclusion of race, and no discrimination against him because of his color. But a colored person has no right to have a jury composed of colored men exclusively. *Virginia v. Rives*, 100 U. S. 313.

There is a distinction between local rights of citizenship within a State and citizenship of the United States. United States citizenship can be conferred only by United States naturalization laws. But each State, in the exercise of its local and reserved sovereignty, may place foreigners or other persons on a footing

**5. Rights of Citizens of States, under the United States Constitution, in other States than that of their Domicile.**—The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.<sup>1</sup>

with its own citizens as to political rights and privileges to be enjoyed within its own dominions. But State regulations do not make the person on whom the right is conferred a citizen of the United States, entitled to the privileges and immunities of citizens of other States. *Dred Scott v. Sandford*, 19 How. (U. S.) 393.

In some of the States, aliens, after having declared their intentions to become citizens are allowed to vote as citizens. *Cooley's Const. Lim.* (4th Ed.) 753.

These States, by conferring on aliens the right to vote, give them an equal voice with every citizen of the United States. *Ex parte Wehlitz*, 16 Wis. 443; *Dred Scott v. Sandford*, 19 How. (U. S.) 393.

The right to vote, however, is not a necessary incident of citizenship. *Minor v. Happersett*, 21 Wall. (U. S.) 162; *Robinson's Case*, 131 Mass. 376.

Each State has the right to prescribe the qualifications of its voters. Naturalization does not confer on the individual naturalized the right to vote. The qualifications which an elector is required to have, in congressional election, depend entirely on the laws of the State in which the elective franchise is exercised, and is purely dependent upon the municipal regulations of the State. It is not necessary to determine whether the voter is a citizen of the United States. *Spragin's v. Houghton*, 2 Scam. (3 Ill.) 377.

An alien otherwise qualified may vote at elections of borough officers in *Pittsburg*. *Stewart v. Foster*, 2 Binney (Pa.), 120.

Judge Sharswood says: "It is a common error to connect the elective franchise inseparably with citizenship, as if elector and citizen were convertible terms. In regard to the persons who shall exercise this franchise in each State, it is determined entirely by the constitution and laws of the State. They may confer the privilege on aliens, negroes, Indians, women, and children. Even in regard to the choice of representatives in Congress and electors of president of the United States, the Federal constitution leaves the matter entirely in the hands of the State." 1 Sharswood's Bl. Com. 376, note.

The provisions of the Illinois consti-

tution of 1848 allowed all the white male inhabitants, including aliens, to vote on equality with the citizens, provided they were residents. Art. 6. sec. 1.

To be a citizen of a State, the person must have all the requirements to the exercise of any civil or political rights which are established by the State constitution and laws in regard to its citizens. If a property qualification or a period of residence is required in order to vote, it must be fulfilled. *Murray v. McCarty*, 2 Munf. (Va.) 398.

1. "Under this clause the citizen of any State is to be regarded, for the purpose of holding, enjoying, devising, or inheriting real estate in any other, as a native thereof." *Leading Cases of Real Prop.* 494.

Under this provision the citizens of all other States have the right to go into any State and carry on business; to hold property and be protected like the citizens in their rights; the right to enforce personal privileges, and to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same State are not subject to. *Corfield v. Coryell*, 4 Wash. C. C. 380; *Campbell v. Morris*, 3 H. & McH. (Md.) 554; *Crandall v. State*, 10 Conn. 343; *Oliver v. Mills*, 11 Allen (Mass.), 281. There are, however, many rights and privileges which depend upon actual residence, such as the right to vote, to have the benefit of the exemption laws, to take fish in the waters of the State, and the like. *Cooley's Const. Lim.* (4th Ed.) 498.

The State of Virginia can prohibit the citizens of other States from planting oysters in a stream in that State where the tide ebbs and flows. The right can be granted to its own citizens exclusively. Such a right is not a privilege or immunity of general but of special citizenship. It does not belong of right to the citizens of all free governments, but only to the citizens of Virginia. They own it by citizenship and domicile united. *McCready v. Virginia*, 94 U. S. 391.

A corporation aggregate is not a citizen within the meaning of the clause of the United States constitution which declares "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." *Ducat v. City, etc.*, 48 Ill. 172; *Paul v. Virginia*,

8 Wall. (U. S.) 168; *Bank of U. S. v. Earle*, 13 Pet. (U. S.) 519.

"Immunities" and "privileges" do not mean the right to hold office or to vote. They mean that all citizens of the United States shall have the right to acquire property and hold it, and this property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected. That this property shall not be subject to any burdens or taxes not imposed on the property of citizens of the State. *Campbell v. Morris*, 3 H. & McH. (Md.) 554; *Wiley v. Parmer*, 14 Ala. 627; *Oliver v. Mills*, 11 Allen (Mass.) 268; *People v. Thurber*, 13 Ill. 554; *Cincinnati, etc., Insurance Co. v. Rosenthal*, 55 Ill. 85; *Manufacturing Co. v. Aetna Ins. Co.*, 2 Paine (C. C.), 501.

As to these rights of citizens of the several States, see *United States v. Cruikshanks*, 92 U. S. 542; *Paul v. Hazleton*, 37 N. J. L. 106; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Murray v. McCarty*, 2 Munf. (Va.) 393; *Bradwell v. State*, 16 Wall. (U. S.) 130; *Lemmon v. People*, 26 Barb. (N. Y.) 270; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 71; *Amy v. Smith*, 1 Litt. (Ky.) 326; *Sears v. Commissioners, etc.*, 36 Ind. 267; *Crandall v. State*, 10 Conn. 340; *Fire Department v. Helfenstein*, 16 Wis. 142; *Com. v. Towles*, 5 Leigh (Va.), 743; *Haney v. Marshall*, 9 Md. 194; *Ins. Co. v. Com.*, 5 Bush (Ky.), 68; *Slaughter v. Com.*, 13 Gratt. (Va.) 767; *State v. Midbury*, 3 R. I. 138; *People v. Coleman*, 4 Cal. 46; *Butler v. Farnsworth*, 4 Wash. C. C. 101; 4 s. c., N. E. Rep. (Ind.) 160; *License Cases*, 5 How. (U. S.) 582; *Thorpe v. Railroad Co.*, 27 Vt. 149.

A State cannot impose, for the privilege of doing business, a greater license tax upon non-residents than upon residents. *Ward v. Maryland*, 12 Wall. (U. S.) 418.

A law imposing a license fee upon drummers for selling imported goods, which is not required of agents selling goods manufactured within the State, is invalid. *Webber v. Virginia*, 103 U. S. 344; *Welton v. Missouri*, 91 U. S. 275; *New Orleans v. Boat Co.*, 33 La. Ann. 647; *Higgins v. Lime*, 130 Mass. 1; *Robbins v. Taxing District, etc.*, 19 Chicago Leg. News (U. S. S. C.), 217, March 19, 1887. This last case involved these facts: There was in force a statute of Tennessee in the taxing district of Shelby county (formerly city of Memphis), which imposed on all drummers and others in like business outside of the

State a license for selling merchandise, etc., within said district. Sabine Robbins, of Ohio, was fined for selling in this district without a license. He appealed to the State supreme court, which sustained the decision of the lower court. Then he carried the case to the United States supreme court, which held the law unconstitutional. The court held that this law of Tennessee was an attempt to regulate commerce among the States, that interstate commerce in the United States must be regulated by one system, and not by a multitude of State regulations. They hold that the constitution of the United States gives Congress the exclusive power over interstate commerce whenever the subjects of it are national in their character or admit of one uniform system of regulation, as was decided in *Cooley v. Board, etc.*, 12 How. (U. S.) 299, and virtually involved in the case of *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, and affirmed in many recent decisions, such as *Brown v. Maryland*, 7 How. (U. S.) 283; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Tax Cases*, 15 Wall. (U. S.) 232; *Henderson v. Mayor, etc.*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *Mobile v. Kimball*, 102 U. S. 691; *Gloucester, etc., v. Pennsylvania*, 114 U. S. 106; *Wabash R. Co. v. Illinois*, 118 U. S. 557.

Where the power of Congress is exclusive, but fails to legislate in this regard, the subject shall be free from restrictions or impositions, and the States must not act in this matter except as to local concerns, and any legislation by the States otherwise is repugnant to such freedom. In confirmation of this the following cases are in point: *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Passenger Cases*, 7 How. (U. S.) 283; *Tax Cases*, 15 Wall. (U. S.) 232; *Railroad Co. v. Husen*, 95 U. S. 465; *Welton v. Missouri*, 91 U. S. 275; *County, etc., v. Kimball*, 102 U. S. 691; *Brown v. Houston*, 114 U. S. 622; *Walling v. Michigan*, 116 U. S. 446; *Pickard v. Pullman, etc.*, 117 U. S. 34; *Wabash R. Co. v. Illinois*, 118 U. S. 557.

The State can, by virtue of its police power, provide for the security of the lives, limbs, health, and comfort of its citizens and the protection of their property. It can provide for the internal regulation of its domestic affairs, such as the regulation of highways, canals, railroads, and other commercial facilities when they do not affect interstate affairs. A State can impose taxes on all property within its limits, but it cannot impose taxes upon persons passing through the

**6. Property Rights as Affected by Citizenship** (See also notes under section 5, *ante*.)—Every citizen of the United States is capable of holding and acquiring title to land by purchase, provided he is under no disability so he cannot contract, and all citizens may take by descent or devise.<sup>1</sup> An alien cannot acquire title to real property by descent, or by other mere operation of law.<sup>2</sup>

This common-law rule as to aliens has been greatly modified or abolished by the several States.<sup>3</sup>

State, or coming into it temporarily, especially if connected with foreign or interstate commerce. It cannot impose taxes upon property imported from abroad or from another State, which has not become a part of the mass of property therein. It cannot discriminate against property from other States. The business of a drummer is not a privilege. The people of this country are citizens of the United States as well as of individual States, and have rights under the constitution of the United States independent of the individual States, and free from any molestation from them. When the goods are imported into the State and become a portion of the great mass of property, then the State can impose a tax on them in like manner as other goods of similar character are taxed. *Brown v. Houston*, 114 U. S. 622; *Machine Co. v. Gage*, 100 U. S. 676. But the sale of such goods cannot be taxed before they are imported into the State, as that would be taxing interstate commerce itself. Interstate commerce cannot be taxed even if the State should tax in like manner its domestic commerce. *Tax Cases*, 15 Wall. (U. S.) 232. Negotiating for the sale of goods which are in another State for the purpose of importing them into the State where the sale is made is interstate commerce.

If selling goods by sample by drummers is injurious to the local affairs of the individual States, Congress has the exclusive power to provide a remedy.

"The confusion into which the commerce of the country would be thrown by being subject to State legislation on this subject would be but a repetition of the disorder which prevailed under the Articles of Confederation." Three of the justices dissent from this decision, and hold that the license fee was demanded for the privilege of selling goods by sample within the State; that the fee is exacted from all alike who do that kind of business unless they have "a license house of business" in the said district, thus showing no discrimination between its own citizens or citizens of other States. *Osborne v. Mobile*, 16 Wall. (U. S.) 481.

The supreme court of Tennessee decided that the license is only required of "drummers and all persons not having a licensed house of business in the taxing district offering for sale or selling goods, wares, or merchandise therein by sample," and that this means nothing more than that any person who sells by sample shall pay the tax, which is the correct interpretation. "It will be time enough to consider whether a non-resident can be taxed for merely soliciting orders without having samples when such a case arises. That is not this case." Chief Justice Waite and Justices Field and Gray.

1. 2 *Bouvier's Inst.* No. 1995.

2. *Calvin's Case*, 7 Co. 25 a.

These statutes must be strictly construed, as they are in derogation of the common law. *Spratt v. Spratt*, 4 Pet. (U. S.) 393.

The following is the summary of the law up to January 1, 1887, as to aliens taking by purchase or descent and transmitting by inheritance as a native citizen:

*Alabama*.—Resident alien placed on same footing as a citizen.

*Arkansas*.—Resident aliens have the same rights as to realty as citizens.

*California*.—All restrictions removed, except the alien must make his claim of property within five years of the accrual of his title.

*Colorado*.—Aliens have the same rights as citizens as to realty.

*Connecticut*.—Resident aliens and Frenchmen are given same property rights as citizens.

*Dakota*.—No restrictions as to property rights.

*Delaware*.—No restrictions as to resident aliens, who have made the preliminary oath of citizenship.

*District of Columbia*.—An alien may inherit from a natural citizen such lands as he acquired by deed or will before naturalization.

*Florida*.—No property restrictions imposed on aliens.

*Georgia*.—Aliens, except enemies, have all the rights of citizens as to realty.

*Illinois.*—No property restrictions: aliens are placed on an equal footing with citizens.

*Indiana.*—An alien can acquire title to land by descent or devise. If a non-resident, he can hold land acquired by descent five years after the settlement of the inheritable estate.

*Iowa.*—Aliens may acquire, inherit, hold and dispose of real or personal property, and all distinctions between aliens and citizens in this respect are abolished.

*Kansas.*—Aliens have same property rights as citizens.

*Kentucky.*—Aliens, not enemies, after the preliminary oath of citizenship, hold as citizens do.

*Louisiana.*—No law forbidding aliens holding and transmitting real estate.

*Maine.*—No restrictions.

*Maryland.*—No restrictions except to alien enemies.

*Massachusetts.*—Aliens may take, hold, and transmit real estate as citizens.

*Michigan.*—Aliens have the same rights to realty as citizens.

*Minnesota.*—An alien has same rights as citizens as to realty.

*Mississippi.*—No restrictions.

*Missouri.*—No restrictions.

*Montana.*—No law on the subject.

*Nebraska.*—No distinction between aliens and citizens.

*Nevada.*—No restrictions except as to Chinese.

*New Hampshire.*—No restriction to resident aliens.

*New Jersey.*—No restriction upon alien friend.

*New Mexico.*—No restrictions.

*New York.*—By act of 1874, an alien is enabled to take land by descent from alien citizen. Devises to aliens are void. But a resident alien after filing with the Secretary of State a deposition declaring his intention of becoming a citizen may take, hold, sell, and mortgage real estate as if he was a citizen, for six years, but not to devise or lease real estate until he is admitted to citizenship. The devisee or grantee of the realty of a resident alien who has died after the devise or grant may hold same, whether citizen or alien; but if an alien, he must file a declaration of his intention of becoming a citizen. Letters testamentary or of administration cannot be granted to non-resident aliens.

*North Carolina.*—No restrictions.

*Ohio.*—An alien can inherit and transmit as a citizen.

*Oregon.*—No restrictions imposed.

*Pennsylvania.*—Aliens, except enemies,

may purchase land not exceeding five thousand acres, nor in net annual income twenty thousand dollars, the same as citizens. Aliens may take, hold, without limit, realty acquired by devise or descent. Titles derived through aliens prior to April 26, 1869, were confirmed by an act of that date. By act of 1881 conveyances of realty liable to escheat before inquisition has been taken against the same are indefeasible in the grantee as to any right of escheat in the State.

*Rhode Island.*—No restriction as to aliens holding realty.

*South Carolina.*—No distinction between citizens and aliens as to the purchase, enjoyment, or descent of property.

*Tennessee.*—Aliens have the same rights as citizens.

*Texas.*—Aliens may take and hold real or personal property by devise or descent, in the same manner in which citizens of the United States may take and hold real or personal property by devise or descent within the country of such aliens.

*Utah.*—Aliens resident take by descent and inherit as citizens. Non-resident aliens must claim an inheritance in the estate of the deceased within five years after the death of the person from whom he claims succession.

*Vermont.*—No prohibition against aliens holding realty. No law for the forfeiture of aliens' estates; still the power exists as a right of sovereignty, but has never been exercised.

*Virginia.*—Aliens, except enemies, have the same property rights as citizens.

*Washington.*—All aliens [except Chinese] have the same property rights as citizens.

*West Virginia.*—Aliens, except enemies, have the same property rights.

*Wisconsin.*—No restrictions as to property rights.

It has been argued that fixing the status of the alien as to property rights belonged to the United States, because they have exclusive control of the relations between this country and foreign nations. *State v. Railroad Co.*, 25 Vt. 433.

But this right conferred by States upon aliens to hold, by purchase, descent, and devise, realty, does not confer the right of citizenship. *Montgomery v. Dorion*, 7 N. H. 475; *Etheridge v. Doe ex dem. of Malempor*, 18 Ala 565.

The power of the United States to provide by treaty for rights and privileges to be allowed to aliens, with regard to realty, has been recognized. *Hauenstein v. Lynham*, 100 U. S. 483; *People v. Gerke*, 5 Cal. 381. But this right was

**7. Expatriation.**—Expatriation is renouncing one's allegiance to his native country.<sup>1</sup> Expatriation is forsaking one's country, with a renunciation of his allegiance, with the intention of becoming a permanent resident and citizen of another country.<sup>2</sup>

**CITY.** (See also MUNICIPAL CORPORATION.)—In *England*, a city was an incorporated town which was or had been the see of a bishop.

In the *United States* this definition has never been applicable, and a city may be defined as an incorporated town, invested by the sovereign power with the highest grade of municipal duties and privileges, and having the power to legislate upon, decide, and control local and subordinate matters pertaining to its respective locality.<sup>3</sup>

**CIVIL.**—Pertaining to a city or State, or to a citizen in his relations to his fellow-citizens or to the State, as *civil* rights, *civil* government.<sup>4</sup> Pertaining to an organized community; reduced to

questioned in *Siemssen v. Bofer*, 6 Cal. 250.

The policy adopted by the United States in this respect has been to stipulate that aliens, subjects of the sovereignty with whom the treaty is made, shall be allowed to sell their lands, and within a certain time be allowed to withdraw the proceeds of such sales. When the time designated has expired under the treaty, if the property remains unsold, the State may take advantage of the forfeiture. *Yeaker's, etc., v. Yeaker's, etc.*, 4 Met. (Ky.) 33.

1. Webster's Dict.

2. Wharton's L. Dict.

The doctrine of the common law was that natural-born subjects owe an allegiance to the sovereign which they cannot absolve; that natural allegiance was primitive and intrinsic, perpetual and indelible, and cannot be divested without the consent of the prince to whom it was first due. 1 Bl. Com. 370; 1 Hale's P. C. 68; Foster's Cr. L. 17, 59, 184. At one time the United States held the same doctrine. *Murray v. Betsey*, 2 Cranch (U. S.), 64; *Talbot v. Janson*, 3 Dall. (Pa.) 133; *Shanks v. Dupont*, 3 Pet. (U. S.) 242.

Congress has enacted that expatriation is a natural right of all persons. U. S. Rev. Stat. secs. 1999, 2000, 2001. *Alsberry v. Hawkins*, 9 Dana (Ky.), 178.

A British subject ceases to be such on becoming naturalized in a foreign State. 33 Vict. c. 14, sec. 6.

3. The general principles of law affecting the government of strictly municipal corporations, such as cities, towns, and villages, can best be considered under the title MUNICIPAL CORPORATIONS.

4. The word has a variety of applications; but in almost all one may readily trace the idea of the character, privileges, or peculiarities of the ancient citizen. Thus it is now used in opposition to what is military; again, in contrast with barbarous, uncivilized, or rustic; and in turn as the opposite of that which is ecclesiastical or priestly; and it may designate that which is for the individual in distinction from the government. But in all these uses it presents the citizen as the standard with which the other is compared. Abbott's Dict.

**As Opposed to Criminal in Statute.**—Where a statute required all process upon recognizances in criminal cases to conclude "against the peace and dignity of the commonwealth of Kentucky," and a *scire facias* issued on a recognizance to keep the peace did not so conclude, the omission was held fatal on demurrer. The court say: This is very clearly not a *civil* case, but in our opinion should be considered as embraced by the expression "in all criminal cases" as used in the statute. *Applegate v. Comm.*, 7 B. Mon. (Ky.) 12.

In *Massachusetts*, a complaint by a woman under the bastardy act accusing a man of being the father of her bastard child, though in some respects in the form of a criminal proceeding, was held to be in substance and effect a civil suit. *Wilbur v. Crane*, 13 Pick. (Mass.) 284.

In *New Jersey*, it is held that where in statutes passed at various times from 1798 to 1882 the phrase "every suit of a civil nature at law" was used, the legislature intended not to include actions for statutory penalties. The court says,

**Definition. CIVIL ACTION—CIVIL DAMAGE ACTS. Statutes.**

order; subject to government, as *civil* society.<sup>1</sup> (See also CIVIL RIGHTS; CIVIL DAMAGE ACTS; MUNICIPAL LAW.)

**CIVIL ACTION.**—In the Civil Law.—A personal action which is instituted to compel payment, or the doing of some other thing which is purely civil.<sup>2</sup>

**At Common Law.**—An action which has for its object the recovery of private or civil rights, or compensation for their infraction.<sup>3</sup> (See also ACTION.)

**CIVIL CORPORATION.** See CORPORATION.

**CIVIL DAMAGE ACTS.** See also INTOXICATING LIQUORS.

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*Who has a Right of Action*, 269.

*What Bars the Action*, 270.

*Evidence*, 271.

1. **Statutes.**—In several States statutes have been passed giving to various parties, as husbands, wives, children, parents, guardians, employers, and others who have sustained injury in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of such person, the right of action in his or her name against any person who has, by selling or giving away intoxicating liquors, caused the intoxication in whole or in part; and this right of action is in many States extended against the owners of the premises on which such intoxicating liquors are sold.<sup>4</sup>

2. **Constitutionality.**—These acts have been held to be constitutional; and even the fact that the seller has been licensed to sell intoxicating liquors does not abrogate the right of the State to make him subject to an action for damages resulting from intoxication produced by intoxicating liquor sold or given by him.<sup>5</sup>

While the term *civil* may be applied to the form of litigation in contradistinction to that which is criminal, it may also with propriety be applied to the nature of litigation as growing out of the relations of citizens *inter sese*, rather than their relations to the State. Koch v. Vanderhoof, 9 Atl. Repr. 773; 11 E. Repr. 531.

1. Webster's Dict.

2. Pothier Introd. Gen. aux Cont. 119.

3. Bouvier's Law Dict.

4. See the various statutes.

5. Bedore v. Newton, 54 N. H. 117; Schaler v. State, 49 Ind. 460; Hornling

v. Wendell, 57 Ind. 171; Jackson v. Reeves, 53 Ind. 231; Moran v. Goodwin, 130 Mass. 158; s. c., 39 Am. Rep. 443; Kreiter v. Nichols, 28 Mich. 496; Volans v. Owen, 74 N. Y. 526; s. c., 30 Am. Rep. 337; Baker v. Pope, 2 Hun (N. Y.), 556; Bertholf v. O'Reilly, 74 N. Y. 509; s. c., 30 Am. Rep. 323; Met. Bd. of Excise v. Barrie, 34 N. Y. 657; Phelps v. Racey, 60 N. Y. 11; Franklin v. Schermerhorn, 15 N. Y. Supr. Ct. 112; State v. Ludington, 33 Wis. 107; Wightman v. Devere, 33 Wis. 570; Werner v. Edmiston, 24 Kans. 147; Stanton v. Simpson, 48 Vt. 628.



### 3. Who Liable.—*Dealer Liable for Sales by Agent or Servant.*—

The right of action for damages is not confined to cases where the liquor-dealer made the sale himself, but extends to cases where the sale was made by his agent even against his express orders. And the servant or agent will in such a case also be personally liable.<sup>1</sup>

*Intoxication Produced by Several Sellers.*—It will be no defence to the seller that the intoxication which caused the injury was produced in part by liquor sold by others.<sup>2</sup>

1. *Peterson v. Knoble*, 35 Wis. 80; *Smith v. Reynolds*, 3 Hun (N. Y.), 128; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 475, 478; *Bodge v. Hughes*, 53 N. H. 614; *Barnaby v. Wood*, 50 Ind. 405.

Where the sale was made by the son of the saloon keeper, the latter was held liable. *Worley v. Spurgeon*, 38 Iowa, 465.

A master is liable if his servant, in the course of his master's business, sells intoxicating liquor, after notice requesting the master not to do so, to a person who has the habit of drinking intoxicating liquor to excess, although the master has instructed the servant not to make a sale to such person, and the sale is without the knowledge and consent of the master. *George v. Gobe*, 128 Mass. 289; s. c., 35 Am. Rep. 376; *Keedy v. Howe*, 72 Ill. 133.

Where A, however, sells to B and B to C, and C becomes intoxicated and injures D, D can recover of B, but not of A. *Bush v. Murray*, 66 Me. 472.

There must be proof of the fact that the liquor was obtained with the consent of the seller or his servant. Where the party who became intoxicated was an employee in a brewery, and simply took the liquor without the consent of the owner or his servants, the owner will not be liable. And taking pay for the liquor consumed will not act as a ratification and make it a sale. *Kreiter v. Nichols*, 28 Mich. 496.

2. *Woolheather v. Risley*, 38 Iowa, 486; *Sibila v. Bahnney*, 34 Ohio St. 399, 409; *Hackett v. Smelsley*, 77 Ill. 109; *Roth v. Eppy*, 80 Ill. 283; *Bryant v. Tidgewell*, 133 Mass. 86.

The statute in effect declares the act of producing intoxication a wrong, and makes every one who has contributed to it by furnishing intoxicating liquor a wrongdoer, and liable. *Elshire v. Schuyler*, 15 Neb. 561.

Each person who, by selling, bartering or giving intoxicating liquors, contributed in part to the intoxication causing the injury complained of, is liable to

the full extent of the injury; and all such persons may be joined, or any one may be sued. *Fountain v. Draper*, 49 Ind. 441; *Emory v. Addis*, 71 Ill. 273; *Boyd v. Watt*, 27 Ohio St. 259; *Rose v. Perkins*, 9 Neb. 304; s. c., 31 Am. Rep. 409; *Kearney v. Fitzgerald*, 43 Iowa. 580; *Bodge v. Hughes*, 53 N. H. 614; *Werner v. Edmiston*, 24 Kans. 147, 153. Compare *Jackson v. Brookins*, 5 Hun (N. Y.), 530.

There being evidence tending to prove that the deceased was intoxicated on the fatal day, and it being contended on the part of the defendants that he was not intoxicated, notwithstanding such evidence, because they had not sold him enough liquor to make him intoxicated, *held*, that it was not error on the part of the court to instruct the jury that "it was not necessary on the part of the plaintiffs to prove that the defendants sold all the liquor that may have produced the intoxication," etc., nor to allow counsel for the plaintiffs to urge to the jury that, rather than reject the evidence before them of the intoxication of the deceased, they might presume that he obtained and drank liquor elsewhere which also contributed to his intoxication. *Kerkow v. Bauer*, 15 Neb. 150.

In an action by a wife against two persons for injury to her means of support, resulting from the habitual intoxication of her husband, caused by intoxicating liquors sold and furnished him by the defendants, and where, from the facts found, it appears that the defendants each sold intoxicating liquors to the husband, and that they were in no way connected in business, and that neither of them was in any way interested in the sales made by the other; but that the husband of the plaintiff, during the time in which the sales were made, was habitually intoxicated, and that the sales were made by both defendants with knowledge of this fact, and the sales thus made contributed to keep up said habit. *Held*, that the defendants were jointly liable. *Rantz v. Barnes*, 40 Ohio St. 43.

The rule will be different, however, when the drunkenness complained of does not consist of a mere simple fit of

intoxication, contributed by two or more. In such a case the action is not joint, but several, and each is only liable for the injury produced by his own acts. *Hitchner v. Ehlers*, 44 Iowa, 40; *La France v. Krayner*, 42 Iowa, 143; *Flint v. Gauer*, 66 Iowa, 696; *Ennis v. Shiley*, 47 Iowa, 552; *Engleken v. Webber*, 47 Iowa, 558; *Jewett v. Wanshura*, 43 Iowa, 574.

An instruction that if defendant sold beer to plaintiff's husband, which with beer sold him by others produced "fits of intoxication," he was liable for all the damage caused thereby, was erroneous. The persons furnishing the liquor were not joint wrong-doers, but each was severally liable for the damage caused by his own acts. *Richmond v. Shickler*, 57 Iowa, 486.

In an action under the Civil Damage Act to recover damages to means of support by reason of intoxication, caused by liquors sold continuously during a period of three years, to a person in the habit of becoming intoxicated, the defendant may offer evidence to show that during the same period such person became intoxicated by liquors which he purchased of other persons, and it was for the jury to say whether such sales by others produced independent intoxication or not. *Kirchner v. Myers*, 35 Ohio St. 85; s. c., 35 Am. Rep. 598. Compare *Brannon v. Silvernail*, 81 Ill. 434.

Where a joint action will not lie against several sellers, it follows that a settlement with one will not bar an action against another. *Jewett v. Wanshura*, 43 Iowa, 574.

Where the damages complained of arise from incapacity for business and loss of estate caused by habitual intoxication, and it becomes impossible to separate the damages caused by others from those caused by the defendant, the latter is liable for all such damages, if the natural and probable consequences of his illegal acts were to cause such injury. *Boyd v. Watt*, 27 Ohio St. 259; *Kearney v. Fitzgerald*, 43 Iowa, 80; *Steele v. Thompson*, 42 Mich. 594. Compare *Huggins v. Kavanagh* 52 Iowa, 368.

In *Boyd v. Watt*, 27 Ohio St. 259, the court sustained the following propositions: 1. If the defendant was the sole cause of the intoxication, he was liable for all the damages resulting. 2. If some of the injury was caused by others, he was not liable for damages resulting from their illegal sales. 3. If the damages could not be separated, then he was liable for all injuries to which he had contributed by his illegal sales.

In such an action, where the husband

is an habitual drunkard, and has been under the influence of liquor most of the time for two years before the action was commenced, the refusal of an instruction that "if the jury find from the evidence the defendant sold plaintiff's husband intoxicating liquors at a time when he was sober, and that at such times he did not become intoxicated, they should not consider such sales in determining the amount of plaintiff's recovery," is not error. It is enough if the liquors sold by the defendant were the direct cause, either in whole or in part, of the intoxication. *Jockers v. Borgman*, 29 Kans. 109; s. c., 44 Am. Rep. 625.

Where a person while drunk broke his leg at about five or six o'clock in the afternoon, and there was no evidence to show that he had been drinking in defendant's saloon after ten or eleven o'clock in the forenoon, it was held error to refuse defendant to show how long it usually takes an intoxicated person to become sober again. Any evidence tending to show that the person had become sober before the accident, or was made drunk by liquor obtained from some one other than defendant, is admissible and proper. If the person intoxicated had recovered from the effects of the liquor sold him by defendant, and was sober at the time of breaking his leg, or if he became sober and then got drunk on liquor procured from others before the accident, then the defendant will not be liable. *Brannon v. Adams*, 76 Ill. 331; *Barks v. Woodruff*, 12 Ill. App. 96.

But in such a case it will be error to instruct the jury that if they find that there was time between the drinking and the act which produced the injury for the intoxicated person to become sober, the seller was not liable. The proper question to be considered was whether the drinker had in fact so recovered. *King v. Haley*, 86 Ill. 106.

Although the several parties may be individually sued for damages, there can be only one satisfaction for the injury. *Kearney v. Fitzgerald*, 43 Iowa, 580; *Putney v. O'Brien*, 53 Iowa, 117; *Emory v. Addis*, 71 Ill. 273.

But where separate actions were brought against different defendants for alleged injuries to a wife's "means of support" from the intoxication of her husband, the petitions in form being identical, it was held that the fact that the plaintiff in one case received a sum of money in satisfaction and discharge of her cause of action was no defence in the other case, if in fact the intoxications were separate and distinct. *Miller v.*

**Liability of Owner of Premises.**—An action for damages will lie not only against the seller of intoxicating liquors, but also against the owner or lessee of the premises on which the sale was made, provided the owner or lessee had knowledge of the fact that the premises were used for the sale of intoxicating liquors.<sup>1</sup>

Patterson, 31 Ohio St. 419. See also Jackson v. Noble, 54 Iowa, 641.

Evidence that the plaintiff had commenced another similar action against another liquor-dealer for damages accruing during the same period is inadmissible. Ward v. Thompson, 48 Iowa, 588.

1. Bertholf v. O'Reilly, 74 N. Y. 509; s. c., 30 Am. Rep. 323; Granger v. Knipper, 2 Cin. (Ohio) 480; Bowers v. Pomeroy, 21 Ohio St. 184; English v. Beard, 51 Ind. 489; McGee v. McCann, 69 Me. 79; Schroder v. Crawford, 94 Ill. 357; Hackett v. Smelsley, 77 Ill. 109.

It is immaterial whether the sale is made by the liquor-seller himself, or his bar-tender or agent, against his instructions and without his knowledge or authority. Smith v. Reynolds, 15 N. Y. Supr. Ct. 128; Keedy v. Howe, 72 Ill. 133.

The action against the owner or lessee of the premises may be brought against him alone, or against him and the seller jointly. La France v. Krayner, 42 Iowa, 143; Jackson v. Brookins, 5 Hun (N. Y.), 530.

In Buckham v. Grape, 65 Iowa, 535, it was held that in such cases the property owner should be made a party to the original action, so as to make the judgment binding upon him.

The provision of the statute which holds the owner of real estate liable for sales of intoxicating liquors does not apply to the owner of property who himself sells liquor therein, but applies to owners who permit others to occupy and use the property for such purposes, and in such case the complaint must show that the owner had knowledge that intoxicating liquors were to be or had been sold therein. Barnaby v. Wood, 50 Ind. 405.

A married woman who owns a building in which intoxicating liquors are sold by her husband, and who has knowledge that such business is carried on by him, is liable under said act. A hotel was owned by defendant M., the wife of I. When she took title, which was before the passage of said act, she and her husband went into possession. She had general charge of the house, except of the bar, and knew that intoxicating liquors were there sold. Held, that the fact that possession was

taken before the act was passed did not exempt her from liability; that the presumption was that the possession originally taken was continued in view of the laws of the State thereafter enacted; and that the question whether M. had given permission for the occupation of the building, with knowledge that liquors were to be sold, was properly submitted to the jury. Mead v. Stratton, 87 N. Y. 493; s. c., 41 Am. Rep. 386.

In order to the establishment of a lien upon the building in which intoxicating liquors are unlawfully sold, the consent of the owner to the unlawful sales need not be shown by any positive and affirmative act, but may be inferred from circumstances, and from knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection. Loan v. Etzel, 62 Iowa, 429; Putney v. O'Brien, 53 Iowa, 117.

To make the owner of the premises liable, it must be proved that liquor was sold and the sale took place with his knowledge and consent. A failure to find out the facts and mere inactivity to prevent such sales is not sufficient. State v. Abrahams, 6 Iowa, 117; Myers v. Kirt, 57 Iowa, 421; Cobleigh v. McBride, 45 Iowa, 116; State v. Shanahan, 54 N. H. 437.

The owner of the premises is entitled to a trial by jury, to decide whether he consented to or had knowledge of the use of the premises for the sale of liquor. Loan v. Hiney, 53 Iowa, 89.

The statutes generally provide that where the lessor of the premises on which the liquor is unlawfully sold acquires knowledge of this fact, he may maintain an action for forcible entry and detainer, and the court may restore possession of the premises, and it is not necessary that such forfeiture should have been first declared by a court of superior jurisdiction. When the landlord seeks to avoid a lease on account of the sale of intoxicating liquor, the seller cannot prevent such avoidance by showing a payment of rent in advance for the entire term. McGarvey v. Puckett, 27 Ohio St. 669; Justice v. Lowe, 26 Ohio St. 375.

But the provision of a statute which declares certain contracts void, does not

**3. Injuries for which Damages may be Claimed.—*Injuries to the Person.***—The statutes generally give a right of action for three different kinds of injuries, viz., injury to the person, to property, and to means of support. Where damages are claimed for injuries to the person, actual injury must be proved. Where no actual violence by the husband, no physical injury to the person or health of the wife, is shown, she cannot recover. Mental anguish, disgrace, loss of society or companionship, are not sufficient.<sup>1</sup>

apply to a contract whereby the lessor in good faith rented or leased his premises, and without any knowledge on his part that the rented or leased property should be used in whole or in part for the sale of intoxicating liquors. *Zink v. Grant*, 25 Ohio St. 352.

Where the liquor has been unlawfully sold on part of the leased premises, it works a forfeiture of the lease of the whole. *McGarvey v. Puckett*, 27 Ohio St. 669; *People v. Bennett*, 21 N. Y. Supr. Ct. 63.

A provision in a statute which declares that real estate not owned by the judgment debtor shall be held liable for the payment of the judgment, is not designed to create a lien on such property, but to authorize it to be subjected to the payment of the judgment in a suit against the owner instituted for the purpose. Until the commencement of such suit the judgment creditor acquires no interest in the property, and if before the suit is brought the property has been sold and conveyed, it cannot be subjected to the payment of the judgment. *Bellinger v. Griffith*, 23 Ohio St. 619.

In an action by a woman for damages occasioned by the unlawful sale of intoxicating liquors to her husband, where the owner of the saloon building was not made a party, and it was not sought to create a lien upon the building for the damages, a description of the saloon property in the petition was mere surplusage, and plaintiff was not limited to the proof of damages occasioned by sales made in the building so described. *Gustafson v. Wind*, 62 Iowa, 281.

In an action for damages against the liquor-seller and the owner of the property on which the liquor is sold for damages done by the intoxicated party, it is not necessary that the intoxicated party should be made a party to the suit. *English v. Beard*, 51 Ind. 489; *Mitchell v. Ratts*, 57 Ind. 259.

1. *Mulford v. Clewell*, 21 Ohio St. 191; *Wightman v. Devere*, 33 Wis. 570; *Jackson v. Noble*, 54 Iowa, 641; *Koerner v. Oberly*, 56 Ind. 234; s. c., 26 Am. Rep. 34; *Schlusser v. State*, 55 Ind. 82; *Fentz*

*v. Meadows*, 72 Ill. 540; *Keedy v. Howe*, 72 Ill. 133; *Kellerman v. Arnold*, 71 Ill. 632; *Meidel v. Anthias*, 76 Ill. 241; *Freese v. Tripp*, 70 Ill. 496; *Brautigam v. White*, 73 Ill. 561. See also *Kerkow v. Bauer*, 15 Neb. 150.

Abuse of the wife by cursing her while under the influence of liquor is not an element of damages; but there must be actual personal violence. *Albrecht v. Walker*, 73 Ill. 69; *Welch v. Jugenheimer*, 56 Iowa, 11.

Where an intoxicated husband called his wife a prostitute and threatened to kill her, held, in the absence of proof that his conduct impaired her health, not to constitute a ground for the recovery of actual damages in her action against the liquor seller, and evidence thereof to be inadmissible as a ground of exemplary damages. *Calloway v. Laydon*, 47 Iowa, 456; s. c., 29 Am. Rep. 489.

Damages are recoverable at the suit of a wife against a saloon-keeper for selling liquor to her husband against her protest when he knows the husband to be an habitual drunkard, if the husband while drunken with the liquor so sold him commits an assault and battery on the wife. *Wilson v. Booth*, 57 Mich. 249.

So where an intoxicated person, in flourishing a pistol, shot and wounded another, the latter was held to have a cause of action against the persons causing the intoxication by selling spirituous liquors to the person doing the injury. *King v. Haley*, 86 Ill. 106; s. c., 29 Am. Rep. 14. See *Schafer v. State*, 49 Ind. 460.

An action for damages may be maintained by one prevented from following his usual occupation by being beaten and wounded by an intoxicated person against the one who sold the liquor which caused the intoxication, and against the owner of the premises on which the liquor was sold. *English v. Beard*, 51 Ind. 489.

Trespass for assault and battery may be maintained against four persons who separately sold liquor to one B. in violation of law, to recover damages occasioned by an injury to the person of the plaintiff done by B. while in a state of

*Injury to Property.*—Where a person squanders money or chattels, or destroys or injures other property, belonging to his wife or any other party, while intoxicated, an action for damages by the owner of the property will lie against the party who sold the liquor which produced the intoxication to the amount of the value of the property destroyed, or the amount of the injury.<sup>1</sup>

*Injury to Means of Support.*—Wherever any one is legally under obligation to support another, as a husband his wife or parents their children, the statutes provide that if in consequence of intoxication or habitual drunkenness of the husband or parent those dependent on them for support are injured in such support the persons so injured shall have a right to an action for damages against the seller of the liquor producing the intoxication or habitual drunkenness.<sup>2</sup>

intoxication produced by liquor so furnished to him. *Bodge v. Hughes*, 53 N. H. 614.

Where an intoxicated husband, without actual violence, but by threatening and abusive language and intimidation, drove his wife out of the house and kept her out for several hours, *held*, that there was a physical injury and suffering sufficient to sustain an action under the statute. *Peterson v. Knoble*, 35 Wis. 80; *Ward v. Thompson*, 48 Iowa, 588.

1. *Mulford v. Clewell*, 21 Ohio St. 197; *Woolheather v. Risley*, 38 Iowa, 486; *McEvoy v. Humphrey*, 77 Ill. 388.

So may the amount paid for the liquor be recovered; and this is specially the case where sales extending over a period of time have produced habits of habitual drunkenness. The right of recovery extends to the executors or administrators of the estate of a deceased habitual drunkard. *Kilburn v. Coc*, 48 How. Pr. (N. Y.) 144; *Ward v. Thompson*, 48 Iowa, 588. *Compare Friend v. Dunks*, 37 Mich. 25; s. c., 39 Mich. 733.

In an action under a statute for injury to her property a wife may recover against the vendor of the liquor by reason of the sale of her chattels by her husband without first demanding the chattels of the vendee or notifying him that she claims them to be her property. *Mulford v. Clewell*, 21 Ohio St. 191.

It will be sufficient that the property for which a wife claims damages is hers as between herself and her husband, no matter what it would have been as between herself and her husband's creditors. So where a wife has a horse which she claims and uses as her own, with the knowledge of her husband, and he sells it and squanders the proceeds, she may recover the value. *Woolheather v. Risley*, 38 Iowa, 486.

Where with plaintiff's knowledge and consent his son took his horse and buggy, apparently with the intention to visit a friend at a place some four miles away, and instead went to defendant's saloon near by, where he purchased and drank whiskey several times at the bar, and then drove to a neighboring village and drank again, and returned to the first saloon, drinking again on his return, and became intoxicated, and the horse died soon after he returned home, the jury found that the horse died from overdriving by the plaintiff's son, and that his treatment of the horse was caused by his intoxication. *Held*, that the plaintiff could recover the value of the horse from defendant. *Bertholf v. O'Reilly*, 74 N. Y. 509; s. c., 30 Am. Rep. 323.

An unlicensed liquor-dealer furnished on Sunday intoxicating liquor to A. until he was helpless and unconscious, and in that condition placed him in his sleigh, to which was attached a quiet horse of the plaintiff which A. had in use. An accident, induced by the inability of A. to manage the horse, caused the latter to run away, whereby the horse was killed. *Held*, that the liquor-seller was liable for the value of the horse. *Dunlap v. Wagner*, 85 Ind. 529; s. c., 44 Am. Rep. 42.

2. *Hill v. Berry*, 75 N. Y. 229; *Volans v. Owen*, 74 N. Y. 526; s. c., 30 Am. Rep. 337; *Elshire v. Schuyler*, 15 Neb. 561.

The injury to the means of support must be proved, and such proof is a question for the jury. *Volans v. Owen*, 74 N. Y. 526; s. c., 30 Am. Rep. 337; *Stevens v. Cheney*, 36 Hun (N. Y.), 1; *Decker v. Stauring*, 57 How. Pr. (N. Y.) 495.

In *Wightman v. Devere*, 33 Wis. 570, 578, the court said: "It may not be easy to give a precise definition of the phrase 'means of support,' but we suppose it

relates to whatever the husband might have earned, or made by his labor and attention to business, and contributed to the support of his family."

The phrase "means of support" in its general sense embraces all those resources from which the necessities and comforts of living are or may be supplied, such as lands, goods, salaries, wages, and other sources of income. In its limited sense it signifies any resource from which the wants of life may be supplied. *Schneider v. Hosier*, 21 Ohio St. 98, 112.

Ordinary labor is a "means of support." A wife has an interest in the labor of her husband and its proceeds, especially when that labor is necessary for her support, and consequently also in his capacity to labor. Any deprivation of her rights or interest in the proceeds of his labor, or his capacity to labor, is an injury to her in her means of support. *Schneider v. Hosier*, 21 Ohio St. 98, 113.

If, upon the trial in such a suit, the death of the plaintiff's husband is shown, and that his death was occasioned by intoxication produced by liquors sold or given to him by the defendant, in the absence of any proof to the contrary the jury will be warranted in inferring therefrom an injury to the plaintiff's means of support. That will be sufficient to shift the burden of proof, and entitle the plaintiff to at least nominal damages. *Flynn v. Fogarty*, 106 Ill. 263.

Evidence that the intoxication of the husband led to the loss of his situation and inability to get other employment is admissible in a suit by his wife against a liquor-dealer who sold him the liquor causing the intoxication. *Roth v. Eppy*, 80 Ill. 283.

The liability of the seller in actions under these statutes for injury in the "means of support" is not confined to cases of injury resulting from drunkenness immediately and during its continuance, but extends as well to cases where the injury results from insanity, sickness, or inability induced by intoxication. *Mulford v. Clewell*, 21 Ohio St. 191, 197.

In such an action it is competent to offer evidence that the husband is an habitual drunkard, and the jury may consider this fact among others, if the wife has been injured in her means of support by the defendant in selling or giving to her husband intoxicating liquors. Where evidence had been introduced tending to prove that the husband had no means of support for his family, excepting his own labor; that owing to his

intoxication he had neglected his business and did not support his wife, as he ought to have done, and could have done if he had been sober, and that she had become an object of public charity,—an instruction that the wife was entitled to recover for any actual damage to her means of support, caused in whole or in part by liquor sold to her husband by the defendant, causing his intoxication, was based upon sufficient evidence. *Jockers v. Borgman*, 29 Kan. 109, s. c., 44 Am. Rep. 625.

In order to sustain her action under the statutes for injury to her "means of support" it is not necessary for the wife to show that she has been at any time in whole or in part without present means of support. It is enough that the means of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. And the rule of damage in such case should be, not the amount of loss occasioned to the husband's estate, but the diminution, if any, thereby resulting to her means of present and future support. *Mulford v. Clewell*, 21 Ohio St. 191, 197; *Woolheather v. Risley*, 38 Iowa, 486; *Confrey v. Stark*, 73 Ill. 187; *McCann v. Roach*, 81 Ill. 213.

Railroad contractors had in their employ a number of hired hands with teams, wagons, and other implements. Part of them became drunk, unable themselves to work, and preventing the other hands and teams from working to advantage. *Held*, that they could recover from the one who sold the liquor damages for injury to their property and means of support. *Duroy v. Blinn*, 11 Ohio St. 331.

In *Hackett v. Smelsley*, 77 Ill. 109, the court held that "the right of support is not limited to the supplying of the bare necessities of life, but embraces comforts that are suitable to the wife's situation and the husband's condition in life. Because the wife may be able-bodied and can earn a livelihood, it does not follow that she does not suffer injury in means of support by loss of her legal supporter. Nor does it so follow where she may have independent means of her own. There are always independent means of support. No one is absolutely dependent on another for means of support, for where there is absence of other means it is provided by public authority." *Hackett v. Smelsley*, 77 Ill. 109.

In an action by a married woman, for herself and minor children, for damages for loss of means of support caused by the sale of intoxicating liquors to her

husband, producing his intoxication and failure to provide for his family, after proof of facts tending to show that before such intoxication he provided for and supported his family, and that afterwards, and during the time of the intoxication, he failed to support the family, it is not error to allow the wife to testify as to the amount necessary to support the family in ordinary comfortable circumstances, suitable for people in her condition. Such testimony would not be competent as establishing the measure of damages, but would be competent as tending to inform the jury as to the value of the means of support of which the plaintiff in the action had been deprived. *Warrick v. Rounds*, 17 Neb. 411.

Where a wife sues for damages on account of being deprived of her means of support through the sale to her husband of intoxicating liquors, evidence that she was supported by her own labor and by the county was material. One of the material facts which plaintiff was required to establish is that during the period in question she was not supported by her husband; and this evidence tended to establish this fact by showing the sources from which her support came. *Fox v. Wunderlich*, 64 Iowa, 187.

On the trial of such case it is competent to prove the physical condition and health of deceased, his habits of industry, his avocation, the monthly or annual product of the same, and whether any and all of the plaintiffs are of such tender age as to render them entirely dependent upon their parents for support. *Kerkow v. Bauer*, 15 Neb. 150; *Flynn v. Fogarty*, 106 Ill. 263.

But what the widow may have done, or what expenditure she may have made, since his death, in respect to the business in which her husband had been engaged, would afford no ground of presumption as to what *he* would have done in the event he had lived. So where, in such a case, it appearing the plaintiff's husband was a farmer, the plaintiff was permitted to prove that since her husband's death she had expended considerable sums in ditching upon the farm, and having rails split, and fencing made, it was held that proof of such expenditures should not have been allowed, as it afforded no criterion by which to determine the extent to which the plaintiff's means of support had been permanently diminished by her husband's death. The plaintiff was also permitted, in giving her testimony, to detail to the jury the inconveniences she had labored under since her husband's

death—how she had to go to town on cold days, and the fact of one of her girls having to work out, and also to speak of the mangled condition in which she found her husband shortly after the injury which was the immediate cause of his death; how she fainted away, and his dying remark to her, "Mary, I can't see you any longer,—I am getting blind." All this was improper, as having no bearing on the issue as to the extent of injury to the plaintiff's means of support by the death of her husband, and only calculated to enhance the damages through sympathy for the plaintiff and prejudice against the defendant. *Flynn v. Fogarty*, 106 Ill. 263. See *Huggins v. Kavanagh*, 52 Iowa, 368.

It may be different, however, if the husband, when sober, is physically incapable of performing any work or labor or of attending to any business or profession, or was of such indolent and shiftless habits that he in fact made his wife support him. *Wightman v. Devere*, 33 Wis. 570, 579.

To what extent the plaintiff has been injured is a question for the jury, who may take in consideration all the circumstances connected with the case. *Ludwig v. Sager*, 84 Ill. 99; *Dunlavy v. Watson*, 38 Iowa, 400.

But evidence of a judgment recovered against other parties for injuries occurring at the same period is admissible to show the extent of the injuries. *Engleken v. Webber*, 47 Iowa, 558. Compare *Ennis v. Shiley*, 47 Iowa, 552.

Where an action is brought for the loss of support, not for the loss of the society or companionship of deceased, proof of the lack of affection, sympathy, or respect for deceased on the part of the adult plaintiff is inadmissible. *Kerkow v. Bauer*, 15 Neb. 150.

Where a person not previously drawing support becomes under the poor-laws dependent upon a town through injuries sustained in consequence of intoxication, such town cannot recover from the seller of the liquor for the support furnished him. S., while intoxicated, and in consequence of such intoxication, had his feet frozen, and came upon the town for support. Held, that the town could recover no reimbursement from the liquor-dealer. *Hollis v. Davis*, 56 N. H. 74.

The rule of law, that where damages are suffered from the wrongful act of another the person suffering the injury must make all reasonable exertions to protect himself from the consequences of such wrongful acts, has no application to actions by a married woman for herself

**Death.**—If death ensues as the natural and legitimate result of the intoxication, it is covered by the language of the statute.<sup>1</sup>

and children for loss of means of support caused by the wrongful sale of intoxicating liquors to the husband and father. *Warrick v. Rounds*, 17 Neb. 411.

To entitle a party to an action for damages for injuries to "means of support" such party must be legally dependent upon the intoxicated person for such "means of support." If the marriage of an alleged wife claiming such damages is void because she has another husband living, she cannot claim the benefit of the statute. *Kearney v. Fitzgerald*, 43 Iowa, 580.

Under a statute giving an action to one "dependent" on the deceased, a plaintiff claiming to be his widow must show a lawful marriage, and one claiming to be his child must show his legitimacy. *Good v. Towns*, 56 Vt. 410; s. c., 48 Am. Rep. 799.

The action given to the "parent" of a minor to whom intoxicating liquor has been sold may be maintained by the mother of the minor, without proof that he has no father. *McNeil v. Collinson*, 130 Mass. 167.

A husband may maintain an action for injury to his "means of support" by the intoxication of his wife caused by defendant. *Moran v. Goodwin*, 130 Mass. 158; s. c., 39 Am. Rep. 443. But in *Nebraska*, where a husband does not inherit from the wife, a husband cannot maintain an action for the death of his wife, unless as executor, where there are next of kin entitled to the amount to be recovered. *Warren v. Englehart*, 13 Neb. 283.

The defendant sold liquor to the son-in-law of the plaintiff, who became intoxicated thereby, and in consequence thereof drove a team behind which he and plaintiff's wife were riding, so recklessly as to upset the wagon and break the wife's arm. In an action by the husband to recover for the loss of her services and expenses of medical attendance, nursing, etc. *Held*, that he was entitled to recover. *Aldrich v. Sager*, 9 Hun (N. Y.), 537.

1. All injuries are covered that are consequent upon the intoxication. If death were excluded, then the minor and temporary injuries would be provided for, while the greatest and most permanent of all would be excluded. *Jackson v. Brookins*, 5 Hun (N. Y.), 530; *Davis v. Standish*, 26 Hun (N. Y.), 608; *Smith v. Reynolds*, 8 Hun (N. Y.), 128; *Quain v. Russell*, 8 Hun (N. Y.), 319; *Mead v.*

*Stratton*, 87 N. Y. 493; s. c., 41 Am. Rep. 386; *Kerkow v. Bauer*, 15 Neb. 150; *Schmidt v. Mitchell*, 84 Ill. 195; s. c., 25 Am. Rep. 446; *Flynn v. Fogarty*, 106 Ill. 263; *Emory v. Addis*, 71 Ill. 273; *Schroder v. Crawford*, 94 Ill. 357; s. c., 34 Am. Rep. 236; *Bedore v. Newton*, 54 N. H. 117; *Rafferty v. Buckman*, 46 Iowa, 195; *Schneider v. Hosier*, 21 Ohio St. 98, 107.

In an action under the Civil Damage Act for injury to means of support in consequence of intoxication, a recovery may be had where the intoxication caused the death of the intoxicated person, and in estimating the damages the condition of the family and the estate may be considered; but exemplary damages are not proper. *Roose v. Perkins*, 9 Neb. 304; s. c., 31 Am. Rep. 409. But see *Davis v. Justice*, 31 Ohio St. 359; s. c., 27 Am. Rep. 514, where it was held that in an action under the Civil Damage Act for injury to means of support in consequence of intoxication which caused the death of the intoxicated person damages resulting from the death cannot be recovered. See also dissenting opinion of Boynton, J., in same case, 27 Am. Rep. 518. See also *Hayes v. Phelan*, 4 Hun (N. Y.), 733; s. c., 5 Hun (N. Y.), 335; *Brookmire v. Monaghan*, 15 Hun (N. Y.), 16; *Barrett v. Dolan*, 130 Mass. 366; s. c., 39 Am. Rep. 456; *Harrington v. McKillop*, 132 Mass. 567; *Hackett v. Smelsley*, 77 Ill. 109; *Kirchner v. Myers*, 35 Ohio St. 85; s. c., 35 Am. Rep. 598.

The father of the minor plaintiff, while intoxicated by liquor sold him by the defendant, murdered the plaintiff's mother, and committed suicide. The plaintiff was dependent on his father for support. *Held*, that the defendant was liable under the Civil Damage Act. *Neu v. McKechnie*, 95 N. Y. 632; s. c., 47 Am. Rep. 89.

In this case it was held that the cause of action is neither taken away nor mitigated, because the injury also constitutes a crime. The jury were not to inquire whether either "the homicide or suicide were the natural, reasonable, or probable consequences of the defendant's act." It is enough if, while intoxicated in whole or in part by liquors sold by the defendants, those acts were committed, if by reason of them, or either of them, the plaintiff's means of support were affected to his injury.

Death must be the immediate conse-



quence of the intoxication to make the liquor-seller liable. *Flynn v. Fogarty*, 106 Ill. 263.

Where in an action under the Civil Damage Act, it appeared that the defendant sold liquor to plaintiff's husband, whereby he became intoxicated, got in an affray, and was wounded; that by reason of the husband's reckless disregard of the surgeon's direction the wound became so dangerous as to lead the surgeon to amputate the leg, whereupon the husband died. *Held* (1), that if the death was occasioned by the disregard of the surgeon's directions the defendant was not liable; (2) that if the amputation was in fact unnecessary, and was the immediate cause of the death, the defendant was not liable, although the surgeon acted in good faith and with ordinary skill. *Schmidt v. Mitchell*, 84 Ill. 195; s. c., 25 Am. Rep. 446.

In *Davis v. Standish*, 26 Hun (N. Y.), 608, it was held, however, that the jury was not confined to an inquiry as to whether intoxicating liquor was the immediate cause of the death; that if it was the proximate cause it justified a verdict for the plaintiff.

Evidence offered by defendants to prove that on the fatal night, on account of its unusual darkness, another person in that vicinity lost his way, and still another had great difficulty in keeping it; also, that deceased had on a former occasion, on a bright moonlight night, lost his way, etc.,—was properly rejected. *Kerkow v. Bauer*, 15 Neb. 150.

The seller of intoxicating liquor to a husband, who becomes intoxicated thereby, and in consequence of his abusive language is killed by a third party, is not liable in damages to the wife for the death. *Shugart v. Egan*, 83 Ill. 56; s. c., 25 Am. Rep. 359.

Where the complaint alleged that the defendant unlawfully sold intoxicating liquor to the decedent during his lifetime, and whilst he was intoxicated, thereby causing him to become so intoxicated and so insensible of his surroundings as to go upon a railroad track, where he was run over and killed by a train of cars, thus depriving the plaintiff of her means of support, it was held that the decedent's death was not the natural, necessary, or probable result of such unlawful sale, and therefore the complaint was bad on demurrer for want of sufficient facts. *Collier v. Early*, 54 Ind. 559.

On the same principles it was held that the widow of a deceased person who came to his death as the result of injuries

received by him from a fall whilst intoxicated could not maintain an action for damages therefor against a person who had unlawfully sold her deceased husband the liquor which caused the intoxication. *Backes v. Dant*, 55 Ind. 181.

Where a husband became grossly intoxicated, and while being hauled home in his wagon received injuries by means of a barrel of salt falling upon him, from which injuries he died, his widow had no right of action under this statute, because the immediate cause of the injury to the plaintiff was the death of the deceased, and his intoxication only the remote cause. A person is answerable for the consequences of his fault only so far as they naturally result from it, and may therefore be foreseen; and in this case the parties selling the liquor could not have anticipated that on his way home the intoxicated man would be fatally injured by the salt barrel. *Krach v. Heilman*, 53 Ind. 517. *Collier v. Early*, 54 Ind. 559; *Backes v. Dant*, 55 Ind. 181; *Krach v. Heilman*, 53 Ind. 517, were criticised and distinguished in *Dunlap v. Wagner*, 85 Ind. 529; s. c., 44 Am. Rep. 42.

In an action under the statute it appeared that plaintiff's husband drank intoxicating liquors at the hotel kept by defendant I., and became so much intoxicated that he had to be helped into his buggy when he started for home. He was found dead, with his leg caught under the foot-bar of the buggy, and his head hanging over between the body of the buggy and the wheel, so that it had been beaten by the wheel. *Held*, that the evidence sufficiently established that the intoxication was the proximate cause of the death. *Mead v. Stratton*, 87 N. Y. 493; s. c., 41 Am. Rep. 386.

Where a wife sued jointly several liquor-dealers to recover damages for the death of her husband, who had been an habitual drunkard, and lost his life from an accident resulting from his intoxication, it was held that such damages only as were in legal contemplation the result of the act of selling could be recovered; that the fact of his being an habitual drunkard could not be deemed in a legal sense the cause of his death, although but for that he might not have drunk the liquor which intoxicated him on the day of his death; and that the dealers who contributed to his habitual intoxication could not be jointly sued with those who caused the particular intoxication resulting in his death. *Tetzner v. Naughton*, 12 Ill. App. 148.

**Compensation for Nursing.**—In addition to damages for injuries to person, property, or means of support, some of the statutes provide that any one who by sale or barter or gift of intoxicating liquor causes the intoxication of another shall pay a reasonable compensation to any one who may take charge of and provide for such intoxicated person, and a stated sum per day in addition thereto for every day such intoxicated person shall be kept in consequence of his intoxication. In some of these States this provision refers to "sales," in others only to "unlawful sales."<sup>1</sup>

**5. Actual and Exemplary Damages.**—Generally the statutes provide not only for actual damages, but also for exemplary damages. To entitle a party to exemplary damages, actual damages must, however, be proved. There can be no recovery unless there be some injury; the right of action does not spring from the relationship alone, and in the absence of actual damage.<sup>2</sup>

1. See the various statutes. *Brannan v. Adams*, 76 Ill. 335; *Fountain v. Draper*, 49 Ill. 441, 444; *Gonfrey v. Stark*, 73 Ill. 187; *Werner v. Edmiston*, 24 Kan. 147; *Wightman v. Devere*, 33 Wis. 570; *Krach v. Heilman*, 53 Ind. 517.

A physician who professionally treats a person who is injured while intoxicated does not "take charge of and provide for" such person within the meaning of the statute. *Samson v. Greenough*, 55 Iowa, 127.

2. *Ganssly v. Perkins*, 30 Mich. 492; *Roth v. Eppy*, 80 Ill. 283; *Hackett v. Smelsley*, 77 Ill. 109; *Confrey v. Stark*, 73 Ill. 187; *McEvoy v. Humphrey*, 77 Ill. 388; *Freese v. Tripp*, 70 Ill. 496; *Brautigam v. While*, 73 Ill. 561; *Fentz v. Meadows*, 72 Ill. 540; *Keedy v. Howe*, 72 Ill. 133; *Boyd v. Watt*, 27 Ohio St. 259; *Schneider v. Hosier*, 21 Ohio St. 98, 112; *Duroy v. Blinn*, 11 Ohio St. 331; *Jockers v. Borgman*, 29 Kan. 109; s. c., 44 Am. Rep. 625; *Fox v. Wunderlich*, 64 Iowa, 187; *Gilmore v. Mathews*, 67 Me. 517. Compare *Roose v. Perkins*, 9 Neb. 304; s. c., 31 Am. Rep. 409; *Koerner v. Oberly*, 56 Ind. 284.

Whether exemplary damages should be allowed or not is a question exclusively for the jury. *Goodenough v. McGrew*, 44 Iowa, 670.

Where it appeared that the wife had notified the defendant not to sell liquor to her husband, and that she sent \$50 by her husband to buy a horse, and that the defendant, in disregard of such notice, sold him liquor, upon which he became intoxicated, and that he was arrested and put in the calaboose, and that when he got out he had spent about \$29, the jury gave a verdict of \$200 against the defendant, upon which judgment was rendered. *Held*, that actual damages being shown to the

extent of \$29, the jury had the right to give exemplary damages, as the sale to the husband after notice was without excuse or palliation, and therefore the damages were not excessive. *McEvoy v. Humphrey*, 77 Ill. 388.

Actual damages must be as nearly commensurate with the actual injury as the case will permit; and exemplary damages should be given in those cases, and only in those cases, where the plaintiff has some personal right to complain of a wanton and wilful wrong, which the wrongdoer, when he committed it, must be regarded as having committed against the plaintiff herself, in spite of the injury he must have known she was likely to suffer by it. In an action by the wife to recover for injuries resulting to her from sales of intoxicating liquors to her husband, where the evidence shows that the husband had been intemperate, and the wife had supported herself and partly supported him ever since a time prior to the passage of the law in question, a charge to the jury which directed them in giving damages to estimate the loss of the sober, intelligent society of the husband, and the loss of "means of support," etc., is inappropriate; for while the defendants should be held liable for the injury they have actually inflicted, their liability must be measured by the effects produced upon the husband and wife as they were, not as they might have been. *Ganssly v. Perkins*, 30 Mich. 492; *Friend v. Dunks*, 39 Mich. 733.

Exemplary damages cannot be imposed on a liquor-seller if it does not appear that any request or suggestion had been made to him to refuse liquor to the injured person, or that he knew that the latter had any family. *Steele v. Thompson*, 42 Mich. 594.

But where such request has been made.

**Mitigating Circumstances.**—The seller may prove in his defence all circumstances which may serve in mitigation, not of the actual,

exemplary damages will be allowable. *Schneider v. Hosier*, 21 Ohio St. 98, 103; *Brautigam v. While*, 73 Ill. 561.

In order to establish her right to exemplary damages, the plaintiff may show the number and age of her children if she also shows that defendant had a knowledge of the fact that she had such children, and that they were in danger of being injured or compelled to leave home. *Ward v. Thompson*, 48 Iowa, 588.

Exemplary damages might be recovered when the evidence showed a state of facts which would warrant the assessment of such damages. Whether there are any circumstances of aggravation in the conduct of the defendant which justified the giving of exemplary damages is a question for the jury upon all the proofs of the case. *Wightman v. Devere*, 33 Wis. 570, 581; *Rawlins v. Vidvard*, 34 Hun (N. Y.), 205; *Schneider v. Hosier*, 21 Ohio St. 98, 112; *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 475, 480; *Schimmelpfenig v. Donovan*, 13 Ill. App. 47.

Where plaintiff's husband had become a confirmed drunkard, had lost a lucrative business in which he was earning five dollars a day, and had squandered valuable property, while plaintiff had forbidden him to sell any more liquor to her husband, the jury rendered a verdict of \$2000 exemplary damages in addition to \$10,000 actual damages. The court held that if the verdict had been larger it could not have been disturbed. *Jewett v. Wanshura*, 43 Iowa, 574.

The jury have power to give exemplary damages, but they clearly should not be allowed to do so in ordinary cases where nothing is proved but the simple sale of a single glass of liquor under ordinary circumstances. Exemplary damages should only be given when there are circumstances of abuse or aggravation in the case proved on the part of the vendor of the liquor. *Franklin v. Schermerhorn*, 8 Hun (N. Y.), 112, 115; *Freese v. Tripp*, 70 Ill. 496; *Kellerman v. Arnold*, 71 Ill. 632.

The Civil Damage Statute expressly authorizes the recovery of damages coextensive with the injury, and likewise exemplary damages. But exemplary damages are not to be allowed under the act, unless the conduct of the defendant is wilful, wanton, reckless, malicious, oppressive, or otherwise deserving of condemnation beyond the mere actual damage. Evidence, however, that the defendant sold intoxicating liquors to a person who was in the

habit of being intoxicated, after notice from the wife not to sell, and that he sold intoxicating liquors to such person while in a state of intoxication, are grounds of exemplary damages, and proof of such remonstrance or notification may be given, although it was made more than two years prior to the commencement of the action. *Jockers v. Borgman*, 29 Kan. 109; s. c., 44 Am. Rep. 625; *Kadgin v. Miller*, 13 Ill. App. 474.

Where it appeared that defendants sold the liquor without a license, and that they had been so selling for a long time, held, that submission to the jury of the question of exemplary damages, and an allowance thereof, was proper. *Neu v. McKechnie*, 95 N. Y. 632; s. c., 47 Am. Rep. 89; *Davis v. Standish*, 26 Hun (N. Y.), 608.

A sale of liquor to a husband who was intoxicated, and was to the knowledge of the liquor-seller in the habit of becoming intoxicated, will be a good ground for exemplary damages in favor of the wife. *Weitz v. Ewen*, 50 Iowa, 34.

And the fact that the liquor was sold on a Sunday, in violation of the statute, may be considered by the jury when the question of exemplary damages is submitted. *Sibila v. Bahney*, 34 Ohio St. 399, 410.

So may evidence of sales made after commencement of the pending suit be submitted to the jury for the sake of assessing exemplary damages. *Bean v. Green*, 33 Ohio St. 444.

In a civil action for damages for an act also punishable as a criminal offence, it was held that exemplary damages were not recoverable by reason of the constitutional provision that no person shall be put twice in jeopardy for the same offence, and that a statute authorizing such damages was void. So held where there was evidence that the sales were made after nine o'clock in the evening, and on Sunday, contrary to law. *Koerner v. Oberly*, 56 Ind. 284; s. c., 26 Am. Rep. 34. See also *Struble v. Nodwift*, 11 Ind. 65; *Schaffer v. Smith*, 63 Ind. 226; *Albrecht v. Walker*, 73 Ill. 69. Compare *Jockers v. Borgman*, 29 Kan. 109; s. c., 44 Am. Rep. 625.

Exemplary damages may lie under the Civil Damage Acts for sales of liquor made by defendant's employees as well as by himself. He is liable not only for his personal acts, but for his recklessness or wilfulness in neglecting to guard against sales that he knew would injure those entitled to bring suit. *Kehrig v. Peters*, 41 Mich. 475.

but of exemplary damages. As that he had given strict orders to his servants not to sell liquor to the inebriate, or that the liquor was obtained by tricks and artifices.<sup>1</sup>

6. Who has a Right of Action.—The statute contemplates that any person injured may recover actual damages, but actions under the statute are strictly confined to persons who are injured in some way; or, in other words, the statute does not give an action to any of these persons merely from their relationship, where their actual damages would be purely nominal. It is to be observed that injuries received from the intoxication of strangers are embraced in the same clause with those suffered from the intoxication of wards, relatives, or husbands and wives, and that persons who may have no blood or marital connection with the intoxicated person are also grouped together.<sup>2</sup>

1. Where the evidence showed that the defendant tried to prevent the husband from getting liquor at his place, had often refused to sell him, and had ordered his clerk not to sell to him; and that the husband had procured it through others, concealing his name; and where there was no evidence to show in what manner the plaintiff had been injured in her "means of support,"—the court held, that there was no foundation laid for exemplary damages. The only instruction given being based upon exemplary damages, a verdict of \$300 was set aside. *Bates v. Davis*, 76 Ill. 222; *Brantigan v. While*, 73 Ill. 561; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Schneider v. Hosier*, 21 Ohio St. 103; *Kreiter v. Nichols*, 28 Mich. 496.

Evidence to the effect that the intoxicated party had procured liquors at other places than defendant's which contributed to his intoxication may be received in mitigation. *Hemmens v. Bentley*, 32 Mich. 88.

Where several parties have a claim for damages against a liquor-dealer resulting from the same sale of intoxicating liquor, exemplary damages can be awarded only once, and a judgment given for actual and exemplary damages which has been satisfied may be given in evidence. *Secor v. Taylor*, 41 Hun (N. Y.), 123.

2. See *Gansley v. Perkins*, 30 Mich. 492, 495, and the various statutes.

In *New York* the court said: "The act is too vague and inexplicit, and presents much difficulty in its practical operation, for the construction of the courts. The legislature, I think, intended to give a single right of action, and single damages to one person; but a right of action is given or may arise to a husband or wife and each of their children, be they ever so many, as well as to the other persons named in said section." *Franklin v.*

*Schermerhorn*, 8 Hun (N. Y.), 112. In this case the husband of the plaintiff was a cripple, and could earn but little for the support of his family, consisting of plaintiff and four children, and he received quarterly pension of fifty-four dollars, and on the day he received it got intoxicated in part at the defendant's house, and thereby lost or had stolen from him fifty dollars. *Held*, that under the statute the plaintiff, as wife, was only entitled to recover her proportionate share, or one fifth thereof.

An action can be maintained by the widow and infant children, jointly or severally, whose husband and father has lost his life in consequence of intoxication, against any and all persons, jointly or severally, who sold, gave, or furnished any intoxicating liquor which was drunk by him on the day or about the time of such intoxication. *Kerkow v. Bauer*, 15 Neb. 150. Compare *McGee v. McCann*, 69 Me. 79.

An action was brought by the plaintiff, a minor, by his mother, as his general guardian, to recover damages for injury to his means of support occasioned by the death of his father by means of intoxicated liquors sold to him by a lessee of the defendant. Upon trial the defendant offered, but was not allowed, to prove that the mother, who was the general guardian of the plaintiff, had already recovered a judgment against the defendant for the sum of \$2000 for damages sustained by the death of the same party caused by the same intoxication, and that the said sum had been paid to her. *Held*, that the evidence was properly excluded, as no claim was made in this case for any exemplary damages. *Secor v. Taylor*, 41 Hun (N. Y.), 123. Citing *Mullen v. Christien*, 22 Week. Dig. (N. Y.) 59.

The right of action vests at the time of the injury, and the intervening death of

**What Bars the Action.**—Where a wife contributes to the intoxication of her husband by providing the liquors herself, or drinking with him, she can sustain no action against the seller of the liquor for damages for injuries received in consequence of such intoxication.<sup>1</sup>

the husband will not divest a "wife" of her right of action for the injury because at the time of the bringing of the action she is his "widow." *Hackett v. Smelsley*, 77 Ill. 109; *Schneider v. Hosier*, 21 Ohio St. 116; *Jackson v. Brookins*, 5 Hun (N. Y.), 530.

The intoxicated person himself has no right of action against the seller of the liquor producing the intoxication for money stolen from him while drunk, *Brooks v. Cook*, 44 Mich. 617; s. c., 38 Am. Rep. 282.

Neither can the seller of the liquor recover from an intoxicated person damages for a trespass committed under the influence of liquor which he sold to him. *Aldrich v. Harvey*, 50 Vt. 162.

1. *Engleken v. Hilger*, 43 Iowa, 563; *Kearney v. Fitzgerald*, 43 Iowa, 580; *Elliott v. Barry*, 34 Hun (N. Y.), 129. See *Hackett v. Smelsley*, 77 Ill. 109.

If, however, such drinking either at the bar or at home was not voluntary on her part, or if she bought and took intoxicating liquors to their home, not with a view of her own drinking, but for the sole purpose of keeping her husband at home and keeping him from squandering his time and money in saloons, or where she purchased and used liquors only for medicinal purposes, and gave the same to her husband for that purpose, she would forfeit none of the benefits which the statute gives. *Kearney v. Fitzgerald*, 43 Iowa, 580; *Ward v. Thompson*, 48 Iowa, 588.

The fact that the wife accompanied her husband to various places and gatherings, and drank liquors with him, and that the husband kept liquors in his house, and drank the same at home with his wife's knowledge and approval, and that all of such drinking on the part of the husband was with her knowledge and consent, is proper to be considered by the jury on the question of damages, especially as the statute allows exemplary damages in such an action. But such facts do not constitute a bar to the action, and it is proper to prove by the wife in rebuttal that the husband compelled her to accompany him to such places. *Hackett v. Smelsley*, 77 Ill. 109.

Where the evidence shows that the plaintiff's husband became a confirmed drunkard, and that he visited the saloons almost daily; that the plaintiff forbade the

defendant selling any liquor to her husband, and that a day or two thereafter plaintiff and her husband went to defendant's saloon, when plaintiff's husband called defendant out, telling him his wife wanted to see him, and defendant claims that plaintiff then countermanded her previous order, and directed him to sell her husband whatever he wanted, it was held that the jury had a right to find from the testimony that the defendant drew reasonable inferences from the facts which he knew, and hence that he had knowledge that plaintiff did not act voluntarily. *Jewett v. Wanshura*, 43 Iowa, 574.

Where a wife knows the fact that her husband has purchased a jug of whiskey, and is drinking immoderately, and has it in her power to prevent him from drinking in such quantity as to injure him, by breaking the jug or pouring out its contents, and is not prevented from doing so through fear, but permits him to use it in great excess, from which death ensues, she must be considered as a willing party to his conduct, and instrumental in bringing the loss upon herself. *Reget v. Bell*, 77 Ill. 593.

The fact that the wife has upon former occasions consented to the sale of liquor to her husband will not defeat her claim, if she did not consent to the sale complained of, and her giving him money to purchase liquor with, does not show that she contributed to the intoxication in the absence of proof that the money was so used. *Rafferty v. Buckman*, 46 Iowa, 195.

Where a wife voluntarily signed a petition for a person applying for a dramshop license she did not thereby consent that the party obtaining the license under the petition should sell intoxicants unlawfully, or in violation of the statute; and such act on her part is no bar to an action brought by her against the dramshop-keeper, under the Civil Damage statute, for causing the intoxication of her husband, nor is evidence of such act competent in mitigation. *Jockers v. Borgman*, 29 Kan. 109; s. c., 44 Am. Rep. 725.

The Statute of Limitations in actions for damages under the Civil Damage laws commences to run from the time of the sale of the liquor causing the intoxication, not from the time when the injury was sustained. *Emmert v. Grill*, 39 Iowa, 690.

**7. Evidence.**—In general it will be true, that if the jury do not find that defendant's act in supplying liquor was so closely connected with the injury for which the action was brought as to have been effective in causing it, they cannot find for the plaintiff.<sup>1</sup>

1. *Steele v. Thompson*, 42 Mich. 594; *Schlosser v. State*, 55 Ind. 82; *Ditton v. Morgan*, 56 Ind. 60; *Schwarm v. Osborn*, 59 Ind. 246; *Welch v. Jugenheimer*, 56 Iowa, 11; *Squires v. Young*, 58 N. H. 192; *Neuerberg v. Gaultier*, 4 Ill. App. 348; *Barks v. Woodruff*, 12 Ill. App. 96; *Brannan v. Adams*, 76 Ill. 331.

In an action under the Civil Damage Act the jury must be satisfied by a preponderance of evidence that defendant contributed to the intoxication of the plaintiff's husband in an appreciable degree. *Chase v. Kenniston*, 76 Me. 209; *Hall v. Barnes*, 82 Ill. 228.

There can be no recovery unless it be shown that the liquor sold either caused or contributed to the husband's intoxication. *Fox v. Wunderlich*, 64 Iowa, 11; *Welch v. Jugenheimer*, 56 Iowa, 187.

A wife cannot recover damages from a liquor-seller simply upon proof that he is a liquor-seller, and that her husband had been in his store and was seen to come out in a state of intoxication. *Lovelan v. Briggs*, 32 Hun (N. Y.), 477.

But where it was proved that defendant was a "saloon-keeper," and that he sold plaintiff's husband liquor, it may be proved by circumstantial evidence that the liquor was intoxicating. *McDougall v. Giacomini*, 13 Neb. 431.

Where the alleged injury is to the plaintiff's means of support, the evidence must be confined to such injury. *Hackett v. Smelsley*, 77 Ill. 109; *Elshire v. Schuyler*, 15 Neb. 561. And where the complaint is made for selling to one who is in the habit of becoming intoxicated, evidence must show that the buyer had such habit. *Ferrell v. State*, 48 Ind. 118.

Where the statute provides for damages for the sale of liquor to an habitual drunkard, there must be evidence to prove that the one to whom the liquor was sold was habitually intoxicated to the knowledge of the seller, although he was not drunk at the time of the sale. Such knowledge may be proved by general reputation. *Fountain v. Draper*, 49 Ind. 441, 448; *Markert v. Hoffner*, 4 Am. L. Rec. (Ohio) 670.

Where defendant introduced testimony to show that plaintiff's husband had been a confirmed toper for years, long before defendant engaged in the

business of selling liquor, and that such condition was in no manner created by any act of defendant, evidence of sales more than two years prior to the beginning of the action was properly admitted as rebutting testimony. *Gustafson v. Wind*, 62 Iowa, 281.

In an action by a wife against a liquor-seller to recover damages for injury suffered by her, and resulting from the intoxication of her husband, alleged to have been caused by the defendant by selling him intoxicating liquors, the complaint need not aver the kind of intoxicating liquor so sold, nor that the defendant had no license, nor that such liquor was sold on his premises, nor that the husband was intoxicated or in the habit of becoming so at the time of such sale. *Walser v. Kerrigan*, 56 Ind. 301. See also *Horn v. Smith*, 77 Ill. 381.

The testimony of an eye-witness that a man at the bar of a saloon was furnished with a glass containing liquor that looked liked beer, and that he paid for it, and was presently thereafter very much intoxicated, is evidence tending to show that intoxicating liquor had been sold to him. *Wilson v. Booth*, 57 Mich. 249.

In such an action the husband will be a competent witness for the wife. *Davenport v. Ryan*, 81 Ill. 218.

Some of the statutes require that notice be given to the liquor-seller not to furnish any more liquor to the inebriate before cause of action will accrue. Under such statute a notice will be sufficient when it is substantially conformed to the requirements of the statute. *Tate v. Donovan*, 143 Mass. 590; *Kennedy v. Saunders*, 142 Mass. 9.

In an action for injury to means of support by a wife, it appeared that the husband had done work for defendant amounting to \$145.50, and that upon a settlement but a small sum was found due, and that the husband was a habitual drunkard, and frequently got liquor of the defendant, which contributed to his dissipation, idleness, and waste of time, and that the wife was compelled to mortgage her property to pay taxes, doctor's bills, and for the support of the family. *Held*, that it was but fair inference that the sale of liquor by the defendant to the husband produced injury to the means of support of his family,

and that the jury were warranted in so finding. *Horn v. Smith*, 77 Ill. 381.

Proof that the husband of plaintiff bought liquor at defendant's store will not shift the burden of proof that said liquor did not produce the intoxication upon defendant. *Macleod v. Geyer*, 53 Iowa, 615.

A wife cannot obtain damages from a liquor-seller for being injured by falling on a slippery sidewalk while following her intoxicated husband to see where he obtained liquor. *Johnson v. Drummond*, 16 Ill. App. 641.

In an action by a wife for damages sustained by the intoxication of her husband, alleged to be caused by liquor sold to him by the defendant, the defendant is not responsible for all damages caused to the plaintiff by any habits of intoxication to the formation or confirmation of which the defendant contributed, unless the liquor sold by the defendant caused, in whole or in part, the intoxication complained of. *Bryant v. Tidgewell*, 133 Mass. 86.

Where a bar-tender, after selling liquor to a customer, engages in a dispute with him and throws a glass at him, but missing his mark, hits and injures a third person, the sale of the liquor was not considered the proximate cause of the injury. *Lueken v. People*, 3 Ill. App. 375.

Evidence having been given tending to prove that the person to whom intoxicating liquor was sold was in the habit of getting intoxicated, and that he resided in the neighborhood of the vendor, it is competent to give his general reputation in that behalf in evidence as a circumstance tending to prove the vendor's knowledge of such habit. *Adams v. State*, 25 Ohio St. 584.

The statement of a physician who was in the habit of getting intoxicated, made at the times of his purchases of liquor, that he wanted it for a patient and for medical purposes, does not, in the absence of proof to the contrary, raise the presumption that it is a sale to the patient. *Boyd v. Watt*, 27 Ohio St. 259.

To make the seller liable it is not necessary that he should compel the purchaser to drink, or use any artifice to cause him to drink, or that he should know that such person would get drunk. *Barnaby v. Wood*, 50 Ind. 405.

Whenever damages are claimed under these statutes direct proof is necessary to show that the provisions of the statute have been violated. It has even been

held that actual injury must be proved beyond a reasonable doubt. *Mason v. Shay*, 3 A. L. Rec. (Ohio) 435. Compare *Lyon v. Fleahmann*, 34 Ohio St. 151.

In *Illinois* it was held that the Civil Damage Act, being of highly penal character, should receive a strict construction. *Fentz v. Meadows*, 72 Ill. 540; *Meidel v. Anthis*, 71 Ill. 241; *Freese v. Tripp*, 70 Ill. 496.

The liability imposed by the Civil Damage Acts may be imposed irrespective of the question whether the sale or giving away of the liquor was lawful or unlawful, or of any question of negligence on the part of the landlord or tenant. Neither is this liability restricted to the results of intoxication from liquors sold or given away, to be drunk on the premises of the seller. *Bertholf v. O'Reilly*, 74 N. Y. 509, 513. See *Sibila v. Bahney*, 34 Ohio St. 399, 407. Compare *Baker v. Beckwith*, 29 Ohio St. 314.

The liquor-dealer's license to sell liquor is not admissible in evidence on the defence. *Roth v. Eppy*, 80 Ill. 283. See *Moran v. Goodwin*, 130 Mass. 158; *McNeil v. Collinson*, 128 Mass. 313.

Where the defendant was licensed by an incorporated town to sell ale, wine, and beer, and gave a bond with surety to pay any damage any person might sustain by reason of his sale of beer or liquor, the surety would be liable thereunder for all damages recoverable, whether compensatory or exemplary, not exceeding the amount of the bond. *Richmond v. Shickler*, 57 Iowa, 486; *Day v. Frank*, 127 Mass. 497.

The Civil Damage Acts are not retrospective, and evidence of sales at a time prior to the passage of the act cannot be received. *Dubois v. Miller*, 5 Hun (N. Y.), 332. See *McCann v. Roach*, 81 Ill. 213.

Neither can evidence be received to prove sales subsequent to the commencement of the suit. *Kearney v. Fitzgerald*, 43 Iowa, 580. But see *Bean v. Green*, where it was held that such evidence may be received and considered by the jury, but only in assessing exemplary damages.

The N. Y. Civil Damage Act has no extra-territorial effect. Where a resident of Vermont came to New York, got drunk, went home again, and did damage to A.'s property, held that A. could not recover from the seller of the liquor in N. Y. *Goodwin v. Young*, 34 Hun (N. Y.), 252.

**CIVILIZATION.**—The art of civilizing or the state of being civilized; refinement; culture.<sup>1</sup> A law; an act of justice or judgment which renders a criminal process civil; performed by turning an information into an inquest, or the contrary.<sup>2</sup>

**CIVILITER.**—Civily; opposed to *criminaliter* or criminally.<sup>3</sup>

**CIVILITER MORTUIS.**—Civily dead. The legal punishment or extinction of a person's rights and capacities among his fellow-members of society.<sup>4</sup>

**CIVIL RIGHTS.** See CONSTITUTIONAL LAW.

**CLAIM.**—Claim is a challenge by a man of the propriety or ownership of a thing which he has not in possession, but which is wrongfully detained from him.<sup>5</sup> In its ordinary sense a *claim* imports the assertion, demand, or challenge of something as a right, or it means the thing thus demanded or challenged.<sup>6</sup> The possession of a settler upon wild lands belonging to the

1. Webster's Dict.

Civilization is a term which covers several states of society. It is relative, and has not a fixed sense; but in all its applications it is limited to a state of society above that among the Indians of whom we are speaking (Miami tribe). It implies an improved and progressive condition of the people living under an organized government, with systematized labor, individual ownership of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well defined and respected domestic and social relations, institutions of learning, intellectual activity, etc. We know historically that the North American Indians are classed as savage and not as civilized people; and that in fact it is problematical whether they are susceptible of civilization. *Per Perkins, J., 19 Ind. 56.*

2. Harris.

3. Bouvier's Law Dict.

The term, with its opposite, *criminaliter*, occurs in the civil law, from which source they were introduced (most probably through Bracton) into the law of every land. Burrill. It is used to distinguish civil actions from criminal prosecutions. The distinction between answering *civiliter* and *criminaliter* for acts injurious to others is this: In the latter case the maxim *actus non facit reum nisi mens sit rea* applies; but in the former the *intent* is immaterial if the act done is injurious to another. *Haycraft v. Creasy, 2 East, 104.* In a man's civil character or position, or by civil in op-

position to criminal process; as sheriffs who execute process at their peril are answerable *civiliter* for what they do upon it; or a man may, without his own fault, be possessed of a horse which has been stolen, but nevertheless he is answerable *civiliter* to the true owner of it. *Brown. Bush v. Steinman, 1 Bos. & Pul. 409.*

4. Abbott's Law Dict.

A man is said to be civilly dead when he has been attainted of treason or felony, and in former times when he abjured the realm or went into a monastery. The 33 & 34 Vict. c. 23 provides that after the passing of that act no confession, inquest, verdict, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any attainder or corruption of blood or any forfeiture or escheat. Wharton. In *New York* it seems that a person convicted of felony and sentenced to imprisonment in the State prison for life is *civiliter mortuis*. *Trent v. Wood, 4 Johns. Ch. (N. Y.) 228; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118; Graham v. Adams, 2 Johns. Cases (N. Y.), 408.*

A person attainted under the Attainder Act of 1799 is *civiliter mortuis*. *Jackson v. Cablin, 2 Johns. Rep. (N. Y.) 248.* But a person found to be an habitual drunkard is not civilly dead, so as to transfer his rights and responsibilities to his trustees as administrators. *Steel v. Young, 4 Watts (Pa.), 459.*

5. *Stowell v. Lord Zouch, Plowd. 359.*

6. *Fordyce v. Goodman, 20 Ohio St. 14; s. c., 4 Sandf. Ch. 381; Scott v. Perley, 98 Mass. 511; Douglass v. Beasley, 40 Ala.*



## Definition.

## CLAIM.

## Definition.

147. Where in a statute the words "damage" and "claim" were used, the court, in discussing the general signification of the terms, says: "'Damage' and 'claim' are words having a well-defined meaning in statutes and legal instruments. And for so much as they rightfully convey, for so much is the city (defendant) bound. 'What is a claim? It is, in just judicial sense, a demand of some matter, *as of right*, made by one person of another, to do or forbear to do some act or thing *as a matter of duty*.'" *Prigg v. Pennsylvania*, 16 Peters (U. S.), 615. The plaintiffs may claim no more of the city (defendant) than the law will give them as a matter of right. . . . The parties are remitted then to the settled rules of law to find how great is the right, how onerous the duty." *Coster v. Mayor of Albany*, 43 N. Y. 413. A claim is the means by or through which the claimant obtains the possession or enjoyment of the thing sought. It is the means to an end, and not the end itself. It is true the word may somewhat stand for the subject claimed; and so may cause for effect. The distinction between the two is somewhat important, notwithstanding. Therefore, before assignment a widow had no estate in the lands of her husband; her right is a mere chose in action, which cannot be sold upon execution at law. Until that time it is strictly a claim. *Lawrence v. Miller*, 2 Comst. (N. Y.) 254.

**Counter-claim.**—The word "claim" has been considered a "word of art." (*Counter-claim*, has been styled an "elegant compound," like "counter-demand," "counter-security," etc.) And its popular signification and use would hardly include *recoupment* in every case. A counter-claim must be a cause of action, a "cross demand." The defendant can have no "claim," properly speaking, arising solely out of the plaintiff's cause of action. *Kneedler v. Sternbergh*, 10 How. Pr. (N. Y.) 72; *Bates v. Rosekrans*, 37 N. Y. 409.

**Claims Includes Notes.**—Where an agreement stipulated that "neither party would take any advantage of the Statute of Limitations having run, or being about to run, upon the other's claims, but would thereafter settle without any objection on that account," and a party to the agreement sought to recover on two notes, against which the statute had run, it was held the notes were included in the time claims, and were clearly within the agreement of the parties excepting them from the effect of the Statute of Limitations. *Noyes v. Hull*, 28 Vt. 645.

**Claims and Effects.**—A power of attorney to sell "claims and effects" cannot be construed to authorize the sale of land or real estate. *De Cordova v. Knowles*, 37 Tex. 19.

**Claims and Demands—In a Deed.**—Where a deed contained a covenant to save harmless certain premises against all actions, suits, claims, and demands whatsoever, both in law and equity, which might be made, etc., by H. W. P. or T. B. W. P., breaches, 1st, that H. P. P. claimed to have a right and title to the premises, entered and cut trees, etc.; 2d, that certain title-deeds relating to the premises were withheld by A. W. at the instance and through the claim and demand of T. B. W. B.; held, that the acts upon which the breaches were assigned were claims in law within the meaning of the covenant. *Fowle v. Welsh*, 1 Barn. & Cr. 29.

**In a Will—Bank Stock not Embraced.**—Where a testator, after several legacies of bank stock and other stock and money, concluded his will: "The remainder of my *worldly substance*, consisting of furniture, bedding, etc., I give to my two daughters, to be divided between them. . . . These, with *all money* of mine that may remain in bank at the time of my death, with *all claims or demands* of whatever nature, I give to my two daughters," and testator had several shares of bank stock and other stock not specifically bequeathed, held, that they did not pass under the above bequest. *Delamater's Es.*, 1 Whart. (Pa.) 262.

**Arbitration of.**—Where by the terms of a submission to arbitrators they were to hear proofs and allegations of and *concerning all claims arising out of the partnership*, and for a final settlement of *all differences between the parties*, an award will not be set aside, although the arbitrators open an account which had been settled as an account stated twenty-three years previous to the submission, notwithstanding the opening of such account was objected to on the hearing. *Emmet v. Hoyt*, 17 Wend. (N. Y.) 410.

**Lawful Claims.**—A bond reciting a conveyance of land and covenanting to indemnify and save harmless the obligee against all actions brought for the recovery of the land, and against all costs and expenses in consequence, is an indemnity only against all *lawful claims*, and the breach assigning the bringing of a suit, and without alleging title in the party prosecuting, will not give a right to recover. *Luddington v. Pulver*, 6 Wend. (N. Y.) 404.

**Indemnity against Claims.**—In an action

**Definition.**

on a contract to indemnify and save harmless against the claim or demand of a third person, the plaintiff must show that he has been actually damaged. *Aberdeen v. Blackmar*, 6 Hill (N. Y.), 324; *Lloyd v. Dimmack*, 26 W. R. 458.

**In Constitutions.**—The constitution of Ohio provides that no money shall "be paid on any *claim*, the subject-matter of which shall not have been provided for by pre existing law, unless such . . . claim be allowed by two thirds of the members elected to each branch of the general assembly." The act of March 30, 1864, providing for the appointment of commissioners to examine claims growing out of the "Morgan raid," and prescribing their duties, was not passed by a two-thirds vote. The commissioners having allowed plaintiff's claim on *mandamus* by him against the auditor of the State to compel payment, it was held that under the provisions of the constitution (*supra*) the claim could not be paid out of the State treasury till allowed by the concurrent votes of two thirds of the members elected to each branch of the general assembly. The court say: "The word as here used (in the constitution) is by implication limited to claims against the State of a pecuniary character. . . . Claims for the payment of money may be preferred against the State on various grounds. They may be either of a legal or of an equitable character. . . . All such demands against the State for the payment of money, whatever be their character or origin, are, we think, *claims* within the meaning of the constitution." *Fordyce v. Godman*, 20 Ohio St. 114.

The act of the legislature of New York, passed December 14, 1847, to release the prior lien of the State on the Hudson & Berkshire Railroad, does not violate the 4th section of the 7th article of the constitution of New York of 1846, which forbids the release or compromise of the *claims* of the State against any incorporated company, to pay the interest and redeem the principal of the stock of the State theretofore loaned or advanced to such company, and provides that such claims shall be fairly enforced. The constitution only requires that claims originating in loans of State credit, made before its adoption, and the securities taken on such loans shall be held as the property of the State, and be managed for its direct pecuniary benefit, and shall not be released, reduced, or surrendered for the benefit of the borrowing corporations, in disregard of the pecuniary interest of the State in its distinct and single character of a creditor of the corporation.

**CLAIM.****Definition.**

With these restrictions the exercise of the ordinary legislative discretion in the management of the claims is not prohibited. *Darby v. Wright*, 3 Blatchf. (U. S. C. C.) 170.

**In Acts of Congress.—When Extends to Bounty Land.**—The word "claim," in the 1st section of the act of March 3, 1823 (adjudging every person guilty of felony who shall transmit to or present at, or cause to be transmitted to or presented at, any office or officer of the Government of the United States, any deed, writing, etc., in support of or in relation to any claim, with intent to defraud the United States, etc.), is not limited to a demand for money, but extends to such a claim to bounty land. *United States v. Wilson*, 4 Blatchf. (U. S. C. C.) 385.

**When Not within Act of Congress declaring all Transfers and Assignments Absolutely Null and Void unless made After Allowance of Claim.**—The term "claim," as used in section 3477 of the Revised Statutes, does not include claims for supplies furnished the Oregon expedition to protect the emigrants of 1854, at least after the act of Congress providing for their payment. *Dowell v. Griswold*, 4 Sawy. (U. S. C. C.) 217.

**In City Charter—Torts not Included.**—A provision that no action shall be maintained against the defendant city "upon any claim or demand" until it shall first have been presented to the common council for allowance, held not to include actions for personal torts. *Kelly v. Madison*, 43 Wis. 638.

**In Statute.—States—When Synonymous with Demand.**—In an "act to regulate the settlement of the estate of deceased persons," the words *claimant* and *claim* are used as synonymous with the words *creditor* and *legal demand*. *Gray v. Palmer*, 9 Cal. 616. So in a probate act. *McCausland's Es.*, 52 Cal. 568. But the word "claims," as used in the act, does not embrace mortgage liens. *Fallon v. Butler*, 21 Cal. 25. But a *note secured by a mortgage* is a claim against the estate. *Ellis v. Polhemus*, 27 Cal. 350.

**Synonymous with Cause of Action.**—The word "claim" and the phrase "cause of action" relate to the same thing and have one meaning. When the plaintiff has a "claim" for damages (under a right given in a city charter), when it is stated in a complaint, it is technically a "cause of action." *Minick v. City of Troy*, 83 N. Y. 516.

**Limitation of.**—Under Kentucky statute claim means a verbal, written, or other intimation of the demand, either express or by some distinct communication that the

United States Government; also the lands themselves so possessed.<sup>1</sup>

debt exists. *Pea v. Wagoner*, 5 Hayw. (Tenn.) 14; *Johnson v. Dew*, 5 Hayw. (Tenn.) 69. In California a verbal allowance of a claim against an estate by an executor or administrator gives the claimant no cause of action. *Pitte v. Shipley*, 40 Cal. 154. In Missouri the statute barring "claims" applies to fees of circuit attorneys omitted in original cost bills, and demanded on supplementary cost bills. *Missouri v. Draper*, 48 Mo. 56.

**In Attachment Act.**—A statute which provides that in attachment proceedings "any person claiming property, etc., may interplead," includes only those who claim to own the property attached. A garnishee of a debt has no such claim.

**In Tort and Contract.**—"Claim," as used in the New York Code, authorizing an attachment, does not apply to a tort. *Saddlesvene v. Arms*, 32 How. Pr. (N. Y.) 280. An affidavit for a *capias* which sets out a claim against defendant by reason of his having, as superintendent of a railroad company, collected moneys belonging to the company, and failed on demand to account for and pay over the same, makes out a case of an action "arising upon contract," within the meaning of that phrase in the Michigan statute. *In re Stephenson*, 32 Mich. 60. In a Wisconsin statute the word "account" refers only to demands arising out of some express or implied contract, or of some fiduciary relation, and "claim" and demand, in the same statute, are said to refer only to such accounts. *Stringham v. Supervisors*, 24 Wis. 594.

**In Relation to Land and Land Titles.**—An unassigned dower interest in land is neither a title nor an estate in the scientific sense of those terms, but is an adverse "claim," which the holder may be called upon to defend under the statute relating to the quieting of titles. *Benoist v. Murrin*, 47 Mo. 537. Under the California revenue act of 1861, a person's "claim to and possession of" lands, or his "claim to" or his "possession of" such lands, may be assessed for taxation. The term "claims" means not only an assertion of title to, but an actual possession of the land claimed. *People v. Frisbee*, 31 Cal. 146. In *Iowa*, to constitute an adverse possession under the statute, it is not necessary that the party must have taken and held possession under *color of title*. Such possession is sufficient if

taken and held under a *claim of title*. The terms are not synonymous. To constitute the former a paper title is requisite in the party claiming, but the latter may exist wholly in parol. *Hamilton v. Wright*, 30 Iowa, 480.

**In Pleading.**—In Wisconsin a statement in an affidavit of appellant's attorney that "appellant claims and alleges" certain facts, is not evidence of such facts. *Amory v. Amory*, 26 Wis. 152. In Alabama the complaint must contain an averment of the ownership by plaintiff of the claim. *Douglass v. Beasley*, 40 Ala. 142.

**"Claiming Under."**—On a purchase of lands which were under mortgage the purchaser paid the principal and interest due on the mortgage and took a conveyance, in which mortgagor and mortgagee joined, of the premises, and of the mortgagor's equity of redemption and all the residue of his interest. *Held*, that the purchaser was a person "claiming under" a mortgage within stat. 7 W. IV. and 1 Vict. c. 28; and that the twenty years' limitation under stat. 3 & 4 W. IV. c. 27, s. 2, ran from the paying off of the mortgage and interest. *Doe v. Massey*, 17 Ad. & Ell. 374.

**Under Whom They Claim.**—A covenant in a deed by the grantors that the land is free from all incumbrances done or suffered by "those under whom they claim," refers to those from whom they derive title, while a similar covenant against the acts of "all claiming under him" would probably be construed to have a different signification, and would not be held to include a vendee of the entire estate of the grantor. *Williamson v. Hall*, 62 Mo. 405.

See, generally, *Camp v. Grant*, 21 Conn. 41; *Olcott v. Wood*, 14 N. Y. 32; *Fellmes v. Clay*, 4 Ad. & Ell. (N. S.) 319; *Queen v. Guardians, etc.*, L. R. 9 Q. B. 383.

**1. Claims on Public Lands.**—When used in connection with public lands, "claim" has a known and definite signification. It refers to the settler's right or improvement on a tract of land, the fee of which is in the government. *Bauman v. Torr*, 3 Iowa, 571.

The possessory claims of settlers on the public lands have been recognized as valid, and as proper subject-matter of sale and transfer. To constitute a valid claim to unsurveyed public lands the *claim* must be so plainly enacted and designated as to be distin-

## CLAIMANT—CLAIM OF COMISANCE—CLANDESTINE.

**CLAIMANT.**—A person who makes a claim in an administrative capacity. The plaintiff in the old action of ejectment was called the "claimant."<sup>1</sup> A person authorized and admitted to defend a libel brought *in rem* against property.<sup>2</sup>

**CLAIM OF COMISANCE.—In Practice.**—An intervention by a third person demanding jurisdiction of a cause which the plaintiff has commenced out of the claimant's court.<sup>3</sup>

**CLAIM OF LIBERTY.**—A suit or petition to the queen in the court of exchequer to have liberties and franchises confirmed there by the attorney-general.<sup>4</sup>

**CLANDESTINE.**—Withdrawn from public notice for an evil purpose; kept secret; hidden; private.<sup>5</sup>

guished from adjacent lands. *Sergeant v. Kellogg*, 10 Ill. 273.

A "claim" on the public lands is a good consideration for a contract. *Starr v. Burgess*, 1 Mow. (Ia.) 438.

In the possession of occupants the public lands of the United States are treated as the property of the individuals occupying them as much as if they owned them in fee, except that no disposition of them can be made so as to affect in any way a title that may be derived from the United States, and it would seem that in an action of ejectment for the possession of a "claim" it is only necessary for the plaintiff to deduce a regular title from the first occupant (unless his claim has been abandoned), who is considered as the fountain of the title, which will prevail, unless opposed by a government title, when it vanishes. *Tenney v. Saunders*, 5 Ill. 527.

A contract concerning an interest in a claim is treated as personalty, and pertains to the administrator of the estate, and the right or interest will descend to the heir of the decedent. *Stewart v. Chadwick*, 8 Iowa, 463. A party selling such a "claim" warrants the title; and if the title fails he is liable at least for the purchase-money and interest. *Bauman v. Torr*, 3 Iowa, 571.

1. *Rapalje's Law Dict.*

2. *Bouvier's Law Dict.*

**Bona Fide Claimant** is one who supposes that he has a good title and knows of no adverse claim. *Morrison v. Robinson*, 31 Pa. St. 459.

**In Statute.**—To make one a "claimant" of property within the meaning of a section of an act, giving the claimant the same right to attack a *fi. fa.* for want of payment of taxes as the defendant had, so as to file the counter affidavit there provided for, he must put in a

claim to the property under the claim laws of the State. *Adams v. Worrill*, 46 Ga. 295.

Under a claim for property act, the person of whose claim the sheriff is notified (in accordance with the act) is "the claimant," and none other is permitted to sue on the bond in the name of the sheriff. *Stewart v. Ball*, 35 Md. 209.

**Public Lands — Pre-emptioner not a Claimant.**—A claimant of public land within the meaning of the third section of the act of Congress granting a right of way over the public lands to the Union and Central Pacific R. Cos. is one who has an interest in the land recognized by the laws of the United States. One who is a pre-emptioner, but has not paid for the land, is not such claimant. *Western Pac. R. Co. v. Tevis*, 41 Cal. 489.

**Pension Acts.**—Where the offence described in an act of Congress is "withholding from a pensioner or other claimant the whole or any part of the claim allowed or due said pensioner or claimant," an indictment thereunder charging the defendant with withholding certain money which he as agent had received from the United States by the collection of claims for "pay and bounty" and "arrearage of pay and bounty" cannot be sustained. The word "claimant" in the act means a person who under the act of July 4, 1864, has a claim before the pension office. *United States v. Bencke*, 8 Otto (U. S.), 447.

3. *Bouvier's Law Dict.*

4. *Wharton's Law Dic.*

5. *Webster's Dict.*

**Clandestine Mortgages.**—Statute of 4 & 5 Wm. & Mary, c. 16. A.D. 1692, enacted that if any person having once mortgaged his lands for a valuable consideration shall again mortgage the same lands

**CLASS.**—A number of persons or things ranked together for some common purpose, or as possessing some attribute in common.<sup>1</sup>

**CLAUSE.**—A part of a treaty; of a legislative act; of a deed; of a will or other written instrument. A part of a sentence.<sup>2</sup>

or any part thereof to any person, the former mortgage being in force, and shall not discover in writing to the second mortgagee the first mortgage, such mortgagor so again mortgaging his lands shall have no relief or equity of redemption against the second mortgagee. But this act is not to bar of her dower any widow who does not legally join her husband in such second mortgage. Wharton.

**In Statute.**—"Clandestinely Provided"—Construction of a statute to prevent parish officers from *clandestinely providing* a premium, to bind out poor children without the sanction of the justices. *King v. Inhabitants of St. Paul*, 10 Barn. & Cress. 12.

1. Bouvier's Law Dict.

**In a Libel.**—An action for a libel does not lie for publication alleged to affect the individual characters of persons and the trade or business carried on by them, if on its face it does not point at the individuals intended otherwise than that they pursue a particular trade or business in a specified section of a city; the publication affecting a *class* of persons, no individual of that class is entitled to sustain an action for the publication. *White v. Delavan*, 17 Wend. (N. Y.) 49.

**Official Bond.**—Where a statute directs an official bond to be payable to a class of official persons, it may and ought to be taken to them by their name of office; and in that name they may sue on it. *Justices v. Armstrong*, 3 Dev. (N. Car.) 284.

**In Statute.**—Where a section of a statute extends the word "person" to a class of persons as well as to individuals, the poor of a parish are a class of persons within the meaning of that section. *College of St. Mary Magdalen v. Atty.-Gen.*, 6 H. L. Cases, 189.

**Statute Relating to Classes.**—When Public or Private.—A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special. *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Ingram v. Foot*, 1 Ld. Raym. 708; *Deir v. Manningham*, 1 Plowd. 60.

Sec. 7, art. 5, of the constitution of Pennsylvania, prohibiting local or special legislation, does not prevent classification of municipal corporations with reference to taxation, and the act of May 23, 1874,

classifying cities according to their population is constitutional.

2. Bouvier's Law Dict.

It has been suggested that a clause must mean something self-contained and independent, which when presented on paper would have a meaning by itself, without reference to the context. I do not know any law which says that that is the necessary meaning of the word "clause." When I read an enactment speaking of a devise, that is to say, speaking of a will or any clause in a will, I naturally infer that the word "clause" there means some collocation of words in the will which, when removed out of the will, will leave the rest of the will intelligible. I know no rule which says that the clause itself must be capable of being read as a document by itself if taken alone. The main object is to see if that which you obliterate, which you claim the right to obliterate, *de jure* under the statute, is something in the first place which you can obliterate *de facto*; because if the obliteration cannot be made *de facto*, then of course the statute allowing it to be made must be inoperative. Earl Cairns, Lord Chancellor, in *Swinton v. Bailey*, L. R. 4 App. Cases, 77, where it was held that J. E. having made a will in which he devised his house, lands, and tenements to his mother "*Elizabeth E.*, her heirs and assigns forever," and he afterward struck his pen through the words "her heirs and assigns forever," that this was under the 7th section of the Statute of Frauds (29 Car. II. c. 3) a valid revocation by obliteration of a *clause* in his will, and that the word "clause" in the first part of said section may properly be read "part."

**In Statutes.**—The word depends largely for its meaning on the connection in which it is employed. It signifies less than "purview," yet not necessarily less than a sentence viewed grammatically. As in grammar the word "clause" denotes a part of a sentence, and qualifying words are required to show the particular part and how much; so in legal language it is believed to indicate a part of a statutory provision, the particular part and how much to appear from the context. Bishop Stat. Crimes, § 53.

**Interpretation Clause.**—A clause in a statute which has for its object to render

**CLAY.**—A soft earth which is plastic, or may be moulded with the hands, consisting of alumina, the characterizing ingredient to which it owes its plasticity, and silica with water. It is the result of the wearing down and decomposition in part of rocks containing aluminous minerals. Earth in general, as representing the elementary particles of the human body.<sup>1</sup>

**CLEANSE.**—To render clean; to free from filth, pollution, infection, guilt, or the like; to clean.<sup>2</sup>

**CLEAR.**—Free from indistinctness or uncertainty; easily understood; perspicuous; plain. Without diminution; in full; net. Free from impediment, obstacle, embarrassment, or accusation.<sup>3</sup>

the meaning plainer. Ordinarily it occupies one section, sometimes at the beginning, sometimes at the end. Bishop Stat. Crimes. §§ 54, 55.

**Enacting Clause** most frequently refers to the main body of a statute or some leading provision, excluding its provisos; it may or may not include an exception. Bishop Stat. Crimes, § 57.

**Saving Clause.**—A saving in a statute is only an exemption of a special thing out of the general things mentioned. Dwar. Stat. 513; Halliwell v. Bridge-water, 2 Anderson, 190.

**Repealing Clause.**—The common form is where an act says in terms that such a statute, clause of a statute, or provision of the common law is repealed. Bishop Stat. Crimes, § 151 *et seq.*

**Appeal Clause.**—A clause showing to what places the operation of the act shall extend; a clause showing from what date the operation of the act is to commence, and how long it shall continue in force. Dwar. Stat. 511. See, generally, Bishop Crim. Proc. § 634; Stat. Crimes, §§ 52-60, 82, 126, 196.

**Clause Irritant.**—By this clause in a deed or settlement the acts or deeds of a tenant for life or other proprietor, contrary to the conditions of his right, become null and void; and by the resolute clause such right becomes resolved and extinguished. Bell Dict.

**Clause Rolls or Close Rolls.**—Rolls preserved in London, containing the records of writs close—*litera clause*. Burrill's Law Dict.

1. Webster's Dict.

**Clay Pits and Mines.**—Where appellants were rated to the poor for clay-pits which were excavations under ground from whence glass-house pot-clay and fire-brick clay were extracted. A perpendicular shaft was sunk from the surface of the land for the purpose of raising the clay out of the strata, which was done by a steam-engine and other mining appara-

tus; the excavations were like those that are made for working coal and metallic mines, and the mode of raising the clay was the same as that used in a coal-mine, it was held that the pits so assessed were *clay-mines*, and therefore not ratable. King v. Brettle, 3 Barn. & Adolph. 424.

2. Webster's Dict.

An act of Parliament authorizing persons to repair and cleanse a navigable river does not authorize them to make a passage to a new wharf on the river. Partheriche v. Mason, 2 Chitty, 658.

3. Webster.

**In Defining Proof.**—When such terms as *clear*, precise, explicit, unequivocal, and indubitable are used by the courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of jurors as strong as verbal testimony is able to convey. It is meant that witnesses shall be found to be credible; that the facts to which they testify are distinctly remembered; that details are narrated exactly and in due order, and that their statements are true. Absolute certainty is, of course, out of the question. The court below charged in regard to an alleged parol agreement to reform a written instrument that said agreement should be made out by "clear, precise, and indubitable proof." *Held*, that these words, restrained by their inherent limitations, could do no harm. Spencer v. Colt, 89 Pa. St. Rep. 314.

**"Clearly Convinced."**—In Collin v. Barr, 64 Ala. 543, it is said: "Reasonable conviction or satisfaction of the mind is the proper measure of proof in civil cases. 'Clearly convinced' lays down too exacting a rule."

**"Clearly Established."**—The words "clearly established by satisfactory proof" are equivalent to the expression "established by satisfactory proof beyond a reasonable doubt." People v. Warden,

8 Pac. Coast L. Jour. 191. In that case the court said: "How can a fact be said to be clearly established so long as there is a reasonable doubt whether it has been established at all? There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof. 'Clearly,' according to Webster's definition of it, means 'in a clear manner, without obscurity, without obstruction, without entanglement or confusion, without uncertainty,' etc. And that is doubtless the sense in which it is popularly understood. The definition of 'a reasonable doubt,' given by Mr. C. J. Shaw, which has been generally approved by the courts, is as follows: 'It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, . . . a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.' Comm. v. Webster, 5 Cush. 320. A juror would have no excuse for saying that he did not 'feel an abiding conviction to a moral certainty' of the truth of a fact which had been 'clearly established by satisfactory proof.' Such proof in any case would convince and direct the understanding and satisfy the reason and judgment of a conscientious juror."

**In Reference to Lands and Estates—Clear Yearly Rent.**—In asserting an estate to be of any *clear* yearly rent, the parties should attend to the meaning of the word "clear" in an agreement between buyer and seller, which is free from all outgoing, incumbrances, and extraordinary charges not according to the custom of the country, as tithes, poor-rates, church-rates, etc., as these are natural charges on the tenant, but subject nevertheless to the land tax and all other outgoing, which, according to such custom, ought to be paid by the landlord. Sugd. V. & P. (14th Ed.) 222.

**Clear Deed.**—A covenant to make a *clear deed* when the title is equally well known by the vendor and the vendee is performed by the delivery of a deed conveying such title as the vendor hath, although it may be but a life estate; for he who purchases a tract of land knowing the title to be defective, takes the risk upon himself. Rohr v. Kindt, 3 W. & S. (Pa.) 563.

**Clear of all Incumbrances.**—If there be a contract for the sale of lands and the bargainor agree to "make a warranty deed free and clear of all incumbrances,"

this agreement is not satisfied by the making of a deed with covenants of general warranty and freedom from incumbrances unless the grantor had the absolute, entire, and unincumbered estate in the land at the time of the conveyance. 2 Greenl. (Me.) 22; 11 Am. Dec. 30.

**Clear Title.**—A contract to convey "by a deed conveying a *clear* title that parcel of land on the corner of A and B streets, and owned by the vendors," is not satisfied by the tender of a warranty deed conveying "that parcel of land on the corner of A and B streets now owned by the grantors" if there is an incumbrance on the land. Roberts v. Bassett, 105 Mass. 409.

A contract of executors not in pursuance of their official duty to sell and convey, with a *clear* and satisfactory title, land of the testator's estate the title to which is in the heir, subject to the payment of the testator's debts and legacies and charges of the administration, is not necessarily void, but binds them individually; and if the terms of the contract imply that the title is to come from more than one source, and may require more than one deed of conveyance, and the executors sell the land under license of the probate court, and then to pass the title tender to the other party, a quitclaim deed of it from the purchaser at the sale, with a warranty deed from the heir, such party cannot avoid the contract either on the ground of its original execution by the executors in their official name or on the ground of his dissatisfaction with the form of their making title in its fulfilment. Dusel v. Jordan, 104 Mass. 407.

**Clear of Assessments.**—Where there is a covenant on the part of the grantees to pay the ground rent free and clear of all assessments, they are not allowed to deduct the same from the rent due to the ground landlord. Peart v. Phipps, 4 Yeates (Pa.) 386.

**Clear of Expense.**—Where a vendor proposed a price for land *clear of all* expenses, it was held that the purchaser should bear the expense of making out the title, the law imposing on him the expense of the conveyance. Stratford v. Bosworth, 2 Ves. & B. 341.

**Clear of Charge.**—Under the words "clear of charge or reprise" the jointure cannot be limited clear of land tax. The word "clear" should be construed in a power as it would be in an agreement between buyer and seller, that is, clear of all outgoing, etc., which do not, according to the custom of the country, fall on the tenant. Tyrconnell v. Ancaster, Ambler, 239; Arran v. Crisp, 12 Mod. 54.

er," when used in a jointure, at the time of making the jointure its continuance. *Tyrconnell v. Peter*, 2 Ves. Sr. 499.

**Clear Land.**—In the absence of limitation, the term "to clear," is understood to mean removing timbers from land, to remove all the timber of every size except the stumps; and parol evidence is not admissible to explain a written conveyance. *Temper v. Pound*, 10 Ind. 32.

Where a contract requires that a party clear, grub, and pile the brush, all in good order, on all the detached piece of land, through which a road runs, it is erroneous to admit evidence that it was not usual in the neighborhood to grub such ravines, or that the land would be better without having been grubbed, especially when the contract is upon his right under the deed to have such grubbing done. The word "clear" in such connection does not mean to brush too small to be grubbed, or to large trees. *Holmes v. Stumhill*, 412.

The words "clearing land," in the absence of limitation, mean removing from all the timber of every size, but not including taking out the stumps; and where a contract for all the timber about trees on certain land, the grantor to pay a stipulated price for the same, and so much per cord for wood, cut and hauled off by him, "and the acres of the white land to be cleared and hauled off" by him by a certain day, the brush of whatever he should pile as cut, simply taking the valuable timber off and piling up the brush from that, leaving smaller standing, is not sufficient. *Seavey v. Clark*, 110 Ind. 494; 9 West. Rep. 416; 11 N. E. Rep. 518.

**"Clear Out" a Highway** means more than to clear it out for all purposes to which it is dedicated. It means to have the easement, the right of passage; that they have a right to permit to be maintained. All obstructions to it must be removed; but beyond the rights of the owner of the soil are not impaired. *Winter v. Peterson*, 10 N. J. L. 528.

**Clear.**—A city owning a passage-way, a lot on one side of it, and a lot in the rear, conveyed to B the lot on the side, bounding it on the one side by said city except for a back passage-way to the lot in the rear, "or for any other purpose which the city may choose to appropriate

said passage-way to." The deed also gave the grantee the right to build over the passage-way, leaving it five feet wide in the clear. The city then quitclaimed to A, the owner of the land on the other side of the passage way, the right to pass over it, describing it as five feet wide, as appurtenant to his estate; and afterwards conveyed to B the lot in the rear, and quitclaimed to him all the rights of the city in the passage-way. *Held*, that A could maintain a bill in equity against B to restrain him from building over the passage-way by placing a wall in it, whereby its width was made less than five feet, it appearing that the passage-way could be built over without such wall at an expense not much larger than by the mode proposed. *Tucker v. Howard*, 122 Mass. 529.

**In Wills—Annuities.**—A devise of an annuity clear for A. means free from taxes. *Hodgworth v. Crowley*, 2 Atk. 376.

An annuity was given by a will clear of all deductions, and was directed to be paid out of certain sums of stock standing in testator's name. *Held*, that it was not subject to the legacy duty. *Dawkins v. Tatham*, 2 Sim. 492.

Where a testator directs his executors and trustees to pay certain annuities and legacies "clear of the property tax and all expenses attending the same," the legacy ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities without any deduction in respect of legacy duty. *Courtoy v. Vincent*, 1 Turn. & R. 433.

**In Contract.**—A contract stating that all small remnants must be "cleared," means taken away. *Pettit v. Mitchell*, 4 M. & G. 838.

Where a party agreed to deliver so many bushels of "first quality clear barley," the contract not stating whether the barley was to be delivered in sacks or bulk, i.e., loose, *held*, that evidence was properly admitted to show a usage of trade to deliver in sacks. *Robinson v. United States*, 13 Wall. 363.

**In Constitution.**—Where a constitution makes "the clear proceeds of all fines collected . . . for any breach of the penal law" a part of the school fund, in a suit for their recovery it is not necessary to allege in the declaration that the fines had been determined or set apart by any tribunal or law of the State. *Wisconsin v. Casey*, 5 Wis. 322.

**In Statute.**—Where a statute provides that "any person . . . having an estate



**CLEARANCE.**—A certificate given by the collector of a port, in which it is stated that the master or commander (naming him) of a ship or vessel named and described, bound for a port named (and having on board goods described, in case the master requires the particulars of his cargo to be stated in such clearance), has entered and cleared his ship or vessel according to law.<sup>1</sup> (See also SHIPPING.) A certificate of the discharge of obligations or dues.<sup>2</sup>

**CLEARING-HOUSE.**—An office organized by the banks of a city where their representatives may meet daily, adjust balances of accounts, and receive and pay differences.<sup>3</sup> The object of its members is to effect at one time and place the daily exchanges between the banks composing the association and the payment of the balances resulting from such exchanges. There are also stock-exchange clearing houses which undertake to clear quantities of stocks.<sup>4</sup> (See also BILLS AND NOTES; BANKS AND BANKING; PRESENTMENT.)

of inheritance or freehold in the town where he dwells of the clear yearly value of ten dollars, and taking the rents and profits thereof three years successively, . . . shall thereby gain a settlement therein;" and one who has such an estate mortgages it in fee to secure a sum, the interest of which being deducted from the annual income reduces it below ten dollars within the three years, gains no settlement. *Groton v. Roxborough*, 6 Mass. 50; *Marsh v. Hammond*, 103 Mass. 146; *Taylor v. Milnesfield*, 3 El. & Bl. 724; *Willcut v. Calnan*, 98 Mass. 76.

**Clear Days.**—Where a rule of court provided for the delivery of paper books *four clear days* before the day appointed for argument, it was held that Sunday was to be counted as one of the four days between the delivery of paper books and the day of argument, except it is the last day. *Hodgkins v. Hancock*, 14 M. & W. 120.

By 49 G. III. c. 68, s. 5, ten clear days of the intention to appeal is required. *Held*, that the ten days are to be taken exclusively both of the day of serving the notice and the day of holding the sessions. *King v. Herefordshire*, 3 Barn. & Ald. 581.

1. Bouvier's Law Dict.

2. Section 23 of 24 & 25 Vict. c. 98 enacts that "whosoever shall forge . . . any acquittance or receipt for money . . . shall be guilty of felony." A. was secretary of a friendly society which had branches in various towns. Any member who had paid all his dues, on going from one of these towns to another, was entitled to a document called a "clearance," which admitted him to member-

ship at any place where a branch of the society existed. The qualifications for membership were the payment of an entrance fee, a time of probation, and certain general payments which were made to the secretary, whose duty it was at once to hand them over to the treasurer. A clearance had to be signed by the secretary and by two other officers of the society. . . . A. gave a clearance to C., to which he was entitled, but to which he had forged the names of the two officers whose signatures besides his own were necessary for the validity of the clearance. The clearance certified that the bearer, C., was a member of the branch society granting it, and had paid all dues and demands, and then it authorized any other branch to receive C. as a clearance member. *Held*, that the clearance was not an "acquittance or receipt" for money within the act. *Queen v. French*, Law Rep. 1 C. C. 217.

3. Abbott.

4. Dos Passos Stockbrokers, 277.

Clearing-houses are established in all large cities. They may be legally incorporated, but commonly are private associations organized by the banks which form their members.

**Mode of Operation.**—The plan pursued is thus described: At a certain hour every morning, usually at ten o'clock, the deputy of each bank attends at the clearing-house, bringing with him all checks upon other banks which have been received by his own bank since the same hour of the preceding day. Each bank has its box or drawer, and the messengers of all the other banks distribute all the checks which they have in their possession, placing each of them in the

drawer or box of the particular bank upon which it is drawn. Each bank is then credited on the books of the clearing-house with the amount of checks upon other banks which it has brought in for collection, and is debited with the amount of the checks drawn upon it which all the other banks have brought. If the former amount exceeds the latter the bank is then declared to have gained "the amount of the excess;" but if the latter amount exceeds the former the bank is declared to have "lost" the amount of the difference. The total of the losses must be precisely the total of the gains. At a later hour in the same day the losing banks are obliged to bring into the clearing house the sums which they have respectively lost; and shortly afterward the gaining banks come and receive from the officers of the clearing-house, out of the funds thus furnished by the losers, the amounts of their respective gains. The computation of how much each bank has brought in against others, and of how much the others have brought in against it, is performed by skilful clerks in a few minutes. So soon as it is finished an officer of each bank takes from its drawer or box all checks against it, and carries them to his own bank to be examined for the purpose of seeing whether any of them must be dishonored. A time is set within which each bank is expected to examine all checks and to refuse such as it refuses to pay. *Morse on Banks and Banking*, 450, 451.

**Effect of Clearing-house Regulations and Usages.**—Its usages and rules, if not in conflict with law, may, by the implication of tacit adoption in the contract of members, bind them in the same way that a general usage of trade may bind those who deal with reference to it, and who are therefore held impliedly to adopt it. But those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them *inter sese* only. *Overman v. Hoboken City Bank*, 1 Vroom (N. J.), 61. In this case the plaintiff, on the 29th of October, 1859, deposited in the Bank of Commerce in New York a check drawn by Andre & Bro. on the defendant bank, which was located in New Jersey. The Ocean Bank of New York was the agent in that city of the defendant, and through it defendant received and paid checks drawn on it. The Bank of Commerce and the Ocean Bank were members of the New York Clearing House. On the 31st (the

30th being Sunday) the Bank of Commerce presented the check to the Ocean Bank at the clearing-house. The rules of the clearing-house required any check which was not to be honored to be returned before 10 A.M. on the day following that on which it was received through the clearing house. The defendant retained the check without notice of non-payment until November 2d, when it was returned to the Bank of Commerce with notice of non-payment. Andre & Bro. failed on the 1st of November. The plaintiff claimed to recover the amount of the check on the ground that by virtue of the above-mentioned rule of the New York Clearing House the defendant was responsible if its agent the Ocean Bank did not return the check to the Bank of Commerce before ten o'clock on the next morning after it was presented, but the court held it not bound by the rule, and that plaintiff could not recover.

**Effect of a Settlement through Clearing-House.**—A settlement made by two banks through the clearing-house, in which checks are presented and exchanged, and a balance between them is struck, will be final and conclusive if either fails to give notice of inability to meet the balance against it on the general adjustment, before the hour when banks usually pass checks to the credit of their depositors. The mutual credits thus given cannot be recalled by either one to the detriment of the other. *Bluffer v. Louisiana National Bank*, 35 La. Ann. 251.

On the 20th of December, 1868, H. presented himself at the defendant bank, to whose officers he was unknown, and stated that he desired to open an account, and presented a check for \$4600.15, purporting to have been drawn by A. upon the plaintiff bank. The amount of the check was entered as cash in a bank-book furnished H. by defendant. On the following morning the check was sent to the clearing-house, and thence was taken to the plaintiff bank, where it was passed as genuine, charged to the account of A., and credited to the defendant bank. On the 22d of December, H. called at defendant bank and drew \$4500. On December 29th, plaintiff discovered the check to be a forgery, and demanded repayment of the check from defendant; but the latter denied its liability beyond the \$100.15 still remaining to the credit of H. The plaintiff having refunded to A. the amount of the forged check, brought suit against the defendant. *Held*, that the plaintiff was bound to know the signatures of its depositors, and that the sending of the check deposited by H.

through the clearing-house by the defendant, and its failure to communicate to plaintiff the fact that it was received from a stranger, was not such negligence as would throw the loss upon defendant. No ruling was made by the court upon the question of an alleged usage among banks not to receive checks from strangers without identification, nor on an alleged well-established usage of the banks in Baltimore to the effect that when one bank sends to the clearing-house a check on another bank payable to the order, and purporting to be indorsed by the payee, the bank sending it guarantees the indorsement of the check to be genuine. *Comm. & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Stuyvesant Bank v. Mechanics' Bank*, 7 Lans. (N. Y.) 197.

In an action against the indorser of a promissory note, payable at the plaintiff bank and discounted by another bank, it appeared that when the note became due, the last-named bank charged it to the plaintiff bank, and sent it through the clearing house for payment; that the plaintiff's teller by mistake, thinking that the maker of the note was in funds at the plaintiff bank, stamped the word "paid" on the face of the note; that the mistake was soon discovered, and, before the close of banking-hours on the same day, both the other bank and the indorser were notified of it and the note was duly protested; and that a dispute between the two as to whether the rules of the clearing-house had been complied with was terminated by a payment of the amount of the note to the other bank by the plaintiff, without any waiver of its legal rights, and at the trial the other bank disclaimed all title or interest in the note. The judge, who tried the case without a jury, found that the note was stamped by mistake as paid; that this act did not amount to a payment of the note, and was not intended as such; that the money paid by the plaintiff to the other bank was not intended and did not operate as a payment of the note; and that the plaintiff had sufficient title and ownership of the note to enable it to bring the action. *Held*, that the defendant could not avail himself of the rules of the clearing-house to which he was not a party in defence of the action. *Manufacturers' Nat. Bank v. Thompson*, 129 Mass 438.

**On Member Banks.**—B., as agent of a bank, sold goods pledged to the bank as collateral security for the payment of his promissory note, and wrongfully deposited the money received therefrom to

his own account in the bank; and against the balance thus produced he drew a check on the bank, which was paid by that bank to another bank through the clearing-house, of which both banks were members. The president of the bank on which the check was drawn, suspecting that B. was financially embarrassed, discovered that no payment had been made by B. on account of the goods entrusted to him for sale, and looking at the condition of B.'s bank account, directed the return of the check to the bank to which it had been paid after one o'clock of the day of such payment. The rules of the clearing-house provided that whenever checks which were not good should be sent through the clearing-house, the banks receiving them should return them to the senders as soon as it should be found that they were not good, "and in no case shall they be retained after one o'clock." *Held*, that the check was paid under such a mistake of fact that the bank paying it could recover the amount from the bank to which it was paid, if the latter had not changed its position between one o'clock and the return of the check. If a bank is entitled to maintain an action to recover back the amount of a check paid by mistake to another bank through the clearing-house, the fact that the latter bank has credited the amount to the account of the customer depositing it does not render the depositor instead of such bank liable to the action. *Merchants' Nat. Bank v. Nat. Bank of the Commonwealth*, 139 Mass. 513.

In *Merchants' Nat. Bank v. Nat. Eagle Bank*, the rules of the clearing house fixed a time before noon for making exchanges at the clearing-house, and a time between noon and one o'clock for paying balances there. The practice under the rules was for the exchanges and payments to be made according to tickets accompanying vouchers presented for exchange, and not from an examination of the vouchers in detail. And by further rules it was provided that errors in the exchanges should be adjusted directly between the banks; and that whenever checks which were not good should be sent through the clearing-house, the banks receiving them should return them to the senders as soon as it should be found that they were not good, "and in no case shall they be retained after one o'clock." *Held*, that the payment of a check through the clearing-house was provisional until one o'clock, to become complete only if the check was retained after that hour; and that if by any mistake of fact a check so paid, but not good,

was retained until after one o'clock, the payment of it was to be treated as a payment made under a mistake of fact to the same extent and subject to the same right of reclamation as if it had been made without the intervention of the clearing house. 101 Mass. 281; Nat. Bank of North America v. Bangs, 106 Mass. 441.

But a stricter rule was laid down by the United States Circuit Court in Illinois. C. deposited certain collaterals with P. K. & Co., bankers and members of the Chicago Clearing House, with the understanding that he should have a right to draw checks on them to within ten per cent of the value of the securities. On August 5, 1881, C. drew his check for \$4000, which was deposited with the defendant bank, also a member of the clearing-house, on the morning of August 6th. Under the rules of the clearing-house, each member was required to pay its balances to the clearing-house by twelve o'clock, and any check which was found not to be good when returned from the clearing-house to the bank against which it was drawn was to be returned to the bank which collected it through the clearing-house, by half-past one o'clock of the same day. When C.'s check came from the clearing-house into P. K. & Co.'s bank, his account was examined, and the collaterals deemed sufficient to pay that check and others drawn on them by him, and they were handed over to the book-keeper, to be charged into his account. At forty-two minutes past one, P. K. & Co. heard that C. had failed, when a second examination was had, and it was found that a mistake had been made, whereupon the check was sent to defendant bank and payment demanded at fifteen minutes before two o'clock, and refused. P. K. & Co. brought suit against defendant to recover the amount of the check as money paid under a mistake. *Held*, that they could not recover.

In *Fernandez v. Glynn*, 1 Camp. 426 n., Lord Ellenborough held that a usage among the banks in the clearing-house at London to return checks at any time before five o'clock even if they had been cancelled, provided the words "cancelled by mistake" was noted upon them, was binding, and amounted to a refusal to pay, though, had it been a bill sent for acceptance and accepted, no change of circumstances could have altered that fact.

**Liability of a Bank Acting as a Clearing-house.**—Defendant had a department for the general clearance of contracts between its customers for the purchase

and sale of gold, known as the "clearing-house." Clearances were made each day by means of statements furnished by dealers to defendant of purchases and sales made by them, defendant acting simply as mutual agent for the parties. On a day when many members of the clearing-house had failed to perform their contracts, and when there was great confusion in regard to them, O. & Co., plaintiff's assignor, presented two separate statements, one in the morning and one in the afternoon. In the first was an item of a transaction between O. & Co. and a firm which failed on the morning of that day. It was not usual to present more than one statement during the same day. When O. & Co. called upon defendant for the balances shown to be due that firm by the statements, they were advised by its president that, owing to the confusion in business, he could not tell how the statements stood, and that the bank would only pay approximate balances, reserving a margin to secure defendant against failures. Defendant accordingly paid \$30,000 on the second statement, leaving \$10,000 unpaid thereon, and paid nothing on the first. In an action to recover the balances shown by the statements, *held*, that to entitle plaintiff to recover, it was necessary for it to show a clearance by defendant of the statements, and that a balance had been struck in favor of O. & Co., which made out a demand in the nature of an account stated; that the statements were to be taken and considered together as but one statement; but that, if considered separately, there was no such clearance of either as bound defendant, and that plaintiff was not entitled to recover. *Nat. City Bank v. N. Y. Gold Exchange Bank*, 101 N. Y. 595.

**Presentment through Clearing-house a Legal Presentment in England.**—If a bill of exchange is accepted, "payable at Mess. A. B. & Co.," who are bankers in the city of London, a presentment of the bill for payment to their clerks at the clearing house is sufficient. *Reynolds v. Chetel*, 2 Camp. 596.

**Clearing-house Due-bill.**—A clearing-house due-bill is not a mere certificate of deposit creating a contract of bailment, but is as negotiable an instrument as a check payable to bearer, or as a promissory note payable to order or bearer; is absolutely unfettered by any special condition or stipulation; is also "simple" in terms, "certain" in amount, and manner of payment "unconditional," and subject to no "contingency." When

**CLERICAL.** See note 1.

**CLERK.** See MASTER AND SERVANT.

**CLIENT.** See ATTORNEY AND CLIENT, Vol. I. p. 942.

**CLOTHES.** See note 2.

such a due-bill has been given to the bank and through it to the other banks, said bank is entitled to require from the owner of the due-bill, by whom it has been lost, a good and sufficient indemnity bond before payment of said due-bill. *Dutton v. Merchants' Nat. Bank*, 16 Phila. 94; *Grant's Law of Banking*; *Morse's Banks and Banking*; *Bolles' Banks and their Depositors*.

1. **Clerical Error.**—Where a judgment in a suit against executors was rendered *de bonis propriis*, it was allowed to be amended to *de bonis testatoris*, after a writ of error had been sued out and decided that such an error so corrected cannot afterwards prevail in an appellate court. *Speed's Exrs. v. Hana*, 1 T. B. Mon. (Ky.) 16.

The erroneous teste of a *fi. fa.* by a clerk, though executed, is amendable. *Baker v. Smith*, 4 Yeates (Pa.), 185; *McCormick v. Meason*, 1 S. & R. (Pa.) 97.

Where, in the *fi. fa.* or *vend. ex.* under which land was condemned and sold to plaintiff, said plaintiff was named as executrix of William McDowell instead of William Dowell, it is only clerical error which would be amended at any time. *Cluggage v. Duncan*, 1 S. & R. (Pa.) 109.

An omission in a *levari facias* of the command to levy the debt, is a clerical mistake, and may be amended after error brought by the lower court, or if it will not, by the upper. *Peddle v. Hollinshead*, 9 S. & R. (Pa.) 277.

Where blanks were left in a *habeas corpus* by the inadvertency of the clerk, and there was a *precept* to amend by, amendments were allowed. *Benner v. Frey*, 1 Binn. (Pa.) 366; *Com. v. Parker*, 2 Pick. (Mass.) 550.

While clerical errors may be amended in a criminal as well as a civil case, the finding by a jury that defendant was guilty of writing and publishing "a bill of scandal," where the indictment was for writing and publishing a libel, was reversed because defendant was not found guilty of the offence charged in the indictment. *Sharff v. Commonwealth*, 2 Binn. (Pa.) 514.

The fact of whether an entry was made before a certain date, the record being defective in having no date, is to be decided by the jury. The party will not be injured by the omission of the clerk, pro-

vided the entry were made in time. *Jack v. Eales*, 3 Binn. (Pa.) 101.

2. **In Will.**—A bequest of all "my linen and clothes" was held to pass body linen only. *Hunt v. Hart*, 3 Brown's Ch. 311.

"When a person is found making her will (although it is true she does not appoint executors), and the only bequest she makes is a gift of her 'personal property, consisting of money and clothes,' the strong presumption is that she did not intend only to do that which she might have effectually done by giving her 'money and clothes' simply. It appears to me there is no *falso demonstratio* here, there is simply an imperfect enumeration. The testatrix was a markswoman, and not very cognizant of the force of particular expressions." *Held*, that the whole of the property passed. *Dean v. Gibson*, L. R. 3 Eq. Cas. 713.

**Ready-made Clothing.**—On a note made payable in ready-made clothing, the clothing may be called for in parcels, but the payee has no right to call for a garment made for a customer at a stipulated price. There must be a demand and refusal before action can be brought. *Vance v. Bloomer*, 20 Wend. (N. Y.) 196.

**Taking Clothes from Dead Body.**—The taking of articles of dress from the body of a dead person, *animus furandi*, is a felony, as they vested in and were the property of some one, and consequently words charging such an offence would be actionable. *Worson v. Sayward*, 13 Pick. (Mass.) 402.

**Larceny of Wife's Clothes.**—Coleridge, J., charging a jury, said: "I think that if she (the wife) elopes with an adulterer, who takes her clothes with them, it is larceny to steal her clothes, which are her husband's property, just as much as it would be a larceny to steal her husband's wearing apparel, or anything else that was his property." *Reg. v. Tollett Car & M.* 112. *Contra*, *Reg. v. Fitch*, Dears. & B. 187.

Prosecutor gave prisoner his waistcoat to take to his washerwoman. Prisoner delivered and received it back as his own. The jury having found that he had no *animus furandi* when he took it, declared him not guilty. *Erskine, J.*, having charged that his getting back the waistcoat from the washerwoman was so lar-

**D ON TITLES.** See BILL TO REMOVE CLOUDS FROM Vol. II. p. 298.

**S.** See SOCIETIES.

See ABBREVIATIONS, Vol. I. p. 15.<sup>1</sup>

**H.** See CARRIAGE; CART.<sup>2</sup>

—A mineral; any substance composed of the ingredients of which coal is composed, and used for fuel, in commercial usage. The common understanding may be known as coal.<sup>3</sup>

He gave it to her as his own. *Evans, Car. & M.* 632.

Where a contract was entered into under a firm name of "I. M. & Co.," having in fact no partner in the city of Philadelphia, it was held that the contract was not void under the New York statute which forbids the use of the words "& Co.," when it represents an actual partner, in an action brought in New York by said Stoddart, governed by the *lex loci contractus*. *Stoddart v. Key*, 62 How. Pr. (N. Y.) 137.

There is an exemption from toll was granted by statute of certain vehicles, but not from stage-coach, stage-wagon, or stage-carriage conveying passengers or goods for pay, it was held that a stage-wagon employed in carrying goods from a canal wharf to persons in the neighborhood and from such persons to a company, was not a stage-wagon and therefore not excluded from the tolling clause. The word "stage" was held to mean the idea of travelling to and from places. *Queen v. Ruscoe*, 8 Ad. 7.

**On Platform of Railway Coaches.** Negligence to attempt passing from one coach to another on a railroad train as to prevent recovery of administrator on an insurance policy including indemnity to an assured who died in consequence of negligence. *Sawtelle v. Railroad Assur. Co.*, 15 Blatchf. (U. S.) 6.

RECORDING, Vol. I. p. 107.

**Insurance Policy.**—It is proper to call a witness who is acquainted with the composition of "patent fuel" whether it is embraced under the word "coal" in a policy of insurance, if he did not deal in coal or patent fuel as a merchant or an underwriter. A commercial usage that it was common to the parties at the time the contract was made, and it must be shown that the character of the fuel had been so known either by other ingredients than

coal, or by the process to which it had been subjected, that the general term coal, according to the common understanding of that name, would not apply to it. *Howard v. Great West Ins. Co.*, 109 Mass. 384.

Patent fuel, composed of coal-dust, mixed with three per cent pitch and lime, is not liable to duties imposed on "coals" imported into the port of London, notwithstanding there is no purpose to which ordinary pit coal can be applied to which coal dust, without the admixture of pitch and lime, could not also be applied. *London v. Parkinson*, 10 C. B. (70 E. C. L. R.) 227.

**Coal Privileges.**—A common practice prevails among the owners of coal lands to grant what is called "coal privileges;" that is, to grant the right of mining and taking out all the coal lying under a certain piece of ground, or a given number of acres, either at a specified rate per bushel, or so much by the acre. *Peterson v. Kler*, 2 Pittsb. (Pa.) 109.

**Refined Coal or Earth Oils in Policy.**—Insured made application for insurance, and the agent inspected the premises, was informed and knew that kerosene oil was used for lighting. The policy which the agent gave to insured contained the condition that if refined coal or earth oil was used or stored without written consent the policy was void. *Held*, that kerosene, in a commercial sense, was a refined coal or earth oil, and that it could not be supposed without imputing bad faith to defendant that the use of kerosene for lighting was intended to be prohibited, as it would have rendered the policy void from the beginning, and also that defendant waived the condition requiring consent in writing, and was estopped from setting up a forfeiture for breach thereof. *Bennett v. N. Brit. & Merc. Ins. Co.*, 81 N. Y. 293; s. c., 37 Am. Rep. 301.

Where an inclosure act provided that nothing therein was to interfere with the rights of the lord of the manor as to the mines, minerals, and quarries, and gave him power to make or grant wagon roads

**COAST.**—That part of the land bordered by the sea. The term "coasting trade" is applied to commercial intercourse carried on by means of navigable rivers as well as the sea.<sup>1</sup>

for "leading, carrying, and conveying the coals and the produce of any other mines and minerals from or under any other lands and grounds whatsoever," it was held that he might haul coke on a railroad constructed by him under the power given, and that the produce of any other mines and minerals meant the produce of mines and minerals before mentioned, and not of those other than coals. *Bowes v. Baron Ravensworth*, 15 C. B. 512, 80 E. C. L. R.

**Coal Mines.**—The express mention in a statute of coal-mines is a virtual exclusion of all other mines, and consequently all other mines, even though operated in the same manner as coal-mines, are not ratable to the relief of the poor under st. 43 Eliz. c. 2. *Rex v. Sedgely*, 2 B. & Ad. 65.

**Coals Worked Out.**—Where a lease was made of a colliery, by which the owners were to have a certain quantity of coals at the mouth of the pit, and the lessees, on suit being brought for non-fulfilment of covenant, filed their plea that the coals were worked out, and it appeared that there was some coal left in the pit, but it would cost more than it was worth to work it, the court held the covenant absolute, and the plea to be no answer. 7 B. & S. 243.

**Workable Coal Seam.**—B licensed A to dig fire-clay under his (B's) lands for 21 years. He demised to C subsequently all coal mines and seams, and all iron-stone or fire-clay found in connection with such coal-seams "as are workable as coal-seams" on the same lands. A expended considerable money on a pit to get at the fire-clay connected with a certain coal-seam. B gave notice that he intended to work said seam, and C filed his bill to restrain him. *Held*, that the evidence having shown that said coal-seam was workable at a profit when both the coal and the fire-clay were taken into account, the said seam was comprised in C's lease; that A's license was not exclusive; that C had first possession of the seam, and A could not restrain him; and that no knowledge could be imputed to the lessor of the extent of A's business, or that he would require all the fire-clay in the land during his term. *Carr v. Benson*, L. R. 3 Ch. App. 524.

1. **Coasting Trade.**—The terms "coasting trade" mean "commercial intercourse carried on between different districts in

different States, between different districts in the same State, and between different places in the same district, on the sea-coast, or on a navigable river." The act of legislature of New York, granting to Livingston and Fulton the exclusive navigation of all the waters within its jurisdiction, with boats moved by fire or steam, for a term of years, is repugnant to that clause of the constitution of the United States which authorizes Congress to regulate commerce, so far as that act forbids vessels licensed, according to law, for carrying on the coasting trade, from navigating those waters by means of fire or steam. *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

The phrase "coasting trade" cannot be applied to ferrying across a river, and Congress has no authority to require a license to carry on a ferry over a river at a place entirely within the limits of the State. *U. S. v. Morrison*, 1 Newb. 24.

Vessels trading between England and Guernsey and Jersey have been decided not to be coasting vessels. *Shepherd v. Hills*, 11 Exch. 55. *Held*, that an act for the more effectual regulation of pilots and pilotage of ships and vessels on the coast of England extended to the river Thames. *Bennett v. Morda*, Holt N. P. 359.

**Atlantic Coast in Insurance Policy.**—In the printed part of the policy the assured warranted that it would not use (among other places) ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico. By a written memorandum on the margin the vessel was to be employed in the coasting trade on the United States Atlantic coast, and was permitted to use gulf ports not west of New Orleans. The vessel was lost in the gulf, west of New Orleans, not far from Morgan City, Louisiana, which is west of New Orleans, while on her voyage to that place from Maine. The assured could not recover, the meaning of the policy excluding the Gulf of Mexico, and the permission to use the gulf ports not west of New Orleans not extending the coasting trade through the gulf. *New Haven Steam Saw-mill Co. v. Security Ins. Co.*, 7 Fed. Rep. 847.

**Flying Coastwise.**—The terms "plying coastwise" and "coasting trade" indicate vessels engaged in the domestic

**C.O.D.** (See also ABBREVIATIONS, Vol. I. p. 15.)—Collect on delivery. Where goods are shipped, marked "C.O.D.," the contract of the common carrier is not only to safely carry and deliver the goods to the consignee, but also to "collect on delivery," and return to the consignor, the charges, price, or value due the consignor on the goods; and the consignor may sue on such contract where neither the goods nor the charges thereon are returned to him.<sup>1</sup>

trade, or plying between port and port in the United States, as contradistinguished from those vessels engaged in the foreign trade, or plying between a port of the United States and a port of a foreign country. *Blackwell v. Walker*, 1 Wend. (N. Y.) 557; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1. Accordingly, vessels plying between San Francisco and Sacramento, and San Francisco and Stockton, are liable to the payment of harbor-dues to the city and county of San Francisco. *San Francisco v. Cal. Steam Nav. Co.*, 10 Cal. 504.

The jurisdiction of district courts of the United States, ascertained by act of Congress of 1794, extends a marine league from the coasts or shores, extending to low-water mark. Shoals covered with water are not part of the coast or shore. *Soult v. L'Africaine*, Bee, 204.

"It would not be unreasonable to assume for domestic purposes connected with our safety and welfare the control of the waters on our coasts, though included within lines stretching from quite distant headlands. . . . It is certain that our government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of waters of our coasts far beyond the reach of cannon-shot, as cruising ground for belligerent purposes. 1 Kent's Commentaries, 29-31.

#### See INTERNATIONAL LAW.

1. *United States Express Co. v. Keefer*, 59 Ind. 264; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *State v. Intoxicating Liquors*, 73 Me. 278; *Collender v. Dinsmore*, 55 N. Y. 206; *American Express Co. v. Lesem*, 39 Ill. 312; *Wagner v. Hallack*, 3 Colo. 184.

**Receipt.**—So where the carrier's agent gives a receipt in which these letters, C.O.D., are used, the company is bound by the contract. *Am. Ex. Co. v. Lesem*, 39 Ill. 312.

**Refusal of Goods by Consignee.**—On refusal of the consignee to receive the goods, and the storing of the same by the carrier pending instructions from consignor, the liability of the carrier is

that of warehouseman only. *Gibson v. Am. Merchants' Un. Exp. Co.*, 1 Hun (N. Y.), 387; *Weed v. Barney*, 45 N. Y. 344.

**Connecting Lines.**—Where goods are shipped C.O.D., and there are intermediate carriers, this direction, C.O.D., means to collect of the ultimate consignee, and intermediate carriers are not called upon to advance the amount on their receipt of the goods. But where packages were marked "C.O.D. \$375, From Turner's Express, Boston, Mass.," and receipt by defendant, the first or intermediate carrier, read: "Rec'd of Phelan & Collender [describing goods], marked

A. King.

Clifton House.

"C.O.D. \$375, Windsor, N. S.  
"From Turner's Express, Boston, Mass."

it was held that the contract must be read: "Collect on delivery \$375 from Turner's Express, Boston;" and that evidence could not be given to show a custom under which a different meaning should be given, since the letters C.O.D. had come to have a well understood meaning in the community. *Collender v. Dinsmore*, 55 N. Y. 206.

**Explaining Meaning.**—Evidence may be given to show what the meaning of C.O.D. is; but they being letters familiar and ordinary, no other than the usual meaning can be given them, neither by proof of custom, previous dealing, nor otherwise. *Am. Exp. Co. v. Leesen*, 39 Ill. 312; *Collender v. Dinsmore*, 55 N. Y. 206.

**Previous Dealings.**—Where goods are sent C.O.D., it is not competent for the company to prove by parol that goods which had on prior occasions been sent by the same consignor to the same consignee, and the receipt given therefor using the same letters, were delivered to the consignee without payment being first required, upon an understanding to that effect between him and the consignor, as such an arrangement in regard to prior transactions did not preclude the company from contracting not to deliver the goods until the money was paid, and



**CODE—CODIFICATION.**—A general collection or compilation of laws by public authority. The word is used frequently in America to signify a concise, comprehensive, systematic re-enactment of the law, deduced from both its principal sources, the pre-existing statutes, and the adjudications of courts, as distinguished from compilations of statute law only.<sup>1</sup> Codes, such as here described, have been adopted and are now in use in many of the States. They are for the most part modelled upon that of New York State.

such proof would change the legal import and effect of the written contract, which cannot be done by parol. *Am. Express Co. v. Lesem*, 39 Ill. 312.

**Vendor and Vendee—Title.**—In *State v. Intoxicating Liquors*, 73 Maine, 278, liquors sent into the State of Maine were seized by the State government before delivery by the express company to the buyer. Afterwards it was ascertained that they were not liable to confiscation. They had been shipped C.O.D., and were claimed by the buyer, and by no one else. The court, Peters, J., said: "The title passed to the vendee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon a tender of the price, could sue for the property. 2 Kent's Com. 492; *Merrill v. Parker*, 24 Maine, 89; *Wing v. Clark*, 24 Maine, 366; *Chase v. Willard*, 57 Maine, 157." The seller not appearing and making claim, the goods were ordered to be given up to the buyer, who had a greater right to them than had the State.

**Transportation Charges.**—C.O.D. does not concern these. *A. M. U. Express Co. v. Schier*, 55 Ill. 140; *Am. Express Co. v. Lesem*, 39 Ill. 312.

**Judicial Notice.**—In 1873, 13 Collender *v. Dinsmore*, 55 N. Y. 205, Allen, J., said: "The letters 'C.O.D.', followed by an amount in dollars, have come to be very well understood in the community and by the public, but perhaps could not, without the aid of extrinsic evidence, be read and interpreted by the courts; that is, their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purpose for which those letters were used. . . . It was certainly competent to explain them, and thus remove all ambiguity by parol evidence."

But not so as to give them a different meaning than their popular one. In that case the explanatory evidence *was* given at the trial, so that the remarks just quoted are not a square authority on the question whether in the absence of such evidence the court will notice judicially the meaning of the letters.

In *State v. Intoxicating Liquors*, 73 Maine, 278, decided in 1882, Peters, J., said: "These initials have acquired a fixed and determinate meaning, which courts and juries may recognize from their general information. . . . What is notorious needs no proof."

In *U. S. Exp. Co. v. Keefer*, 59 Ind. 263 (1877), it was considered that the letters "have acquired such a fixed and determinate meaning that courts and juries, from their general information, will readily understand what is meant thereby, when they are used as the appellees have used them [a use in no sense peculiar] in their complaint. If the complaint were defective, for the want of an averment of the meaning of those letters, the defect would be one which could be reached by a motion to make more specific, and which would certainly be cured by the verdict. A motion in arrest of judgment would not reach such a defect in the complaint, if it were conceded to be defective in this particular."

**1. Revision.**—The general rule is, that when any statute is revised, or when one statute is framed from another, some parts being omitted, the parts omitted are to be considered as annulled. For it must be presumed that the legislature has declared its entire will. *Sedg. on Stat.* p. 429; *M. & O. Railroad v. Weiner*, 49 Miss. 725. See Coode's *Treatise on Legislative Expression* (Lond. 1845), reprinted in *Brightly's Purdon's Penna. Digest*; in England, *Gael's Legal Composition*, Lond. 1840.

## CODICILS. (See also WILLS.)

*Definition and Origin*, 291.*Construction of Will and Codicil*, 292.*Revocation of Will by Codicil*, 296.*Presumptive Revocation of Codicil by**Destruction of Will*, 299.*Republication and Confirmation of Will by Codicil*, 301.

1. **Definition and Origin.**—The term "codicil" in the sense in which it is now universally used in the English and American law, may be defined to be some addition to or qualification of one's last will and testament. The term is derived from the Latin *codicillus*, a diminutive of *codex*, and literally imports a little code or writing—a little will or testament.<sup>1</sup> It may add to or subtract from, alter, explain, confirm, revive, or republish any will with which it can be incorporated. There may be many codicils, but there can be but one will.<sup>2</sup> All the codicils form a part of the will, and must be ex-

1. 1 Redfield on Wills (4th Ed.), 287; 1 Bouv. Dict. (15th Ed.) 328.

In the Roman civil law codicil was defined as an act which contains dispositions of property in prospect of death without the institution of an heir or executor. 1 Redfield, 287; 2 Domat, by Strahan, 485, pt. 2, book 4, sec. 1, art. 1; Inst. § 2, 1, 2, tit. Codicillo. The early English writers define the term much in the same way. 2 Swinburne, pt. 1, sec. 5, pl. 2.

Godolphin defines it to be "the just sentence of our will touching that which we would have done after our death without the appointment of an executor." Godolphin, pt. 1, c. 16.

By the Roman civil law, and a similar rule obtained in the canon law and in the early English law, it was considered that no one could make a valid will or testament unless he appointed an executor, as that was of the essence of the act. This was attended with great formality and solemnity, in the presence of seven Roman citizens as witnesses. Hence a codicil was termed an "unsolemn testament." Swinburne, pt. 1, sec. 5, pl. 4; Godolph., pt. 1, ch. 1, § 2; pt. 1, ch. 6, § 2.

Woodward v. Lord Darcy, Plowd. 185, where it was said by the judges that without an executor a "will is null and void," which has not been regarded as law in England for some centuries.

By the civil law there were two kinds of codicils: one where no testament existed, and which embraced the disposition of property only, without creating any such trusts and confidences as it is common to institute in formal testaments, and which in fact more nearly resembled what we now call a *donatio mortis causa* or nuncupative will than anything else

in force among us, except that they were in writing. The other form of codicil by the civil law was where a prior testament did exist, the codicil having relation to the testament and forming part of it, and to be construed in connection with it, much in the same way codicils are in the present day. 1 Redfield (4th Ed.), 288, citing 2 Strahan's Domat, 487, pt. 2, book 4, tit. 1, sec. 1, art. 5; Inst. 1, 16, D. de jure codic.

Codicils owe their origin to the following circumstances: Lucius Lentulus dying in Africa left codicils, confirmed by anticipation in a will of former date, and in these codicils requested the Emperor Augustus, by way of *fidei commissum* or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by the advice of learned men, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 225; Bouv. L. Dict. tit. Codicil.

The form of devising by codicil is abolished in Louisiana. Code, 1563. And whether the disposition of the property be made by testament under this title or under that of institution of heir, of legacy, codicil, *donatio mortis causa*, or under any other name indicating the last will, provided it be clothed with the forms required for the validity of a testament, it is, as far as form is concerned, to be considered a testament. Code, 1563; Brown Civil Law, 292; Domat. Lois Civ. liv. 4, t. 1, § 1; Leçons Élément du Dr. Civ. Rom. tit. 25; Bouv. L. Dict. tit. 25.

2. Jarman on Wills (5th Ed.), 27 n.; Williams on Executors (6th Am. Ed.), 9;

ecuted with the same formalities.<sup>1</sup>

**2. Construction of Will and Codicil.**—A codicil is part of the will to which it is attached or refers, and it and the original will must be taken and construed as one testament.<sup>2</sup> The annexation need

4 Kent Com. 531; Metcalf, J., in *Tilden v. Tilden*, 13 Gray (Mass.), 103, 108; *Johns Hopkins University v. Pinckney*, 55 Md. 365.

Although in a codicil regularly executors may not be instituted or primarily appointed, yet executors may be substituted or added by a codicil. Godolph. pt. 1, c. 1, sec. 3; Swinb. pt. 15, pl. 5.

This rule has been carried to the extent of enabling two persons to prove a will and codicil, one of whom was named as sole executor in the will, and the other as sole executor in the codicil. *Mullin, P. J.*, in *Wetmore v. Parker*, 7 Lans. (N. Y.) 121, 129.

1. 4 Kent Com. 531; *Tilden v. Tilden*, 13 Gray (Mass.), 103.

If a codicil be imperfectly executed, it is said that it is of no force as a part of the will; and acquires no additional validity by being admitted to probate, and recorded by the surrogate as a part of the will, he having no authority to act upon such a case. If the proceeding were in solemn form, with due notice to all parties to appear and contest the probate, it may be questionable how far parties can go behind the decree of the court. *Burhans v. Haswell*, 43 Barb. (N. Y.) 424. But where a testator provided by his will for the emancipation of slaves, and his will was sufficient for that purpose, and by a codicil changed the terms of emancipation by reducing the amount to be paid by the slaves, it was held that the codicil affected only the personalty of his estate, and was valid, although signed by one witness only, though two witnesses were necessary to emancipate slaves. *Orchard v. David*, 6 B. Mon. (Ky.) 376.

**Unattested Codicil.**—A codicil signed, and containing an unsigned attestation clause in the handwriting of the testator, is incomplete and invalid. *Power v. Davis*, 3 McArthur (D. C.), 153.

It has been held, however, that a codicil in the handwriting of the testator, found with his will, reciting the changes and alterations he intended to make in it as to his personal estate, was a good and valid testamentary disposition of such estate, though not signed by him nor attested by witnesses. *Brown v. Tilden*, 5 Har. & J. (Md.) 371.

2. A strong illustration of this principle may be found in the case of *Sherer v.*

*Bishop*, 4 Bro. C. C. 55, where the testator gave the residue of his personal estate among such of his relations only as were mentioned in that his last will. He afterwards made a codicil which he directed to be taken as part of his will, and a second by which he gave legacies to two of his relations, but gave no such direction; and it was held by Lord Commissioner Eyre (*dubitantibus* Ashurst and Wilson, JJ.) that as every codicil was part of the testamentary disposition, though not part of the instrument, the relations named in the second codicil were entitled to a share in the residue. This decision has been considered as carrying the principle too far.

In *Hall v. Severne*, 9 Sim. 517, 518, the testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his before-mentioned legatees, in proportion to their several legacies thereinbefore given. By a codicil, which he directed to be taken as a part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil were given to the therein-mentioned legatees in addition to what he had given to them, or any of them, by his will. It was held by Shadwell, V. C., that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil. Where a testator devised property to the children of B. in like manner, as they were entitled under the will of B., it was held that the testator referred to the will and codicils of B., as the whole together must be taken to be his will. *Pigott v. Wilder*, 26 Beav. 90.

In *Fuller v. Hooper*, 2 Ves. Sen. 242, and Supplement by Belt, 333, where the testator gave legacies to all her nephews and nieces, *except those hereinafter named*, and desired her executors to look upon all memoranda in her hand as parts of or a codicil to her will, and then bequeathed the residue to the children of her sisters; and by a codicil gave legacies to some other nephews and nieces, Lord Hardwicke held that the nephews mentioned in the subsequent part of the will, and *not those mentioned in the codicil*, were excluded from the first-mentioned legacies, because the testatrix meant to refer, not

not be physical, provided the language of the codicil is sufficiently clear to identify the will referred to.<sup>1</sup> Where the testator refers to the codicil to his former wills, and provides that if he die within a certain period one of them shall go into effect, if otherwise, the codicil will belong to whichever will goes into opera-

tion of the will or testament, but to the particular instrument.

In a case where the residue was given to the executors by will, and a codicil directed that A. should also be executor, and that the will should take effect as if his name had been inserted therein as executor, the testator was held not entitled to a share of the residue. *Hillersdon v. Grove*, 21 Beav.

See also *Early v. Benbow*, 2 Coll. 481; *Day v. Croft*, 4 Beav. 561; *Warwick v. Hawkins*, 5 De G. & Sm 481; In the *Trusts of Howard*, L. R. 1 P. & D. 636; *Die v. McDoual*, 4 Ves. 610; *Fahrney v. Alsinger*, 65 Pa. St. 388; *Brownell v. Wolf*, 3 Mason (U. S.), 494; *Lessee v. Esser v. Curry*, 3 Wash. (C. C.) 481; *Wells v. White*, 6 Johns. Ch. (N. Y.) 481; *Van Cortland v. Kip*, 7 Hill (N. Y.) 446; *Negley v. Sard*, 20 Ohio, 310; *Wiley v. Tribber*, 16 Beav. 510. *Willon Executors* (6th Am. Ed.), 9, and cases cited.

Where a testator copies and republishes his will and the several codicils, and in his attestation styles them "codicils," he does not thereby become part of the will, but they remain codicils and constitute separate instruments, and a bequest of the residue of his estate by the will, "to the legatees," will be confined to such legatees as are therein named, and to such legatees as are substituted by codicil for those named in the will, and will not extend to those to whom legacies are left by codicil. *Alsop's App.*, 9 Pa. St. 374; *Riley's App.*, 9 Pa. St. 374.

*Van Cortland v. Kip*, 7 Hill (N. Y.), 446. See also opinion of Lord Commissioner Eyre in *Barnes v. Crowe*, 1 Ves. 486; *Van Kleeck v. Dutch Church*, 10 Wend. (N. Y.) 457; *Snowhill v. Snowhill*, 1 Zab. (N. J.) 447.

*Harvey v. Chouteau*, 14 Mo. 587; a. c., 12 Mo. Dec. 120. the testator made an olographic will in duplicate, sending one to A in St. Louis and one to B in Louisiana. He subsequently made a codicil in duplicate, taken down by a notary public, and duly witnessed and executed. In it he referred to the olographic will thus: "I have made an olographic will, which is made in duplicate, one of which has been placed in the hands of A of St. Louis, in the State of

Missouri, and the other deposited in the hands of B of the parish of Jefferson, one of my executors appointed by said will." "If the codicil had been attached by a wafer to the original olographic copy sent to A., I presume that there would have been no room for doubt. A list of decisions for more than one hundred and thirty years sustains this point. What is the difference between this wafer annexation of a codicil, which may not mention the previous will otherwise than by reciting that 'this is my codicil to my last will,' and the case before us, where the fact of making his olographic will in duplicate, and the statement of the fact to whom he had sent the duplicates, appear on the face of the codicil? In this case the codicil, by the manner in which it refers to the original olographic will, affords a specimen of internal annexation morally as strong, if not stronger, than the physical annexation of wafer, wrapper, and tape."

3. A testator, by an instrument termed a codicil to his will, made distinct bequests and devises, and further referring to the former wills, the latter of which contained certain charitable bequests, provided that if he died within three calendar months of the execution of said latter will the former should go into effect; otherwise the latter should be his will. Testator died within three calendar months of the execution of the latter will. *Held*, that the former will took effect, and that the codicil was to be considered as part thereof. "The codicil did not fall with the latter will, and the legatees and devisees therein named were entitled to the benefits conferred upon them thereby. After the death of the testator the three writings were connected together, and all of them admitted to probate. As he died before the 1st of March, the writing of January 13th did not take effect as a will. *Bradish's App.*, 74 Pa. St. 69. The question now is, Did the codicil become inoperative and fall with that writing, or did it become a supplement to the will of November 20th, 1871? Although a subsequent will without a revoking clause will repeal a prior will, yet it does not preclude a testator

In interpreting a will and codicil, the general rule is that the whole will takes effect so far as it is not inconsistent with the codicil, and the provisions of the latter are to be so construed, if it can fairly be done, as to make it harmonize with the body of the will.<sup>1</sup> It is the established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil.<sup>2</sup>

by appropriate writing from reinstating the prior one. A codicil may revoke by implication the posterior of the wills, by expressly referring to and recognizing the prior one as the actually subsisting will of the testator. 1 Jarman, 189. Here the codicil does not stop with that implication. With both wills in his mind he refers to each distinctly, and in unmistakable language the testator declares, in a certain contingency, the earlier one to be his last will and testament. That contingency has occurred. When the testator executed the codicil he was uncertain which one of the former writings would take effect as his will. It depended on the contingency of his dying before the time specified. There was no intimation that it should not take effect in either case. The clear intent was that it should have full effect and attach itself to whichever writing became operative as a will. The codicil was to become part of that writing, and the two constitute the whole will. Any presumption that the codicil and the writing of January 13th were both executed at the same time is clearly rebutted by the reference in the codicil to the latter as a writing then existing." The *dictum* in Bradish's App., 74 Pa. St. 69, that the codicil was to be taken as a part of the later will, overruled. Bradish v. McClellan, 100 Pa. St. 607.

In *New York* this case arose: The decedent executed a will in June, 1861, and another will March 16, 1863; also a codicil March 28, 1863, which declared itself a codicil to a will bearing date June 21, 1861. The will of June, 1861, was found among the papers of his lawyer with the seal and signature cut out: the day of the month had never been filled up. The will of March 16, 1863, and codicil of March 28, 1863, were proved as duly executed. Held, that the codicil could not be attached to the will of March 16, 1863; it declared itself to be a codicil to the will of June 21, 1861. The testator, by the codicil, republished that will as his last will, thereby revoking the will of March 16, 1863. He did not thereby revive the will which he designated as that of June

21, 1861. The effect was to revoke and abrogate both wills, and the codicil could not stand alone as a testamentary disposition. Intestacy decreed. Pinckney's Will, 1 Tuck. (N. Y. Surr.) 436. See 2 R. S. 63, § 40, and post, § 5 n.

1. Robertson v. Powell, 2 H. & C. 762; Lease v. Knight, 11 L. T. N. S. 134.

2. Jarman on Wills (3d Eng. Ed.) [160]; Conover v. Hoffman, 1 Bosw. (N. Y.) 214; Tilden v. Tilden, 13 Grav. 108, 109; Holden v. Blaney, 119 Mass. 421; Wetmore v. Parker, 7 Lans. (N. Y.) 121, 127; Lovat v. Leeds, 2 Drew. & Sm. 62; Hinchcliffe v. Hinchcliffe, 2 Drew. & Sm. 96; Molyneux v. Rowe, 8 De G. M. & G. 368; Davis v. Bennett, 30 Beav. 226.

Even where the will names one person executor, and the codicil names another sole executor, it was held the provisions were not inconsistent, and that both persons named executors were entitled to probate of both papers. Greaves v. Price, 32 L. J. Prob. 113.

Where it is apparent that the equality of shares given to several sons by a will was intended to be preserved by a codicil, that construction should, if possible, be given to the codicil which will effectuate such intention. Wheeler v. Fellowes, 52 Conn. 238.

Two papers executed by a married woman, having a power of appointment, the first professing to dispose of all her property by deed or gift, and the second expressing a wish that the donee should pay certain bequests out of it, and which papers were afterwards spoken of together as her will, were admitted to probate as such. Webb *in re*, 3 Sw. & Tr. 482. See also Nickalls *in re*, 4 Sw. & Tr. 40; 34 L. J. Prob. 103; 13 W. R. 1047. Compare also Birks v. Birks, 13 L. T. N. S. 193.

The principle is well illustrated by the recent case of Reichard's App., 8 Atl. Rep. 382. Subject to previous paragraphs of his will, John Reichard by "Item D, paragraph 8," devised and bequeathed to John Reichard, Jr., and other trustees and executors, one sixth of his property "in trust, . . . to receive the annual income or profit arising therefrom, and to pay over the same . . . to my daughter

An erroneous recital in a codicil that a gift had been made in particular form does not extend such bequest beyond its legitimate operation according to the terms of the will.<sup>1</sup>

ma, for and during her natural life, from and after the death of my said sister, in trust to pay said net annual income . . . to the child or children of said daughter, who shall be living at the time of her death, and the issue of said child or children . . . until they shall severally . . . attain the age of twenty-one years; and upon the first to pay over, convey and deliver to said child or children . . . as they respectively attain the age of twenty-one years, his . . . respective share of the said income. By a codicil, "Item D, paragraph 8, wherein by my will I have appointed my executors to collect and receive the annual income and profit arising from the one-sixth part of my estate, and pay over the same to my daughter during her natural life, is hereby revoked, and instead thereof my said daughter, and instead thereof my said daughter's . . . are hereby directed to pay to my said daughter Helena, now married with J. H. Suyver, as soon as conveniently can after my death, the twelfth and last paragraph of my will is hereby revoked." Held, that the codicil revoked only the part of the will which referred to Helena's life estate, and that the one sixth should be held in trust, to pay the same to those entitled to it under the intestate laws, and after her death in trust for her children, as provided in the unrevoked part of the will. The testator having in his will given to A. B. the interest on \$10,000 during her life, expressing the impulse which induced the bequest with unusual solemnity and force, afterwards made a codicil, which contained no clause expressing the revocation of this gift, but which did express terms revoke one bequest and another, giving in lieu of the first interest in all his realty. The will contained a clause which, if standing alone, might have been construed as disposing of all other personal property not coming to the testator, not otherwise disposed of by the preceding clauses of the will, and the same clause expressly confirmed the will in every respect. Held, that the legacy of A. B. was not revoked by the codicil. The will and codicil were to be construed together, and in ratifying his will in all other respects he meant to confirm all such provisions of the will as

were not plainly revoked or altered by the codicil. It was not his purpose, as the appellants contend, to make an absolute disposition of his entire property by the codicil, thus leaving no part of the original testamentary paper operative, except the clause appointing the executors. This would be to give the codicil the effect of a new will out and out, and not as the testator meant it to be—merely an addition or supplement to his original will. *Johns Hopkins University v. Pinckney*, 55 Md. 365.

1. *In re Smith*, 2 Johns. & H. 594.

It seems to be well settled that a mere recital in a will or codicil of the fact of having made a particular legacy may create such legacy if there is nothing to which the description can refer in the will. *Sir Wm. Grant in Smith v. Fitzgerald*, 3 V. & B. 8.

But commonly it is of no force to alter what has been done. *Re Arnold's Est.*, 33 Beav. 163, 171; *McKenzie v. Bradbury*, 35 Beav. 617.

But where the codicil provided that an annuity of £30 given in the will should be increased to an annuity of £50, the will having in fact given only a legacy of £30, it was held that the legatee should take the annuity. "The plain meaning of the words of the codicil is to say that the plaintiff was to have an annuity of £50. For some reason or other the testatrix wished to increase her bounty to that amount. The words as they stand would give A. B. an annuity of £50; and if so, it is for those who assert that there has been a mistake to point out what the mistake is, and how it is to be cured. The mistake lies in the words 'immediate annuity of;' but because the testatrix has misdescribed a legacy as an annuity, I cannot hold that by 'an annuity of £50' she meant a 'legacy of £50.' If she had said 'and I increase the £30 left by will to A. B. to an annuity of £50,' there could have been no difficulty. I must therefore strike out the erroneous words, and leave the codicil as it would stand without them. The result is that the plaintiff would take an annuity of £50." *Ives v. Dodgson*, L. R. 9 Eq. 401.

A disposition by codicil of "all my real and personal estate and effects" was held on the context not to include a fund of personal estate specifically disposed of by the will. *In re Arrowsmith*, 2 De Gex, F. & J. 474.

A codicil appended to declare the meaning of a particular clause of a will cannot be construed to pass other property than that embraced in such clause.<sup>1</sup> Upon the same principle it is an established rule of construction, that an additional legacy given by a codicil is attended with the same incidents and qualities as the original legacy, and that a devise upon condition that the devisee shall "comply with what is enjoined upon him in this will" must be construed, *prima facie*, to be upon condition that the devisee shall also comply with what may be enjoined upon him by any codicil.<sup>2</sup> Nevertheless it must be borne in mind that a codicil will stand even if inconsistent and repugnant to a clause in the will, and that in so far as it is inconsistent with the will it will operate as a revocation.<sup>3</sup>

**3. Revocation of Will by Codicil.**—A codicil revokes so much of the will as is inconsistent with it;<sup>4</sup> but as a general rule it will not be held to be inconsistent beyond the clear import of its language.<sup>5</sup> And where a devise is clear, it is incumbent upon those who contend that it is not to take effect by reason of a revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise.<sup>6</sup> Indeed, it may

1. *McCutchen v. Marshall*, 8 Pet. (U. S.) 220.

2. *Metcalf, J.*, in *Tilden v. Tilden*, 13 Gray (Mass.), 103, 108, citing 4 Dane Abr. 550; 4 Kent Com. (6th Ed.) 531; 1 Jarman on Wills, 160; 1 Roper on Legacies (2d Am. Ed.), 873-875; 2 Williams on Executors, 1403 *et seq.*; *Doe v. Latham*, Busbee L. 365.

3. *Flood v. Howser*, 1 Nott & M. 321; *Bosley v. Wyatt*, 14 How. (U. S.) 390.

4. *Bosley v. Wyatt*, 14 How. (U. S.) 390; *Larrabee v. Larrabee*, 28 Vt. 274.

Thus where the testator had devised his real estate to A, and subsequently by codicil said, "I acknowledge B to be my next of kin, and heir at law of all my real and personal property," it was held a revocation. *Parker v. Nickson*, 9 Jur. N. S. 451.

Where, however, a testator made a devise to A, of certain property, and also of the use of other property for the life of A., and then to his heirs in fee, *held*, that a codicil revoking that part of the will wherein any part of his estate was devised to A., and in lieu thereof bequeathing him the income thereof, applied only to that part of the will devising property to A. absolutely; and that that part of the will giving A. a life estate, with remainder to his heirs in fee, was not revoked. *Homer v. Brown*, 16 How. (U. S.) 354.

A testator directed all his real and personal property to be sold and converted into money by his executors, and

one third thereof he gave to his wife. A codicil which reserved from sale a part of such real property until her death, and secured to her the use of it during her life, was held not to revoke by implication the bequest to her; and where a part of such personal property consists of stocks which were by the codicil to be reserved from sale, and the dividends to be paid over as they accrued "to the heirs" of the testator, it was held that such codicil did not revoke the bequest of the will. *Collier v. Collier*, 3 Ohio St. 369.

A legacy bequeathed to a granddaughter by a codicil in lieu of a devise in the will to the mother, who had since deceased, is a revocation of the original devise to the mother. *Brownell v. De Wolf*, 3 Mas. (C. C. Rep.) 486.

It should be observed that between a codicil and a subsequent will there is this difference of construction: a codicil is a republication and ratification.

5. 1 Redfield on Wills, 362 n.; 1 Jarman, 160, n. 2; *Wetmore v. Parker*, 52 N. Y. 461.

6. *Doe d. Hearle v. Hicks*, 8 Bing. 479; *Cleoburey v. Beckett*, 14 Beav. 587, *per Romilly, M. R.*; *Williams v. Evans*, 1 El. & Bl. 739. See also *Patch v. Graves*, 3 Drew. 348, 376; *Robertson v. Powell*, 2 H. & C. 762; *Butler v. Greenwood*, 22 Beav. 303; *Norman v. Kynaston*, 29 Beav. 96; s. c., 3 De G. F. & J. 29; *Molyneux v. Rowe*, 8 De G. M. & G. 368; *Kellett v. Kellett*, L. R. 3 H. L.

be stated generally as a canon of construction, that a clear gift cannot be cut down by any subsequent words, unless they show an equally clear intention.<sup>1</sup> But in applying the rule, it is sufficient that the subsequent words indicate the testator's intention to cut the gift down with reasonable certainty, and the rule does not mean that you are to institute a comparison between the clauses as to lucidity.<sup>2</sup> It may also be said to be an established principle, that an expressed intention to make an alteration in a will in one particular negatives by implication an intention to alter it in any other respect.<sup>3</sup> The codicil may revoke the provisions of the will

167; *Williams v. Evans*, 1 El. & Bl. 727; *Evans v. Evans*, 17 Sim. 86; 1 Jarman on Wills (3d Eng. Ed.), 168 *et seq.*; *Ives v. Harris*, 7 R. I. 413; *Quincy v. Rogers*, 9 Cush. 295, 296; *In re Arrowsmith's Trusts*, 2 De G. F. & J. 474; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Wetmore v. Parker*, 52 N. Y. 450; *Pickering v. Langdon*, 22 Maine, 430; *Tilden v. Tilden*, 13 Gray (Mass.), 108; 4 Kent. 531; *Jenkins v. Maxwell*, 7 Jones Law, 612; *Conover v. Hoffman*, 1 Bosw. 214; *Boyd v. Latham*, *Busbee (Law)*, 365; *Homer v. Shelton*, 2 Met. (Mass.) 202; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Bosley v. Bosley*, 14 How. (U. S.) 390; *Kane v. Astor*, 5 Sandf. (N. Y.) 467; *Brant v. Wilson*, 8 Cowen (N. Y.), 56; *Alt v. Gregory*, 8 De G. M. & G. 221; *Joiner v. Joiner*, 2 Jones Eq. (N. Car.) 68; *Bradley v. Gibbs*, 2 Jones Eq. (N. Car.) 113; *Read v. Manning*, 30 Miss. 308; *Larrabee v. Larrabee*, 28 Vt. 274; *Pillsworth v. Mosse*, 14 Ir. Ch. 163; *Collier v. Collier*, 3 Ohio N. S. 369; *Clarke v. Butler*, 1 Mer. 304; *Hill v. Walker*, 4 Kay & J. 166; *Kermode v. MacDonald*, L. R. 3 Ch. App. 584; *Robertson v. Powell*, 9 L. T. N. S. 543.

1. *Williams on Executors* (6th Am. Ed.), 221.

A testator gave to his four sons, including J., "each an equal share of the balance of my estate;" and in a codicil directed his executors to pay J.'s share "unto my daughter-in-law M., the wife of my said son J., her heirs and assigns at the time distribution is made to my other heirs." *Held*, that the codicil revoked the bequest to J., and that M. took J.'s full share without liability for J.'s debts to the estate. "It is not a case of legal substitution whereby one person becomes substituted to the right of another by operation of law, but it is a case of change in the intention of the testator, whereby he suffered one person to drop out of his will and another to fall in. The very change of intention contradicts the idea of mere substitution. J. was left to stand where he stood before, a debtor to

the estate, and M. was given the bequest in her own right, not his." *Bartholomew's App.* 75 Pa. St. 169.

Where a will gives the testator's entire estate to one for life, and a codicil provides legacies to others in absolute and unambiguous terms, the codicil changes the will to that extent, and the legacies are payable at the usual time, unaffected by the life estate. *Beardsley v. Selectmen of Bridgeport*, 3 Atl. Repr. (S. C. Conn.) 557. See also as to the use of words, *Boyd v. Boyd*, 2 Fed. Rep. 138.

Where a testator by his will divides his property among his six children, to five of whom he has made advancements differing largely in amount, and directs that the amounts advanced to each shall be considered as so much towards his or her share of his estate, and by a codicil executed a few days later provides that "all sums of money given to my children in my said will, and all sums paid to them by my executors under said will, are given to them, and are paid to them, for the benefit of their heirs respectively, and are not to be in any way liable for their debts, or taken by their respective creditors, if any, in any way or form," the codicil will not be construed as depriving the children of their ownership, or as establishing a trust for their heirs, but as annexing a condition to such ownership, to which no legal effect could be given. *Potter v. Merrill* (Mass.), 9 N. E. Repr. 572.

2. *Williams on Executors* (6th Am. Ed.), 220.

3. *Quincy v. Rogers*, 9 Cush. (Mass.) 296.

These principles are well illustrated in the leading case of *Wetmore v. Parker*, 52 N. Y. 461. The will of C., among other bequests, contained one to the U. F. Academy of \$10,000, to be expended in the erection of a new building, etc., and one to the R. D. Church of \$10,000, to be expended in the erection of a church edifice. The residuary clause of the will gave the residue of the estate to the sev-



either by expressly declaring such to be the intention of the testator, or by making a new disposition of the estate different from that made by the will, but in the latter case the disposition to be effectual as a revocation must be valid.<sup>1</sup> A gift of the residue in

eral legatees thereinbefore named, in proportion to the amounts of the specific bequests. In a codicil C. stated that she had advanced \$3000 upon the legacy to the U. F. Academy, and therefore she revoked so much thereof. She also stated that it appearing probable that the purpose of the bequest to the R. D. Church would soon be accomplished, and having concluded to give at that time \$3000, she therefore revoked the legacy to said church. "The question is whether it was the intention of the testatrix, by these revocations, to deprive the Dutch Church of all share in the residuary estate, and to restrict the Female Academy to the proportion of the residue represented by \$7000 instead of \$10,000. The primary object in construing wills is to ascertain and carry out the intention of the testator, and various rules have been adopted to accomplish this object. From the nature of the subject, these rules must be quite general, because no two wills can be found precisely alike in language and surrounding circumstances. It is a general rule, that a codicil will not operate as a revocation beyond the clear import of its language. 1 Redfield on Wills, 362, and note; 1 Jarman, 160, n. 2; 8 Cowen, 56. Another rule is that an expressed intention to make an alteration in a will in one particular, negatives by implication an intention to alter it in any other respect. 9 Cush. 296. It is always important to scrutinize with care the language employed not only in the particular parts, but in every part of the instrument, in order as far as practicable to ascertain the operation and intent of the mind using it. After a careful examination and considerable reflection, I have arrived at the conclusion that the two codicils do not operate to cut off or impair the right of the Academy or the Dutch Church to share in the residue under the seventh clause of the will. First as to the Female Academy. The two bequests are not dependent. The reference to the first, in the last, designates the legatee and the amount, but as legacies they are independent. They are for different purposes; one for particular, the other for general purposes. We are justified in inferring that the testatrix had two objects in view: one to aid in completing and furnishing the building, the other to contribute towards a fund for

permanent support. The first bequest would necessarily be expended at once; the latter might and ordinarily would be permanently invested. By the terms of the will the Female Academy was designated as a residuary legatee for an amount made certain by mere arithmetical calculation, as effectually as if the name and amount were written out. This is confessedly the legal construction and effect of the will. Was it changed by the testatrix? I think not. She paid \$3000 upon the specific legacy in her lifetime, and revoked so much of it in language carefully confined to that alone. If she had intended to affect the other bequest, we are to presume that she would have said so. Her will and codicils bear evidence of particularity of expression as to every testamentary arrangement, and within the rule referred to, the alteration of one bequest negatives an intent to alter the other. Suppose she had paid the whole ten thousand while she lived. Would it tend to show an intent that the other should not take effect? So far from it, it would evince a continued testamentary friendship. The act of payment and revocation are one, and must be construed together; the latter was made to perpetuate evidence of the former. The reasons for revocation apply only to the specific legacies, showing that the testatrix regarded them as independent. The right of the Dutch Church to the residuary legacy is substantially the same, and for the same reasons." *Wetmore v. Parker*, 52 N. Y. 461-463; *Colt v. Colt*, 32 Conn. 122. See also *Kiver v. Oldfield*, 4 De G. & J. 30.

1. *Jones v. Jones*, 2 Dev. Eq. (N. Car.) 387.

The testator may rely either upon his express declaration to effect the revocation, in which case the validity or invalidity of the subsequent disposition made by the codicil is immaterial, or he may rely upon the subsequent disposition itself to effect the revocation; and in the latter case, although the codicil profess an intention to make a disposition of the whole estate different from the will, if the disposition is only in part effectual, the revocation is merely *pro tanto*. Thus a codicil to a will "unqualified by revoking" a bequest given in the body of the will, and in addition containing a bequest, will operate as a revocation, although it

cil revokes a gift of residue in the will.<sup>1</sup> But where there is a codicil of the residue of a particular fund only, and a subsequent codicil a general gift of residue, as the two are not necessarily inconsistent the latter will not revoke the former.

A power of sale in a will is not revoked by a different disposition made of the estate by codicil, unless there is some inconsistency between the exercise of the power and some part of the will.<sup>2</sup> A codicil which ineffectually intends to revive a prior will which the testator has destroyed, does not operate as a revocation of an intermediate will, if it is not inconsistent therewith and does not show any intention to revoke.<sup>4</sup>

**Presumptive Revocation of Codicils by Destruction of Will.**—The presumption is *prima facie* dependent upon the will; and where the will and the codicil to it are shown to have been in existence, and the will is destroyed, the burden of proof is upon the party setting up the codicil to show that it was the testator's intention to have the codicil operate separately from the will; otherwise, the presumption is that the destruction of the will was intended as a revocation.

The intention of the testator may be determined with reasonable certainty from the frame of the codicil. If it be entire and independent in itself alone, and especially where it contains an effectual disposition of all or most of the testator's estate, and was carefully preserved by the testator in a place where he must, and naturally have been aware of its existence, it will afford

proof as to the bequest it contains. *Congregation's App.*, 5 Atl. 1752.

On the other hand, a codicil which in its terms revoke a former will made in a manner wholly different from the will, only operates as a revocation of the will, notwithstanding that the codicil professes to dispose of the estate differently from the will. *Hillson*, 8 Cow. (N. Y.) 56. See also *Lee v. Larrabee*, 28 Vt. 274; 48 Pa. St. 50.

As to partial revocation by codicil, see *Hancock*, 2 My. & C. 606; *Cahnal*, 4 De G. & S. 533; *Reeds*, 2 Dr. & Sm. 62; *Philips*, 7 Sim. 446; *Murray v. D. & War.* 143; *Wells v. D. & War.* 1020; *Hillerson v. Grove*, 18; *Fry v. Fry*, 9 Jur. 894; *Powell*, 2 Coll. 262; *Sandford*, 1 De G. & S. 67; *Ives v. D. & C.* 34; *Daly v. Daly*, 2 J. & M. 52; *Boulcott v. Boulcott*, 2 35; *Alt v. Gregory*, 2 Jur. N.

*Wicke v. Douglass*, 7 Cl. & Fin. 1. A codicil giving to a residuary

legatee a certain sum of money will not revoke the residuary bequest to such legatee. *Stultz v. Kiser*, 2 Ired. Eq. (N. Car.) 538.

8. *Inglefield v. Coghlan*, 2 Coll. 247, *Evans v. Evans*, 17 Sim. 108.

On the other hand, a codicil which gives as a reason for bequeathing a legacy to the testator's grandson that he had disinherited him, the fact being that he had not disinherited him, but had given him a large legacy by the will, does not revoke the legacy in the will, but is itself rendered void by the mistake. *Mordecai v. Boylan*, 6 Jones Eq. (N. Car.) 365.

8. *Conover v. Hoffman*, 1 Abb. N. Y. App. Dec. 429.

4. *Williams on Executors* (6th Am. Ed.), 220, and cases cited.

6. 1 *Redfield on Wills*, § 23 a, p. 11, citing *Grimwood v. Cozens*, 2 Sw. & Tr. 364; *Dutton in re*, 3 Sw. & Tr. 66.

But the rule of presumptive revocation of the codicil by the revocation of the will does not obtain under the English statute, 1 Vic. Ch. 26. Under that statute there must appear to have been an intention to revoke the particular instrument. *Savage in re*, L. R. 2 P. & D. 78. See also *Black v. Jobling*, 1 P. & D. 685.

very strong presumption of an intention to have it operate; but where these circumstances are wanting, or others indicating a contrary purpose exist, it may require different consideration, as where the dispositions of the codicil are so complicated with and dependent upon those of the will as to be incapable of a separate and independent existence.<sup>1</sup>

Where it appears from the manner of cancelling the will and not cancelling the codicil, or from extrinsic evidence, that the testator intended only to revoke the will and let the codicil remain in force, probate will be granted of that alone.<sup>2</sup> If the codicil is substantially independent of the will, it is not necessarily affected by its revocation.<sup>3</sup>

1. 1 Redfield on Wills (4th Ed.), 311.

Where the testator made provision for an illegitimate child and its mother by a codicil, which he declared should be taken as part of his will, such child being born after the making of the will, the will not being found at the decease of the testator, it was held that the codicil should be treated as unrevoked, there being nothing to show an intention to revoke it, and its provisions being in favor of those to whom the testator owed a moral duty, but one not recognized by the municipal law, and the provisions of the codicil having no dependence upon those of the will. *Tagart v. Squire*, 1 Curteis, 289; 1 Jarman, 131, and cases cited; 1 Redfield, 312.

It seems to be the general rule in the ecclesiastical courts to involve the codicils in the revocation of the will, unless a contrary intention can fairly be gathered, either from the structure of the codicils or from extrinsic evidence. *Medlycott v. Assheton*, 2 Add. 229; *Coppin v. Dillon*, 4 Hagg. 362; 1 Jarman, 131, and notes.

2. *Harris in re*, 3 Sw. & Tr. 485; 10 Jur. N. S. 684.

3. *Ellice in re*, 33 L. J. Prob. 27. See also *Coulthard in re*, 11 Jur. N. S. 184; and *Goods of Grieg*, L. R. 1 P. & D. 72.

A codicil depending upon the body of the will for explanation or execution cannot be established as an independent will when the will itself has been revoked. *Youse v. Forman*, 5 Bush (Ky.), 337; *Pinckney's Will*, 1 Tuck. (N. Y. Sur.) 436.

**Revocation of Will by Destruction of Codicil.**—Testator made his will, and sometime afterwards executed a codicil to the same, and deposited the codicil in the hands of the party in whose favor the codicil had been made. The testator afterwards married, and while visiting at

the house of the party in whose favor the codicil was made called for it, remarking that "those papers were of no force now. I have somebody else to leave my property to." The codicil was produced, and the testator destroyed it by throwing it into the fire. The court held that the destruction of the codicil was limited merely to the revocation of the codicil, and that to cancel or revoke the will the cancellation or destruction must be directed against the whole will. "In the case before us it was physically impossible that the act of destruction in question—the burning of the codicil—could have been directed against the will, inasmuch as the will was not present, but in a different custody. And yet the court instructed the jury that if the testator intended at the time of destroying the codicil thereby to revoke the will, in that case the destruction of the codicil was a revocation of both the will and the codicil. If this be correct, it must be either because a codicil is so essential a part of a will that its revocation necessarily involves the revocation of the will (a ground too palpably wrong to require discussion, and not assumed by the appellee's counsel nor by the circuit court), or because the destruction of a codicil, without any the slightest destruction of the will, or any attempt to destroy it, or even an intent to destroy it, must have the effect of revoking the will if so intended by the testator. This last proposition, it seems to me, requires but little consideration after what has been already said. To place it in the strongest light for the appellees, let us suppose that the testator, at the time of burning the codicil, expressly declared that he did it with intent thereby to revoke the will. Could it have that effect? The will itself was in nowise cancelled or destroyed, but remained perfect and entire, indestructible and intangible by the act in question.

**publication and Confirmation of Will by Codicil.**—From the fact that the codicil is a part of the will to which it is attached or that the execution of the codicil *per se* operates as a republication of the will, and the two are to be regarded as but one instrument speaking from the date of the codicil.<sup>2</sup> A codicil attached to a particular will *ipso facto* has the effect to republish that particular will, and also to revoke all intervening wills between the date of that particular will and the date of the codicil, unless the language of the codicil indicates a different purpose.<sup>3</sup>

It is not obvious that, if revoked, it can be given effect by the sole efficacy of the testator's parol declaration, directly or indirectly, in violation of the statute. . . . The intention to revoke must concur with the act of revocation, but cannot go beyond it, and is limited by law to the act itself. It is not to confound the intent to do the physical act of cancellation or destruction with the intent to produce the legal effect of revocation. The intent to do the physical act with the act itself, it then becomes an act of revocation; and when the intent to revoke concurs with the act of revocation, it then becomes an act of revocation. When the concurrent physical act and intent to do the physical act only, we have merely a partial act of revocation, and as regards the testator designs to do no more, thus the question is presented, whether a partial act of revocation can be treated as a total revocation? a question answered by merely stating it."

*Adm. v. Hobbs*, 1 Robinson 100; 2 A. C. 39 Am. Dec. 263.  
*Adm. v. Cunningham*, 39 Am. Dec. 263.  
*Mon. (Ky.)* 390.

The effect of the cases is to give an effect to the codicil *per se*, and independent of any intention, so as to bind the will to the date of the making of the will speak of that date, in which case it will repel that which the codicil draws the will down to its own date, in the very terms of the will and makes it operate as if it were executed in those terms. Lord Ellenborough, C. J., in *Goodtitle v. Meredith*, 2 M. & S. 5, 13 (the substance of which is given above), was approved. "That such was the rule in England prior to the passage of the statute 1 Vict. ch. 26, and in this State until April 8, 1833, when our present Statute of Wills was enacted, is conceded by the appellant; but it is insisted that by those enactments the law has been changed, and that now a codicil must contain an expressed intent to revoke the will to which it is annexed, or to which it refers, in order to have that effect, or contain an expressed intent to revoke a former will, in order to work its revocation, unless the dispositions made by the codicil are inconsistent with those of the former will. The 22d section of the British statute is as follows: 'No

*Movers v. White*, 6 Johns. Ch. 375; *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 593; *Payne v. Payne*, 18 Cal. 291; *Murray v. Oliver*, 6 Ire. Eq. (N. Car.) 55; *Rose v. Drayton*, 4 Rich. Eq. (S. Car.) 260; *Stover v. Kendall*, 1 Coldw. (Tenn.) 557; *McCurdy v. Wiall*, 7 Atl. Rep. (N. J.) 566.

3. *Neff's App.*, 48 Pa. St. 501. In this case the testator made his will in 1850, revoking all former wills. In August, 1857, he made another will, signed by him, but not witnessed. In October, 1857, he made a codicil to the first will revoking some of its provisions, and spoke of it as the "foregoing will." It was held a republication of the first will, as of the date of the codicil.

*Strong, J.*, in delivering the opinion of the court, said: "That the effect of a codicil, duly executed, is to republish the will to which it refers, whether the codicil be annexed to the will or not, is the doctrine of all the authorities. The legal presumption of intended republication may indeed be rebutted by the language of the codicil; but in the absence of any expressed intent to the contrary, it always operates as a new adoption of the will, and a republication at the time when the codicil was made. Upon so plain a subject it seems almost superfluous to refer to authorities." The language of Lord Ellenborough in *Goodtitle v. Meredith*, 2 M. & S. 5, 13 (the substance of which is given above), was approved. "That such was the rule in England prior to the passage of the statute 1 Vict. ch. 26, and in this State until April 8, 1833, when our present Statute of Wills was enacted, is conceded by the appellant; but it is insisted that by those enactments the law has been changed, and that now a codicil must contain an expressed intent to revoke the will to which it is annexed, or to which it refers, in order to have that effect, or contain an expressed intent to revoke a former will, in order to work its revocation, unless the dispositions made by the codicil are inconsistent with those of the former will. The 22d section of the British statute is as follows: 'No

While no precise form of words is necessary to republish the will, nor is it necessary that the codicil be indorsed upon or attached to it,<sup>1</sup> it is essential that the codicil distinctly recognize

will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and where any will or codicil which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.' It is argued that since this statute a codicil to a will does not revive it or republish it so as to make it a revocation of another will made prior to the codicil, if it does not contain an expressed intention to work such republication or revocation. Such, however, is not the construction given to the statute in England. . . . True, a codicil must show an intention to revive in order to work a revival; but it necessarily shows such an intention unless it be disclaimed. A codicil is a written alteration of a will or addition to it, executed in the manner required by law. The act of executing it involves an intention that it shall operate as part of a will. It is unmeaning unless it does. It therefore necessarily evinces a design that the will of which it is made a part shall be a will; that if it has been revoked, it shall have new life. . . .

"The 13th section of the Pennsylvania Wills Act of 8th of April, 1833 (P. D. ), enacts that 'no will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the same manner as is hereinbefore provided, or by burning, canceling, etc.' The 14th section makes similar provisions in regard to wills respecting personal estate, adding, however, to the words in which repeals and alterations may be made the instrumentality of a nuncupative will. A will, then, is a legitimate mode of repealing another will or altering its devises or directions. So is a codicil. So is another writing, not a will or codicil, declaring a repeal or alteration. So is burning and cancellation, and, in case of personalty, so is a nuncupative will. An intent to revoke an existing will, and consequently a revocation, may be shown in either of these ways; and in these respects there is no

change of the law as it was under the act of 1705. True, a republication by parol is no longer possible, but that was because of other provisions of the act which define the mode in which alone a will may be made. They have no bearing upon the question now under discussion, for republication by a codicil is not parol republication. The sole object of the 13th and 14th sections of the act of 1833 was to prevent the possibility of revoking or altering wills by parol, except by destruction or cancellation, and this it did by requiring the intent of the testator to be manifested in writing. But it did not undertake to define what construction should be given to a written manifestation.

"It is still the law, then, as it always was, that a codicil to a will is a republication of it, unless the contrary intent be avowed by the testator, and that it makes the will republished to speak from the date of the codicil, to use the language of Lord Abinger in *Doe ex dem. York v. Walker*, 12 M. & W. 597. The will must be construed 'as if the testator had inserted in the codicil all the words of the will.'" See also *Powell on Devises*, vol. i. p. 611, n. 1, *Jarman's Edition*; 1 *Jarman on Wills*, 723, where the English cases are collated; *Houblon in re*, 11 Jur. N. S. 549; *Thomson in re*, 11 Jur. N. S. 960; *S. C. L. R.* 1 P. & D. 8; 1 *Redfield on Wills*, § 29, pl. 3 and 4.

If a codicil refers to one of two existing wills by a wrong date, as "July 1, 1792," when the date in fact was the 21st, it appearing from the other circumstances in the case, and the fact that the other will was dated the 18th of July, 1796, that it must have been intended for the 21st, it will not defeat the republication. *Jansen v. Jansen*, cited in *Rogers v. Pittis*, 1 Add. 38; 1 *Redfield on Wills*, § 29, pl. 4.

Of course where it appears from the terms of codicil that it was not intended to operate as a republication of the will, it cannot have that effect. 1 *Redfield on Wills*, § 29, pl. 4, and cases cited.

Omission to mention a codicil in an act of republication, in which other codicils made prior to that act are mentioned, implies a revocation of it; but this may be rebutted by circumstances showing a contrary intention. *Wickoff's App.*, 15 Pa. St. 281; s. c., 53 Am. Dec. 597.

1. *Sir John Strange, M. R.*, in *Potter v. Potter*, 1 Ves. Sr. 437, 442; *Vernon v. Vernon*, 1 Com. 381; *Jackson v. Hur-*

the existence of the will,<sup>1</sup> and be itself executed with due solemnity, for all the purposes embraced in the latter,<sup>2</sup> and that the will referred to be identified.<sup>3</sup> To establish the identification parol evidence is admissible.<sup>4</sup> If there be more than one will, the fact that the codicil was attached to one of them is regarded as very effective to show that the codicil was intended as a republication of that particular one.<sup>5</sup> The natural presumption is that a codicil is made as a part of the testator's last will, if there be two in existence at the time; but if one of them have been cancelled or revoked, so as to be no longer in existence as a valid, operative instrument, the codicil will be presumed to have been intended to form part of the will then in existence and in force. Where there are numerous codicils, the effect of the later ones is to republish the earlier ones.<sup>6</sup> A codicil by referring to a revoked will in adequate terms may have the effect of reviving it,<sup>7</sup> and it has even been held that a codicil duly executed, if attached to a paper which was never signed, attested and published as a will, will have the effect of giving force and operation to the whole as one will.<sup>8</sup> To the same principle may be referred the rule that

lock, Amb. 487; *Doe v. Davy*, Cowp. 158; *Barnes v. Crowe*, 1 Ves. Jr. 486; *Harvey v. Chouteau*, 14 Mo. 587; s.c., 55 Am. Dec. 120.

1. 1 Redfield on Wills, § 23 a, pl. 5; *Coale v. Smith*, 4 Pa. St. 376.

2. *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390; 1 Redfield on Wills, § 23 a, pl. 6.

It has been held that a memorandum indorsed upon the will and signed by the requisite number of witnesses is a good republication, although the testator did not himself sign it. *Reynolds v. Shirley*, 7 Ohio, 39.

3. *Tonnele v. Hall*, 4 Comst. (N. Y.) 140.

4. Thus where a codicil began, "This is a codicil to my last will and testament," extrinsic evidence was admitted to show that no other document had been found to answer the description. *Ellen v. Maddock*, 11 Moore P. C. C. 427; 1 Redfield, § 21, pl. 16.

5. *Barnes v. Crowe*, 1 Ves. Jr. 490; *Rogers v. Pittis*, 1 Add. 41.

6. *Guest v. Willasey*, 3 Bing. 614; 12 J. B. Moore, 2.

A testator made five codicils to his will, in the fourth, of which he revoked the three preceding, and in the fifth he confirmed the will "and four codicils." Held, that by reviving the four codicils no other result could follow but that the fourth should nullify the three first. Unless this was so, the fourth would cease to have its legitimate operation. This decision is grounded upon the same principle as the rule that the republication

of a will only sets up the will as it then exists, and will not restore legacies revoked, adeemed, or otherwise vacated. In *Goods of Thompson*, L. R. 1 P. & D. 8.

It is not competent for the will, when executed in due form, to provide for the payment of such legacies as may thereafter be given by codicils informally executed, since all such papers are testamentary, and must be so treated, thus referring their operation to the effect of the probate. *Rose v. Cunynghame*, 12 Ves. 29; *Whytall v. Kay*, 2 My. & K. 765; 1 Redfield on Wills, § 23 a, pl. 6. See also *Wilkinson v. Adam*, 1 Ves. & Bea. 422.

7. *Beall v. Cunningham*, 39 Am. Dec. 469; s. c., 3 B. Mon. (Ky.) 390.

But the intention to revive the will must be clear upon the face of the codicil, either by express words or by necessary implication, conveying to the mind of the court with reasonable certainty the existence of such an intention. Mere reference to the will by date or any ordinary implication will not be sufficient. *Steele et als. in re*, L. R. 1 P. & D. 575.

An olographic will once revoked can be republished only by a written instrument, setting forth the testator's intentions, and duly attested by the statutory number of witnesses, or by a paper written by the testator himself, and deposited by him as required for the original will, and such subsequent writing would be construed to be a codicil. *Love v. Johnston*, 12 Ired. L. (N. Car.) 355; *Sawyer v. Sawyer*, 7 Jones L. (N. Car.) 134.

8. In 1827 the decedent procured a

proof of the execution of the codicil obviates the want of proof of the execution of the will itself.<sup>1</sup>

A will which is invalid to pass real estate for want of the requisite number of witnesses may be confirmed by a duly attested codicil.<sup>2</sup> The charge of undue influence in the execution of the will may also be overcome by proof of the due execution of a codicil after the testator is removed from the alleged influence.<sup>3</sup> A codicil which is an express confirmation of the will may also pass real estate acquired between the date of the will and the codicil.<sup>4</sup> A will altered after execution, if republished by a codi-

paper to be drafted as his will, but took it to his house until recovery from a fractured arm. There was no evidence that the paper was ever signed or attested. In 1832 he procured a codicil to be written on the same paper, calling and treating the paper as his will. The codicil was signed and attested. It was held that the codicil had the effect of giving force and validity to the unexecuted draft, and that both instruments went into operation as a single testament.

"The counsel for the appellants . . . contend that though a codicil, duly executed, may operate as a republication of a revoked will, which has been duly executed as such, yet it cannot have the effect to bring into operation, as a will, a paper which has never been signed or executed as a will. We can see no difference in principle in the cases. If a codicil so attaches itself to and forms a part of a revoked will as to revive and give force and effect to it as such, we cannot perceive why it may not be so attached to and engrafted upon any other paper which the testator may choose to treat as his will. In either case it is a question of intention. If the testator, by the alteration of parts of his will, by a codicil, may be construed to intend to recognize the parts unaltered, and the whole subject to the alteration as his will, why may he not by referring to an unsigned and unaltered paper as his will, and treating it as such, be construed to adopt the parts unaltered, and the whole thus altered, as his last will and testament. If the codicil can so engraft itself upon and draw within its operative influence a revoked will as to amount to a republication, we cannot perceive why it may not engraft itself upon and draw within its operative influence any instrument which the testator may treat as his will, so as to amount to a publication of the whole as his will. The reason that would sustain the republication in the one case would equally sustain the publication in the other, and each rests upon the recog-

nized intention of the testator, plainly implied from the execution of the codicil, referring to the paper as his will." *Beall v. Cunningham*, 39 Am. Dec. 469; 3 B. Mon. (Ky.) 390.

1. *Storm's Will*, 3 Redf. (N. Y.) 327; See *Allen v. Maddock*, 11 Moore P. C. 427.

The execution of the codicil cures all defects in the execution of the original instrument. *McCurdy v. Wiall*, 7 Atl. Rep. (N. J.) 566.

Under the New York Revised Statutes (2 R. S. 63, § 40), which require a declaration by the testator at the time of making or acknowledging the subscription that the instrument so subscribed is his last will and testament, a codicil executed as a codicil and not as a will cannot give effect to an invalid will. Nor can it be admitted to probate as a will. *Proctor v. Clarke*, 3 Redf. (N. Y.) 445.

This provision has not changed the rule that a codicil executed with all the formalities required by the statutes for the execution of wills operates as a republication of the will to which it refers, so far as not changed by the codicil. *Brown v. Clark*, 77 N. Y. 369.

2. *Stover v. Kendall*, 1 Coldw. (Tenn.) 557.

3. *O'Neal v. Farr*, 1 Rich. L. (S. Car.) 80.

4. *Brownell v. De Wolf*, 3 Mas. (C. C. Rep.) 486.

The rule in the English court of chancery is that a codicil makes the will speak from its own date, and it will, as a republication, take in lands purchased up to the date of the codicil. A clear intent will, however, prevent the application of the rule, as if the codicil should say, "I am now dealing with the property given by will, and with none other." *Money-penny v. Bristow*, 2 Russell & M. 117; *Movers v. White*, 6 Johns. Ch. (N. Y.) 375; *William v. Lancaster*, 3 Russell, 108; *Yarnold v. Wallis*, 4 Y. & Coll. 160; *Hughes v. Turner*, 3 My. & K. 666; 4 Kent Com. (5th Ed.) 510.

cil, annexed and referring to it, is made valid, and it may be shown by parol evidence that the alterations were made before the execution of the codicil.<sup>1</sup>

**COERCION.** See DURESS.

**COFFEE-HOUSE.**—A house of entertainment, where guests are supplied with coffee and other refreshments, and where men meet for conversation.<sup>2</sup> The term is also used—rarely, however—in the sense of an inn.

**COFFER.**—A chest or trunk; especially one used for keeping money or other valuables.<sup>3</sup>

In *Virginia* it has been declared that the addition of a codicil is not sufficient to operate as a devise of lands purchased by the testator between the date of the will and the date of the codicil, there being no words in the codicil to show such to be the intention of the testator. *Kendall v. Kendall*, 5 Munf. (Va.) 272.

In *Richardson v. Richardson*, C. W. Dud. 184, it was held that to operate as a republication of the will a codicil must be either annexed to it at the time of its execution or expressly confirm it. But see *Dunlap v. Dunlap*, 4 Desauss. (S. C.) 305; *Jones v. Hartley*, 2 Wharton (Pa.), 103.

1. *Burge v. Hamilton*, 72 Ga. 568. See also *Linnard's App.* 93 Pa. St. 313.

Under the rule that a codicil republishes the will as of the date of the codicil, it has been held that where children are not named in the will, but are named in the codicil, this will prevent the children from taking under a statute which provides that children take a certain proportion of the estate by statute if they are not mentioned in the will. *Payne v. Payne*, 18 Cal. 291.

A codicil expressed to take effect upon an event which does not happen is entitled to probate if it refer to the will by date, upon the ground that it amounts to a republication of the will. 1 *Redfield on Wills*, § 23 a, pl. 10, citing *Mendes Da Silva in re*, 2 Sw. & Tr. 315.

2. Webster.

A coffee-house is not an inn, within the meaning of a *policy of insurance* against fire, enumerating the trade of an innkeeper, with others, as double-hazardous. So held of Grigsby's coffee-house, where country visitors to London lodged as in an inn. Lord Ellenborough said: "Horses, wagons, and coaches come to an inn; there are stables and out-houses attached to it; people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered double-hazardous. But the trade of a coffee-

house keeper is of a very different description." *Doe d. Pitt v. Laming*, 4 Campbell, 73, 76, approved, N. Y. Eq. Ins. Co. v. Langdon, 6 Wendell (N. Y.), 627; *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harrison (N. J.), 483.

**Innkeeper's Lien on Goods of Guest.**—A house of entertainment in London, where beds, provisions, etc., are furnished at so much per night, for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches and wagons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London. So held in an action of trover brought by a former guest for goods detained by the landlord for money due for lodging and entertainment, in which action a nonsuit was sustained by the court after argument. *Thompson v. Lacy*, 3 Barn. & Ald. 283.

A mere eating-house is not an inn, nor is the proprietor liable as an innkeeper; and although the defendant may carry on in another part of his premises the business of an innkeeper, yet a person who enters the restaurant for a meal is not a guest or traveller entitled to the protection afforded against innkeepers. *Carpenter v. Taylor*, 1 Hilton (N. Y.), 193; *People v. Jones*, 54 Barb. (N. Y.) 311; *Sto. on Bailments*, § 475, and note 6. So as to a mere boarding-house. *Carpenter v. Taylor*, 1 Hilton (N. Y.), 193.

**Pleading.**—To charge hotel-keeper as innkeeper, he must be declared against as an innkeeper. *Jones v. Osborn*, 2 Chitty's Reports, 484.

See TAVERN; HOTEL; INN; RESTAURANT; Bishop on Statutory Crimes, § 297.

3. Webster.

In an *Indictment*.—"An indictment *de quatuor riscis et cessis, Angliæ, chests*



**COGNATE.**—Relatives by the mother's side or by females. *Cognatio*, relationship through females.<sup>2</sup>

**COGNIZANCE.**—1. Judicial knowledge or jurisdiction; the hearing a matter judicially; the right to take notice of and determine a course.<sup>3</sup> 2. (a) An acknowledgment or confession, as an acknowledgment of a fine.<sup>4</sup> (b) The acknowledgment of the defendant, in replevin,<sup>5</sup> that he took the goods, with the allegation

and coffers, is good, because synonymous." Bacon's Abr., Indictment (G), 3; 2 Hale P. C. 183.

1. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family. Bouvier's Law Dict.

As shown by Burrill, it is used by civil-law writers sometimes for relatives generally, including those both by father and mother, and this even in the same paragraph where it is used in its technical sense of relatives by the mother, thus causing difficulty in translation. See Taylor's Explanation, Civil Law, 314.

2. 2 Bl. Com. 235.

In the canon law consanguinity is distinguished from affinity. 4 Reeves Hist. Eng. Law, 56-58. As including affinity. 4 Reeves Hist. Eng. Law, 56-58. *Agnate*, relations by the father. 2 Bl. Com. 235.

3. Webster.

Burder v. Veley, 12 Ad. & Ellis, 259.

**Cognizance of Pleas.**—A privilege granted by the crown to a city or town, to hold pleas of all contracts, etc., within the liberty of the franchise; and when a person is impleaded for such matters in the courts of Westminster, the mayor, etc., of such franchise may ask cognizance of the plea, and demand that it shall be determined before them.—*Termes de la Ley*.

**Judicial Cognizance.**—Knowledge upon which a judge is bound to act without evidence. See JUDICIAL NOTICE.

Cognizance, in a statute giving cognizance of all capital and other crimes, is a word of the largest import, embracing all power, authority, and jurisdiction. Webster v. Commonwealth, 5 Cush. (Mass.) 400.

"Cognizance and Control" properly relate to administrative, executive, or judicial authority, and are not commonly used to confer legislative authority. Earl, J., dissenting opinion in Matter of Zborowski, 68 N. Y. 101; but held by the court in that case, that "cognizance and control" given by New York act of 1865 to the Croton Aqueduct Board, and by act of 1870 to their successors the De-

partment of Public Works, meant, in view of former legislation, power to direct the making of sewers.

In Federal Judicature.—In 1838, the United States Supreme Court held that "powers" and "cognizance," as used in the acts of Congress establishing the judicial system of the United States, are not each of the same meaning, but that "powers" denotes the process, the mode of proceeding, while "cognizance" denotes jurisdiction; though in general speech the words have the same meaning as applied to courts of justice. Kendall v. U. S., 12 Peters, 636.

4. See 2 Bl. 350, where he describes conveyance of land by fine, which was usually an action of covenant for breach of a pretended agreement to convey. After the *licentia concordandi*, or leave to agree the suit, came the *concord*, or cognizance, itself, which is usually an acknowledgment from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant. "And from this acknowledgment, or recognition of right, the party levying the fine is called the *cognitor*, and he to whom it is levied the *cognisee*. This acknowledgment must be made either openly in the court of common pleas, or before one of the judges of that court, or before commissioners empowered by a writ of *dedimus potestatem*, or before justices of the assize. The judges and commissioners are bound by 18 Edw. I. st. 4 to take care that the cognitors are of full age and understanding; and if any be a married woman, she must be examined privately to see whether she acts willingly without compulsion." Quoting Blackstone.

5. In *replevin*, if the defendant pleads some matter confessing the taking, but showing lawful title or excuse, such pleading is not (as it would be in other actions) called a *plea in bar*, but an *avowry* or *cognizance*; the former term applying to the case where the defendant sets up a right or title in himself; the latter being used when he alleges the right or title to be in another person, by whose command he acted. Comyn's Digest, Pleader, Replevin, 3 K. 13, 14. The answer

he did it legally, by command of another person who had a right to distrain. (c) The acknowledgment or "badge worn by a master or dependent, to indicate the person or party to which he belonged. 'Wearing the liveries and cognizance of their master.'"<sup>2</sup>

**COGNOVIT.** (See also JUDGMENT.)—*Cognovit Actionem*, a written confession of judgment signed, but not sealed, by the defendant or his attorney, and given to the plaintiff after declaration filed. In substance it acknowledges the demand of the plaintiff to be just, and authorizes him to enter judgment for a specified sum either absolutely or upon specified condition.<sup>3</sup>

An avowry or cognizance is called *plea*, and then follow replication, rejoinder, etc.; the ordinary name of each being thus postponed by one. See Tyler's *Stephen's Pleading*, 203, 204.

In cognizance in replevin demands of the goods, it must set up a good title. "In replevin the avowant is as if actor, and must therefore make a good title." Lord Hardwicke, in *Wright v. Birkmire*, *cas. temp. Hardricks*, 1 Brown v. Bissett, 1 Zabriskie, 100. The court said: "But there is a distinction between a just title in trespass and an avowry in replevin. There is a difference when a man claims by virtue of an authority to exercise a right or control over the property of another, and when it is claimed defensively, and relied on as an excuse. In replevin, the sheriff's return does not seek simply to excuse the trespass, but he is an actor, sets up a title, seeks to have a return, and to make a good title *in omnibus*." See *Goodman v. Aylin*, *Yelverton*, 100. Same effect; also *Stephens v. Strange*, 847.

Accordingly, where the New Jersey statute regarding attachments against delinquent and absent debtors, though requiring an affidavit by the plaintiff to justify the attachment, did not require indorsement of the affidavit on the return, yet nevertheless in replevin the plaintiff could not rely on the usual rule of regularity of process must be preserved.

He must in his avowry aver that the plaintiff's in the attachment proceeding made and filed an affidavit pursuant to the statute. So in *Stephens v. Strange*, 847, defendant in replevin having avowed as bailiff of a house for an amercement, it was held on demurrer to be an ill avowry, because it was not averred that the defendant was guilty. See *Horton v. Hendon*, 1 Hill, 118; *Noble v. Holmes*, 5

Hill, 194; *Sturbridge v. Winslow*, 21 Pick. 87.

But since, where authority may be given generally and verbally, it may be pleaded in general terms (*Stephen on Pl.* 304), a bailiff may make cognizance as bailiff where the seizure was for rent in arrear, or as damages feasant, without showing any warrant for that purpose. *Mathews v. Cary*, 3 Mod. 138.

**Quare Clausum Fregit.**—In this action, plaintiff cannot traverse command by a third person as owner, averred in defendant's cognizance, for to do so would be to admit the truth of the rest of the plea, viz., that the third person was owner; and this would be fatal, because if another than plaintiff owns the land the plaintiff has no standing in court. *Trevillian v. Pyne*, 1 Salkeld 107.

**Making Cognizance rather than Avowry** is mistake so immaterial that it will not be noticed even on special demurrer thereto. *Brown v. Bissett*, 1 Zabriskie (N. J.), 49. So where avowry is made instead of cognizance. *Wheadon v. Sugg*, Cro. Jac. 373.

1. 3 Bl. Com. 150.

2. Webster.

3. Burrill L. D.; Rep. & Law. L. D.; Adams' Gloss.; 1 Tidd Pr. 559.

The condition is usually that the defendant will be allowed a certain time within which to pay the debt or damages and costs. *Wharton's L. L.*

A *cognovit* differs from a warrant of attorney in that the latter is given before suit brought, and is under seal.

"A *cognovit* is a mere acknowledgment of an account, and there is no mutuality;" but if terms be added there is, and it becomes an agreement within the provisions of a stamp act. *Ames v. Hill*, 2 B. & P. 150.

A *cognovit* is not discharged by the bankruptcy of the defendant. "The court observed that a *cognovit* is a mere acknowledgment of the amount of damages, and where a man acknowledges

**COHABIT—COHABITATION.** (See also ADULTERY; BIGAMY; DIVORCE; MARRIAGE).—To cohabit is primarily to dwell with another in the same place.<sup>1</sup> Derivatively, it means to dwell constantly together as husband and wife. There is a diversity of opinion as to the amount of constancy and the intimacy of the relation which are requisite.<sup>2</sup>

the cause of action the plaintiff may sign judgment at any time. This was not like a warrant of attorney." *Wyborne v. Ross*, 2 Taunt. 68.

A bond in which it is agreed that it shall be lawful for the obligees to commence an action, proceed to judgment, and upon the judgment issue execution, and that the judgment should be security for the payment of whatever should become due, is in legal effect a *cognovit actionem*. *Hurst v. Jennings*, 5 B. & C. 650.

For the English practice, see 3 Geo. IV. c. 39, sec. 3; 6 & 7 Vict. c. 66; 12 & 13 Vict. c. 106, sec. 136; 32 & 33 Vict. c. 62, sec. 24, by the latter of which, in order that a *cognovit* may be valid, there must be present at its execution an attorney of one of the superior courts in behalf of the defendant, named by him and attending at his request, to inform him of the nature and effect of the *cognovit*, and who shall subscribe it as a witness to its due execution, stating in the attestation that he is such an attorney.

1. Worcester. The word is never used in this sense in a criminal statute. *Canon v. U. S.*, 116 U. S. 55. And see *Brinckle v. Brinckle*, 12 Phila. (Pa.) 232.

2. "The legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only. To cohabit is to live or dwell together; to have the same habitation; so that where one lives and dwells there does the other live and dwell always with him." *Yardley's Est.*, 75 Pa. St. 207. "The primary meaning of the word 'cohabit' is to dwell with some one—not merely to visit or see them. It includes more than that. Worcester defines the word thus: 'to dwell with another in the same place.' Webster's definition is 'to dwell with; to inhabit or reside in the same place or country. To dwell or live together, usually or often applied to persons not legally married.'" *Calef v. Calef*, 54 Me. 365. There must be a living together in the same house as husband and wife. *Sullivan v. State*, 32 Ark. 187; *Bush v. State*, 37 Ark. 215. "Cohabiting means a living together in one house; a boarding and tabling together; it carries with

it the idea of a fixed residence." It is an unwarrantable extension of the meaning of the term to include persons travelling together. *Ohio v. Connaway*, Tappan (Ohio), 58.

Mere sexual intercourse does not constitute cohabitation. *Taylor v. State*, 36 Ark. 84.

"By cohabiting must be understood as dwelling or living together—not a transient and single unlawful interview." *Comm. v. Calef*, 10 Mass. 153; *Comm. v. Bradley*, 2 Cush. (Mass.) 553. "Cohabitation does not mean merely living together; it means living together as husband and wife. The mere act of a man and woman living together and carrying on an illicit intercourse is wholly insufficient to raise a legal presumption of marriage, as it often happens that such cohabitation takes place where the intercourse of the parties is clearly meretricious." *Brinckle v. Brinckle*, 12 Phila. (Pa.) 232; *Calef v. Calef*, 54 Me. 365. Consequently cohabitation does not mean simply sleeping together in the same bed. *Dunn v. Dunn*, 4 Paige (N. Y.), 425.

In the interpretation of statutes imposing a penalty upon the commission of adultery a somewhat different construction is put upon the word. "Whilst one such interview would not, repeated adulterous meetings at any given place, or even at different places,—as, for instance, at houses of assignation,—would perhaps be such cohabiting as would constitute the offence of adultery." *Swancoat v. State*, 4 Tex. App. 105. "A 'state of cohabitation' evidently means something different from simply living together as man and wife, which is not unlawful." *Park v. State*, 4 Tex. App. 134. But see *Ohio v. Connaway*, Tappan (Ohio), 58.

On the other hand, sexual intercourse is not a necessary element of cohabitation. Under the Edmunds Act, by which it is made a misdemeanor to "cohabit with more than one woman," it was decided "that the court properly charged the jury that the defendant was to be found guilty if he lived in the same house with the two women, and at their respective tables, one third of his time or thereabouts,

**COIN.** (See also CONSTITUTIONAL LAW; COUNTERFEITING; LEGAL TENDER.)—A piece of metal stamped with certain marks and made current at a certain value. It differs from money as the species differs from the genus.<sup>1</sup> To fit metal to circulate as money by dividing it into pieces of exact fineness and weight, and stamping with devices adapted to prevent counterfeiting or abstraction of any part.<sup>2</sup>

and held them out to the world, by his language or conduct or both, as his wives, and that it was not necessary it should be shown that he and the two women or either of them occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them."

"This meaning of the phrase 'cohabit with more than one woman' in the statute is in consonance with a recognized definition of the word 'cohabit.' In Webster 'cohabit' is defined thus: '1. To dwell with; to inhabit or reside in company or in the same place or country; 2. To dwell or live together as husband and wife.' In Worcester it is defined thus: '1. To dwell with another in the same place; 2. To live together as husband and wife.' The word is never used in its first meaning in a criminal statute; and its second meaning is that to which its use in this statute has relation." *Cannon v. U. S.*, 116 U. S. 55. Miller and Field, JJ., dissented from this opinion, the former saying: "I know of no instance in which the word cohabitation has been used to describe a criminal offence where it did not imply sexual intercourse." This case was followed in *Ex parte Snow*, 7 Sup. Ct. Repr. 556. In *England* "matrimonial cohabitation" has been used in distinction from "matrimonial intercourse," to signify living together in the same house without copula. *Foster v. Foster*, 1 Hagg. Const. Rep. 144; *Orme v. Orme*, 2 Add. Ec. 823.

It is not necessary, in order to cohabit as husband and wife, that the parties should claim to be husband and wife. *Lyerly v. State*, 36 Ark. 39. And it seems that notoriety is not a necessary incident of cohabitation, it having been held that in an indictment for lewdness it is not a sufficient averment of the publicity of the acts charged to allege that A and B "did live, use, and cohabit together as man and wife." *State v. Moore*, 1 Swan (Tenn.), 136.

Where there was a proviso in a deed granting an annuity that it should cease if the lady to whom it was granted should "associate, continue to keep company with or cohabit or criminally correspond with J. F.," all intercourse whatever,

though most innocent, even mere calling like any other visitors, was held to be within these terms. *Lord Dormer v. Knight*, 1 Taunt. 417. See note to *Bishop on Mar. & Div.* § 777.

1. Wharton's Law Lexicon.

2. Abbott's Law Dictionary.

"The word *coin* is one of well-settled meaning. The primary sense of the *noun*, according to Dr. Webster, is 'the die used for stamping money,' and the undisputed signification of the *verb*, according to most if not all the lexicographers, is 'to stamp metal and convert it into coin.' In Wharton's Law Lexicon (*ad verbum*) it is said: 'Strictly speaking, coin differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, shells, etc., which has currency as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process called coining.' It was argued at the bar—I do not know whether seriously or not—that printing was stamping, and these notes might therefore literally be said to be coined. No such use of the word in any author has been shown. We may say, figuratively, to coin a story, meaning to invent one, but never to coin the book in which it is printed." *Sharswood, J.*, in *Borie v. Trott*, 5 Phila. (Pa.) 403.

"A coin is a piece of metal stamped and made legally current as money. A counterfeit coin is one in imitation of the genuine. The coins known to the law are those authorized to be issued from the mints of the United States, and those of foreign countries current here." *U. S. v. Bogart*, 9 Ben. (C. C.) 314.

**A Collective Noun.**—"Coin is a word collective, which contains in it all manner of the several stamps and portraits of money. "Termes de la Ley; Comm. v. Gallagher, 16 Gray (Mass.), 240. In this case, in an indictment for larceny, it was held that "copper coin of the value of two dollars and seventy five cents does not legally mean a copper coin, but more than one, and as many as are necessary to constitute the alleged value."

**To Coin Money.**—"To coin money clearly means to mould into form a me-

**COINAGE**—The business or function of coining money.<sup>1</sup> The great mass of metallic currency in circulation.<sup>2</sup>

**COLLAR**. See note 3.

**COLLATERAL**—That which is by the side of, assists, co-operates with, is made or given in addition to, some other thing which is presented as the principal.<sup>4</sup>

tallic substance of intrinsic value and stamp on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency." Robertson, J., in *Griswold v. Hepburn*, 2 Duv. (Ky.) 29; *Thayer v. Hedge*, 22 Ind. 306. "The coining of money has never been construed as including the issue of a paper currency. Coin and coinage are understood to be the stamping of metal in some way so as to give them currency, but it is not applied to any other material." *Meyer v. Roosevelt*, 25 How. (Pr.) 105.

**Coins, Gold, Silver, and Copper**.—Chinese coin, known in China as "copper cash," made of copper and lead, is not "coins, gold, silver, or copper" within the customs laws, unless intended to be used here as a part of the currency. It is otherwise chargeable with duty as "copper, when old and fit only to be remanufactured." *Crocker v. Redfield*, 4 Blatchf. (C. C.) 378.

**Instrument Adapted for Coining**.—This phrase applies to any instrument that may be used in the formation of any part of the coin. A die for stamping one side of a coin is such. *Comm. v. Kent*, 6 Metc. (Mass.) 221.

**To Pay in Current Coin**.—Where manufacturers employed a man to make stocking heels at 7d. per dozen, he to find the labor and work on their premises, using their machine, and it was contracted that settlements should be made weekly, and from the sum due the plaintiff were to be deducted the rent of frame, fines, charges for gas, heat, etc., it was held that this was not a contract to pay wages otherwise than in the current coin of the realm. *Archer v. James*, 2 B. & S. 61.

1. Abbott's Law Dict.; *Meyer v. Roosevelt*, 25 How. Pr. 105.

2. Abbott's Law Dict. "Coinage of the United States" is the exact legal equivalent of "coins coined at the mint of the United States." U. S. v. Otey, 31 Fed. Rep. 68.

3. Under an act which authorizes "any person to kill any dog or dogs found and being without a collar" it is lawful to kill a dog if he is out of the enclosure of his owner, without a collar, although under the immediate care of the owner. *Colt v. Barnard*, 18 Pick. (Mass.) 260.

4. **Collateral Ancestors**.—Uncles and aunts, brothers and sister of lineal ancestors. See *Bank v. Walker*, 3 Barb. Ch. (N.Y.) 446.

**Collateral Assurance**.—One which is independent of, but subordinate to, an assurance or agreement affecting the same subject-matter. *Rapalje & Lawr. L. D.* That which is made over and above the deed itself. *Abbott's Law Dict.*; *Bouv. Law Dict.*

**Collateral Consanguinity**.—The relation of those who are descended from the same ancestor, but not one from the other. 2 Bl. Com. 203.

**Collateral Descent**.—Descent to collateral kindred. See *Lessee of Levy v. McCartee*, 6 Pet. (U. S.) 102.

**Collateral Estoppel**.—The collateral determination of a question by a court having general jurisdiction of the subject. *Bouv. Law Dict.*; *Small v. Leonard*, 26 Vt. 209.

**Collateral Facts**.—Facts not directly involved or connected with the principal issue or matter in dispute. *Rapalje & Lawr. Law Dic.*; *Bouv. Law Dict.* Those facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. Such facts are inadmissible as not tending to prove the issue. *Greenleaf on Ev.* § 52; *Taylor on Ev.* (8th Eng. Ed.) p. 304 *sq.*

**Collateral Inheritance Tax**.—A tax levied upon the collateral devolution of property by will or under the intestate law.

**Collateral Issue**.—(1). A question which is not immediately or mediately a matter in dispute in the proceeding. *Rapalje & Lawr. Law Dict.*

(2). The issue raised when a convicted criminal pleads anything allowed by law in bar or stay of execution, as that he is not the person found guilty, or a pardon or pregnancy, which must be tried at once, for which purpose a jury is empanelled. *Wharton's Law Lex.*; 4 Bl. Com. 306.

**Collateral Kindred or Collaterals**.—Those who are descended from a common ancestor and not one from the other.

**Collateral Limitation**.—A limitation in the conveyance of an estate which gives an interest for a specified period, but

**COLLATION—COLLATIO BONORUM.** (See also **ADVANCE-HOTCHPOT.**)—A bringing together of goods or property common fund; especially of property received of a decedent by way of advancement, for the purpose of a more equitable division among the heirs.<sup>1</sup>

In ecclesiastical law, *collation* is the conferring or bestowing of a benefice by the bishop, where he has himself the right of patronage.<sup>2</sup>

The right of enjoyment to depend on a collateral event, as a limitation to a man and his heirs, tenants of the life of Dale, or to a woman during widowhood. 4 Kent Com. 129; 1 Washb.

**Collateral Promise.**—A promise to be liable for the payment of the debt of another person, having immediate respect to the original liability, and no new consideration moving to the promisor to pay or answer for such liability. *Elder v. Warfield*, 7 Md. 395. "The terms original and collateral promise are convenient to distinguish between the cases, the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those in which though the effect of the promise is to discharge the debt of another, yet the object of the undertaker is to subvert some interest or purpose of his own." The former is within the section of the Statute of the latter is not. *Nelson v. Metc.* (Mass.) 396; 2 C. C. 37; 148; *Clay v. Walron*, 9 Cal. If the promise is made by one in name to pay for goods or money to or services done for another, it is his own contract on consideration, and is called original, binding on him without writing. The language is 'Let him have goods, or do service for him, and I will see you paid,' or 'I promise he will pay,' or 'If he does not pay, this is collateral, and though for good consideration, it is void by the Statute of Frauds.' *Stone v. Walker*, (Mass.), 615.

**Collateral Security.**—A separate obligation is attached to another contract guaranteeing its performance; also a security of property, or of other contract, to insure the performance of a contract. *Bouv. Law Dict.* *Lochrane v. Solomon*, 38 Ga. *vin v. Sherman*, 9 Ia. 331. Collateral security in bank phraseology means security additional to the obligation of the borrower. *er v. Nat. Mech. Bank*, 2 Abb.

(C. C.) 416. "The use of the term collateral security, when a debtor transfers to his creditor an article of value or an evidence of debt, is intended to express that it is not received in payment of the principal debt, and that it is not an additional right to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the means of the creditor to realize the principal debt which it is given to secure." *Munn v. McDonald*, 10 Watts (Pa.), 270.

Under an act which provides that "no person is entitled to a mechanic's lien who takes collateral security on the same contract," the taking of a mortgage from the debtor upon the same property covered by the lien and for the same debt is not taking of collateral security on the same contract. *Gilcrest v. Gottschalk*, 39 Ia. 311; *Mervin v. Sherman*, 9 Ia. 331.

Property or contracts transferred as collateral security are called "collateral."

**Collateral Warranty.**—Warranty as to an estate made by one who was ancestor to the heir thereof, either actually or by implication of law, in respect to other property, but who could not have been so in respect to the estate in question. *Bouv. Law Dict.* Warranty made where the heir's title to the land neither was nor could have been derived from the warranting ancestor. 2 Bla. Com. 301; 4 Kent Com. 469; 2 Washb. on R. P. 668 37; *Challis on R. P.* 249; *Den v. Crawford*, 3 Halst. (N. J.) 106.

1. *Cooper's Justinian*, 574. "The collation of goods is the supposed or real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession." *Succession of Cucullu*, 9 La. Ann. 96; *Destrehan v. Destrehan*, 4 Mart. N. S. (La.) 557. It corresponds to the hotchpot of the common law, which is supposed to have been derived from it. 2 Bla. Com. 517; 4 Kent Com. 419; *The Ship Henry Ewbank & Cargo*, 1 Sumn. (C. C.) 421.

2. 1 Bla. Com. 391; 2 Bla. Com. 22.

In maritime law, *collation* means contribution or average.<sup>1</sup>

A comparison of two things by putting them together.<sup>2</sup>

**COLLECT — COLLECTIBLE — COLLECTION — COLLECTOR.**—To collect is to gather into one body or place, especially to gather money or revenue from debtors; to demand and receive.<sup>3</sup>

1. Adams' Gloss.; Loccen. De Jur. Mar. lib. ii. c. 8. § 1.

2. *Collatio Signorum*, or *Sigillorum*, the mode of testing the genuineness of a seal by comparing it with one known to be genuine. Adams' Gloss.; Bracton, 389 b, 398 b; Fleta, lib. vi. c. 34, § 5.

3. Webster.

**Collect.**—A power to collect assets given by statute to a receiver authorizes him to collect, sell, and do whatever is necessary should be done to convert the property into money, in order to apply it to the payment of claims. *Fling v. Goodall*, 40 N. H. 219.

A power given in a city charter to *levy and collect* a special tax, does not carry with it a power to collect it by a sale of the property on which it is assessed. The power to collect may be enforced by action in the courts. *McInerney v. Reed*, 23 Iowa, 410.

A direction in a will to an executor to "collect" and "pay over" the residue of the testator's estate, "without sacrificing too much by forcing the sale thereof," gives to the executor the power to sell by implication. *Going v. Emery*, 16 Pick. (Mass.) 107; s. c., 26 Am. Dec. 645.

Where one is authorized "to collect, receive, and apply to his own use all or any part of the money due," he has a power coupled with an interest, and is not a mere agent empowered to collect debts. "He is not by any construction of the instrument restrained in the mode of collection. It would be a narrow construction of the instrument to confine him to the receipt of money only." *Thorp v. Smith*, 2 Watts (Pa.), 389.

**Collected.**—A tax is "collected" when it has been paid by those on whose property it has been levied. *Fitzpatrick v. Flagg*, 5 Abb. Pr. (N. Y.) 213.

Where a mortgage is given for a fine adjudged to the State in a criminal prosecution, the judgment is not "paid and collected" so as to preclude an appeal. *Floyd v. State*, 32 Ark. 200.

**Collectible**—Where a note is guaranteed to be "good and collectible after due course of law," if the holder means to resort to the guaranty, he must prosecute with due diligence all the parties to the note. *Moakley v. Riggs*, 19 Ins. (N. Y.) 69; s. c., 10 Am. Dec. 196. But

where note was guaranteed simply to be good and collectible, it was held not to be necessary to first exhaust legal remedies against the makers of the note. There can be other evidence that the note was not capable of collection. *Marsh v. Day*, 18 Pick. (Mass.) 321; *Sanford v. Allen*, 1 Cush. (Mass.) 473. In the former case suit had been begun. In *French v. Marsh*, 29 Wis. 649, however, it was held necessary under like circumstances to prove due diligence in attempting to collect the note by action commenced within a reasonable time after maturity, and that the insolvency of the maker did not excuse the want of such an attempt. In *McDoal v. Yeomans*, 8 Watts (Pa.), 361, insolvency was held to excuse the want of an attempt to collect the note from the maker by process. And see *Wheeler v. Lewis*, 11 Vt. 265; cases *infra*, under **COLLECTION**.

**Collection.**—The power to enforce the "collection of fines, forfeitures and penalties," conferred on State's attorneys, includes the right to receive and give receipts therefor, that shall operate as full discharge to the parties paying the same; and also the right to receive the amount of any judgment that may have been rendered for any such fine, etc., and to execute an acquittance therefor. *People v. Christerson*, 59 Ill. 157.

"I guarantee the collection of this note" is equivalent to a guaranty that it is collectible by due course of law, and the guarantor is not liable until an attempt to collect it by process from the makers has been made. *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Loveland v. Shepard*, 2 Hill (N. Y.), 139; *Dyer v. Gibson*, 16 Wis. 557; and see *White v. Case*, 13 Wend. (N. Y.) 543.

**For Collection.**—See **BANKS AND BANKING; CHECKS; ENDORSEMENT.**

Common carriers doing business between certain points, and not undertaking personally for the carriage of goods to farther points, but merely engaging to forward them to their destination by the established lines of transportation, are not liable upon the receipt for a bill of goods "for collection" from a person beyond the terminus, in the absence of a special contract creating an additional obligation upon the failure of the other

**COLLECTION AGENCIES.** See BANKS, Vol. II., p. 111.

**COLLEGES.** See EDUCATION; SCHOOLS, etc.

**COLLIERY.**—The place where coals are dug.<sup>1</sup> "Colliery is, however, a word sufficiently wide to include all contiguous and connected veins and seams of coal which are worked as one concern, without regard to the closes and pieces of ground under which they are carried. See *Hodgson v. Field*, 7 East, 620. Indeed, it is apparently wide enough to include the engines and machinery in the 'contiguous and connected veins,' as well as those veins themselves. Webster, in defining 'colliery,' refers to 'coalery,' and he defines 'coalery' as a coal-mine, coal-pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the coal."<sup>2</sup>

carriers, to whom in the ordinary course of business the bill was intrusted for collection, to pay over the amount received by them upon the same. *Lowell Fence Wire Co. v. Sargent*, 8 Allen (Mass.), 189.

**Collector.**—In a statute providing the mode of execution against a municipal corporation, *collector* "means the officer having the legal custody of and power to distribute the funds of such corporation." *Gabler v. Elizabeth*, 13 Vr. (N. J.) 79.

A collector of taxes is a public officer within the meaning of an embezzlement act. *State v. Walton*, 62 Me. 106.

"Decision of the collector," in the 14th sec of the act of Congress of June 30, 1864, which makes the same conclusive unless appealed from within thirty days, etc., is synonymous with "ascertainment and liquidation of the duties by the proper officers of the customs," used in the same section. *U. S. v. Cousmery*, 7 Ben. (C. C.) 251.

1. *Carey v. Bright*, 58 Pa. St. 85.

2. Quoted from *MacSwinney on Mines*, p. 25.

In *Carey v. Bright*, 58 Pa. St. 85, *Sharswood, J.* said: "Neither was there any error in declining to affirm the seventeenth point, that the sale by Kirk, Baum, Ogle, Clark, and Gross to the defendants below of all their interest in the shaft and slope collieries 'included all the movable property belonging to and used at these places in the mining of coal, and that the word "colliery" is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which the coal is mined.' According to the most approved lexicographers, to whose works courts must resort for the meaning of words which have no settled

legal construction, a colliery is 'a place where coals are dug.' Johnson, Webster, *ad verbum*. No question appears to have been raised as to whether the articles in dispute were or were not fixtures. It is probable that many things about a colliery, although not actually affixed to the freehold, may come within that category, like the rolls of an iron-mill, or the machinery of a manufactory, whether fast or loose, which is necessary to constitute it, and without which it would not be a mill or manufactory at all. *Voorhis v. Freeman*, 2 W. & S. 116. But the mere loose movables about such an establishment, in the absence of any usage or general understanding, would no more pass than would the tools of a mechanic by the sale of his shop." See *Bainbridge on Mines* (4th Ed.), 401, for a discussion of transfer of machinery, etc.

But judgment was reversed because of the refusal of evidence offered on the trial, to show that "the term 'colliery' embraces all the movable property at the mines used or placed there to be used in the working of them, and that it has been so understood for twenty-five years (1868) by all engaged in mining in Schuylkill county."

**Seams of Coal.**—In *Hodgson v. Field*, referred to in *MacSwinney on Mines*, 7 East, 620, Lord Ellenborough said: "The deed speaks of an *intended colliery*. It seems that the object of the grant was to drain the water from such *intended colliery*, the local extent and limits of which intended colliery we have no means of defining; but judging from the nature of such works, there seems no reason to give them any other or narrower limit than the boundaries of the continued property of the grantee, under which the intended colliery might be prosecuted by him, without regard to the closes and



COLLIERY—COLOR—COME—COMFORT.

**COLLISION.** See SHIPPING.

**COLLUSION.** See DIVORCE; FRAUD, etc.

**COLOR** in law means not the thing itself, but only an appearance thereof; as color of title means only the appearance of title.<sup>1</sup>

**COME—COMING.**—To move toward or into; to approach;<sup>2</sup> to appear in court.<sup>3</sup>

**COLOR OF TITLE.** See ADVERSE POSSESSION, Vol. I. p. 225.

**COMFORT.**—The word embraces whatever is requisite to give security from want, and furnish reasonable physical, mental, and spiritual enjoyment.<sup>4</sup>

**COMMENCEMENT OF A BUILDING** is the first labor done on the ground which is made the foundation of the building, and to form part of the work suitable and necessary for its construction.<sup>5</sup>

pieces of ground under it which might be carried, and who might of course be expected to follow the coal through all the contiguous and connected veins and seams of coal which belonged to him." It was held, accordingly, that the grant of the right to maintain rough pits for the intended colliery authorized the use of the pits so long as coal was dug from any part of the colliery, whether under the tract where the deed mentioned that the mine was to be opened, or not.

**Working a Colliery.**—Under statute 18 & 19 Vic. c. 108, s. 4, requiring the ventilation of every colliery while the same is worked, the penalty imposed by the act for violation of its provisions will be imposed upon an agent who fails to ventilate during the suspension of work between Saturday night and Monday morning. Cockburn, C. J., said: "As the present case proves, the result of such neglect is that bad air collects in the workings, and the men who first enter the colliery afterwards are exposed to unnecessary danger, and are compelled to resort to a most hazardous operation for the purpose of restoring the ventilation."

**English Legislation.**—See consolidation and amendments by the Coal Mines Regulation Act, 1872.

**Ejectment** will lie for a coal-mine. *Comyn v. Kyneto*, Cro. Jac. 150; *Lawson v. Williams*, cited Cro. Jac. 150; *Comyn v. Wheatly*, Noy, 121. Or for a coal-pit. *Wyld's Case*, cited Noy, 121.

1. *Broughton v. Haywood*, 61 N. Car. 383.

2. Webster.

"Come to person . . . from the part of his father" in an intestate act includes coming by gift and devise as well as by descent. *Shippen v. Izard*, 1 S. & R. 222.

**Come to Reside.**—One who goes to a place with his family to spend the summer at the residence of his father, does not "come to reside" so as to render him liable to perform militia duty. *Comm. v. Swan*, 1 Pick. (Mass.) 194.

**Come to Settle.**—Under an act which provides that any one can gain a settlement who comes to settle on a tenement of a certain value, the coming must be *animo morandi* or *manendi*: it may be for a temporary purpose, but there must be an intention to settle. One who went to a town to sell a load of hay, and was detained there by a broken limb, did not come to settle. *The King v. Inhab. of St. James*, etc., 10 East. 29; *The King v. Inhab. of Hooe*, 4 East, 362. It is not necessary that the settler should reside upon the tenement. *The King v. Churchwardens*, 6 B. & C. 70.

**Coming to Market.**—In an act forbidding forestalling this means "on its way to market," with the intent to be there offered for sale in market hours; it is not necessary that there should be a market actually holding at the time of the purchase in order to constitute the offence. *Boteler v. Corp. of Washington*, 1 Cr. (C. C.) 676.

3. The word is used in this sense in the introduction to a plea. It is taken from the style of the entry of the proceedings on the record. It formed no part of the *viva voce* pleading, and is not considered as in strictness constituting a part of the plea. *Steph. on Pldg.* 431 n.; 1 Chitty Pldg. 411.

4. *Forman v. Whitney*, 2 Keyes (N. Y.), 168.

5. *Pennock v. Hover*, 5 Rawle (Pa.), 308. See *Brooks v. Lester*, 36 Md. 70; *Jean v. Wilson*, 38 Md. 296.

**COMMERCE.** See CONSTITUTIONAL LAW; INTERSTATE COMMERCE.

**COMMERCIAL TRAVELLERS OR DRUMMERS.** (See also AGENCY.)

1. **Definition.**—Where an agent simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterward to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchasers to the principal on such delivery, such agent is generally called a "drummer" or commercial traveller.<sup>1</sup>

2. **Powers and Duties of Commercial Agents.**—Commercial agents may be clothed with general and special powers, and their authority as once established is presumed to continue till notice to the contrary appears.<sup>2</sup>

1. *City of Kansas v. Collins*, 34 Kans. 434; *State v. Miller*, 93 N. Car. 511.

2. *Diversy v. Kellogg*, 44 Ill. 114.

A principal is bound by the acts of his travelling agent done within the scope of his authority, and the principal will also be responsible for the unauthorized acts of such agent where the conduct of the principal justifies a party dealing with the agent in believing that such agent was acting within and not in excess of the authority conferred on him. Where such agent is held out to the world as one having the authority of a general agent, any private instructions or limitations not communicated to the persons dealing with such agent will not affect them nor relieve the principal from liability where the agent oversteps such limitations. *Banks v. Everest*, 35 Kans. 687.

An agent who merely solicits orders for goods, sending them to his principal to be filled, has no implied authority to receive payment for the goods sent by the principal to fill such orders. An order solicited by and given to such agent does not constitute a sale, either absolute or conditional, of the goods ordered, but is a mere proposal, to be accepted or not, as the principal may see fit. *McKindley v. Dunham*, 55 Wis. 515; *Clark v. Smith*, 88 Ill. 298; *Abrahams v. Weiller*, 87 Ill. 179; *Reynolds v. Ferree*, 86 Ill. 570.

A travelling salesman of a wholesale house may be regarded by those who deal with him as a general agent, and his acts within the scope of his business will bind his principals, although in violation of their printed instructions to him, unless the parties dealing with him have notice of the limitations upon his authority. A contract of a drummer not to sell a certain class of goods to any other merchant

in a town except the purchaser, is within the apparent scope of his authority, and binding upon his principal. *Keith v. Herschberg Optical Co.*, 48 Ark. 138.

Where a bill of goods is sent to the purchaser by the vendors upon an order procured by an agent of the latter, together with a bill thereof in the name of such vendors, payment to such agent in the absence of any proof of authority in the agent to collect, or of any prior dealings between the purchaser and the vendors, is no defence to an action by the vendors for the price of such goods. *Korneman v. Monaghan*, 24 Mich. 36; *Butler v. Dorman*, 68 Mo. 298; s. c., 30 Am. Rep. 795; *Law v. Stokes*, 32 N. J. L. 250; *Seiple v. Irwin*, 30 Pa. St. 513; *Greenhood v. Keator*, 9 Ill. App. 183; *Hogarth v. Wherley*, 14 Eng. (Moak) 474. *Compare Hoskins v. Johnson*, 5 Sneed (Tenn.), 469; *Collins v. Newton*, 7 Baxt. (Tenn.) 269; *Putnam v. French*, 53 Vt. 402; s. c., 38 Am. Rep. 682.

In *Trainer v. Morison*, 78 Me. 160, it was held that an agent who has authority to contract for the sale of chattels has authority to collect pay for them at the time, or as a part of the same transaction, in the absence of any prohibition known to the purchaser. Knowledge of this prohibition may be inferred from the circumstances of sale, or from customary usages of trade known to the parties. Persons dealing with an agent have a right to presume that his agency is general, and not limited, and notice of the limited authority must be brought to their knowledge before they are bound to regard it. The notice of the limited authority of the agent, in this case, printed at the top of the bill accompanying the goods sold and not seen by the purchasers, is not so prominent as to

hold them at fault in not observing it. Citing *Capel v. Thornton*, 3 Car. & P. 352; *Greeley v. Bartlett*, 1 Me. 173; *Goodenow v. Tyler*, 7 Mass. 36; *Methuen Co. v. Hayes*, 33 Me. 169; *Kinsman v. Kershaw*, 119 Mass. 140; *Putnam v. French*, 53 Vt. 402; *Wass v. M. M. Ins. Co.*, 51 Me. 537.

The purchaser from a commercial agent is bound to ascertain the agents' powers, and in the absence of actual authority the agent's statement that he had authority is not binding upon the principals. The purchaser has no right to act on anything that did not proceed from the principals, either as actual authority or in some form of binding admission. *Korneman v. Monaghan*, 24 Mich. 36.

A commercial agent will, however, have the power to collect when such power is either directly or impliedly given to him by his principal, as where he has possession of the goods and delivers them. *Sumner v. Saunders*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505; *Rice v. Groffman*, 56 Mo. 434; *Seiple v. Irwin*, 30 Pa. St. 513; *Harris v. Simmerman*, 81 Ill. 413.

The rule that the authority of an agent to sell goods imports the authority to receive the proceeds of the sale is limited to cases where there are circumstances or appearances which give color to the belief in the purchaser that the authority exists. An agent to sell goods who has possession of them and delivers them to the purchaser has authority to collect the purchase price; but if he is merely employed to sell, and has no possession of the goods, he has no authority to receive the price; and payment to him will not discharge the purchaser unless there is a known usage of trade or course of business to justify him in making it. *Meyer v. Stone*, 46 Ark. 210.

Where the travelling salesman of a corporation has power to make a contract in its name, take payments thereon, receive a bond for its fulfilment, and settle with the other party to the contract, his agency is sufficiently established to charge the corporation with notice of what was said and done in respect to liability on the bond at the time of the settlement. *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 386.

A commercial traveller sold his samples and converted the proceeds to his own use. In a suit by his principal against the vendee to recover the value of the samples, the court charged the jury that if the sale of the samples was embraced within the real or apparent

scope of the agent's authority, his principal would be bound by the sale and could not recover. The evidence showed the extent of the agent's authority was to exhibit the samples and solicit, receive, and forward orders for merchandise. *Held*, the law announced by the court was correct; but as there was no evidence of usage enlarging the authority of a commercial agent, and as an agent authorized to sell on credit has no authority to collect the price in the name of his principal, the court below erred in its instruction so far as it related to apparent authority. *Kohn v. Washer*, 64 Tex. 131.

Orders or subscriptions taken by a book canvasser are contracts between the publisher and the buyer or subscriber. The canvasser will only be liable on them as a guarantor, or where bad faith is shown. He has no right to cancel any of these orders or to transfer them to another publisher. *Stoddard v. Warren*, 7 Repr. (U. S.) 517.

A drummer is not protected from the penalty denounced by a statute against persons selling goods without license, which requires "that every person acting as a 'drummer' in his own behalf, or for another person or firm, who shall sell, or attempt to sell, goods, wares, or merchandise of any description by wholesale, with or without samples, before soliciting orders, or making any such sales, shall pay the treasurer of the State a tax of \$100 and obtain a license, which shall be effective for a year next after its date, and be used by not more than one person at one time, and shall be in the possession of the person while doing business under this section in this State to secure his protection," unless he shall be in the actual possession of the license while doing business. In this case the license was mailed to defendant but not received by him at the time the sale was made. *Lewis v. Dugar*, 91 N. Car. 16; *State v. Smith*, 93 N. Car. 519; *State v. Long*, 95 N. Car. 582.

A law imposing a tax upon drummers and all persons not having a regular licensed house of business in a taxing district and selling goods by sample has, however, been held unconstitutional and void. *Robbins v. Taxing Dist. of Shelby Co.*, 120 U. S. 489. See dissenting opinion of Waite, C. J., in same case.

Same principle sustained in *Corson v. Maryland*, 120 U. S. 502.

If the legislature of a State frames a law relating to merchants and sample merchants with the intention to discriminate against non-residents in favor of residents, and against goods in other

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MISSION MERCHANTS OR FACTORS. (See also AGENCY.)

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**Definition.**—A commission-merchant or factor is an agent for  
of goods in his possession or consigned to him. The  
commission-merchant" and "factor" are synonymous, and  
ne who receives goods, chattels, or merchandise for sale,  
e, or other disposition, and who is to receive a compensa-  
his services, to be paid by the owner or derived from the  
he goods.<sup>1</sup>

d by sample in favor of goods  
n the State for sale, and if the  
has this practical effect, then  
sions are null and void, and all  
d prosecutions under them are  
ut the legislature has a right  
inate against sample merchants  
of merchants, the State being  
mistress of her own policy in  
ng what classes she shall lay a  
x upon, and what classes she  
pt from such taxation, and in  
ow lightly or how heavily she  
e such a tax. *Exp. Thornton*,  
ep. 538. See *Webber v. Vir-*  
U. S. 350; *Welton v. State*, 91  
; *State v. Browning*, 62 Mo.  
Taylor, 58 Miss. 478; *Walling*  
on, 116 U. S. 446; *Machine Co.*  
oo U. S. 676. *Compare* *Single-*  
sch, 4 Lea (Tenn.), 93.  
mercial traveller is neither a  
r a merchant, so as to make  
ct to the payment of taxes

under a city ordinance; nor will a single  
sale and delivery of goods by such agent,  
or by any other person, out of the sam-  
ples exhibited, or out of any lot of goods,  
constitute such agent or other person a  
pedler or a merchant. *Kansas v. Collins*,  
34 Kans. 436; *Exp. Taylor*, 58 Miss.  
478; *Com. v. Jones*, 7 Bush (Ky.), 502;  
*Com. v. Farnum*, 114 Mass. 267. *Com-*  
*pare* *Morrill v. State*, 38 Wis. 428.

A commercial agent travelling for his  
principal at a stated salary per year  
commits no violation of duty by taking  
gratuitously orders for goods upon a  
house in whose service he had formerly  
been engaged, he not having solicited  
them, and it not appearing that such  
orders were in any way prejudicial to the  
interests of his employers. *Gelger v.*  
*Harris*, 19 Mich. 209.

1. *Perkins v. State*, 50 Ala. 154; *Gra-*  
*ham v. Duckwall*, 8 Bush (Ky.), 12; *Bar-*  
*ling v. Corrie*, 2 B. & Ald. 143. See  
*Blood v. Palmer*, 11 Me. 414; s. c., 26

Am. Dec. 547; *Ward v. Brandt*, 11 Martin (La.), 331; s. c., 23 Am. Dec. 352; *Higgins v. Moore*, 34 N. Y. 418; *Ladd v. Arkell*, 37 N. Y. Superior Ct. 35; *Duguid v. Edwards*, 50 Barb. (N. Y.) 288; *Hopkirk v. Bell*, 3 Cranch (U. S.), 454; *Slack v. Tucker*, 23 Wall. (U. S.) 321; *Winne v. Hammond*, 37 Ill. 99; *Taylor v. Wells*, 3 Watts (Pa.), 65; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Cotton v. Hiller*, 52 Miss. 7.

The term "factor" is seldom used in the United States. 1 Parsons on Contr. (7th Ed.) 100.

The factor must be a specialist pursuing the particular business as a trade. One who undertakes to sell a piece of goods out of his line of business is not therefore a factor. Wharton on Agency, § 735.

If a person has the possession of goods at the time of sale, and he sells them upon credit for a commission, it is sufficient to constitute him a factor within the definition, viz.: An agent employed to sell personal property intrusted to his possession, by or for his principal, for a compensation, commonly called "factorage" or "commission." *Edgerton v. Michels*, 66 Wis. 124.

A party agreeing with the owners to receive coal shipped to him for sale, hoist from the vessel and put the same on dock, pay the lake freight, and charge the cost of hoisting and putting the coal on the dock, and the lake freight paid by him, against the coal, and who is to receive for docking, screening, selling and delivering the coal, including his commissions, the sum of \$1.50 per ton on all coal delivered at any point outside the yard requiring carting and \$1.00 per ton on all coal delivered at the yard, and an additional commission of fifty per cent of the net profits on sales, and who agrees to guarantee payment on all sales, advance on the coal as it is shipped \$3.00 per ton of the invoice price, to be drawn for at sight on bills of lading, and to pay the shippers as the coal is sold the balance of the proceeds of the sale, and who agrees not to sell the coal below the market price, and to render monthly statements of accounts of sales, will be as to the coal shipped to him a factor or commission-merchant. *Burton v. Goodspeed*, 69 Ill. 237.

He is called a supercargo if authorized to sell a cargo which he accompanies on the voyage. 1 Beawes Lex. Merc. (6th Ed.) 47.

A partnership having for its object to sell goods consigned to them for a commission may be considered factors.

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**Powers of Commercial Agents.—How Conferred.**—The authority of commercial agents is conferred like the authority of agents in general, either under seal, by power of attorney; in writing, by a deed of appointment or by correspondence; by parol or by implication.<sup>1</sup>

**Extent of Power Defined by Usage.**—The extent of the power of a factor is, like that of a broker, largely defined by usage. When a particular power is by usage conceded to factors the law recognizes it.<sup>2</sup>

But the broker is in a different position. He is not trusted with the possession of the goods and is not authorized to sell in his own name; and if he does so in his own name he acts beyond the scope of his authority, and his principal is not bound. *Baring v. Corrie*, 2 Q. B. 143; *Saladin v. Mitchell*, 45 Ill. 143; *Black v. Tucker*, 23 Wall. (U. S.) 321; *Moore v. Moore*, 34 N. Y. 417, 420; *Wells on Contr.* 91.

A factor, unlike a broker, can only sell goods in his possession or under his possession. A factor gave the following note: "Galveston, Nov. 4, 1872. Received for account of N. from S. 450 bales of cotton, at basis of 15½ cents for ordinary." There was no further possession of the goods until fifteen days later. *Held*, that there was no sub-sale, the usage of trade under the cotton market allowing only sales for the factor's designation of goods. *Harbert v. Neill*, 49 Tex. 301. Compare *Neill v. Billingsley*, 49 Ill. 301.

A broker may act for both parties, and bind them by bought and sold notes. A factor can bind only the seller, and his note will not bind the buyer, so as to carry a transaction out of the Statute of *Quinnell v. Evans* 6 H. & N. 660. Though a factor is generally designated as an agent who sells goods for his principal on commission, those agents who buy goods for another and receive a commission for their services are also factors. When purchases are made on the strict account of another, the general character of a factor applies to him who buys and to him who sells on commission, and is intrusted in connection with the possession and apparent ownership of the property. *Brooks v. Wend*, 26 N. Y. 367; *Stevens v. Robins*, 12 Mass. 182; *Wells on Agency*, § 34.

See AGENCY (APPOINTMENT OF), § 336; 1 Bell Comm. (4th Ed.) B. 1, ch. iv. § 4, art. 410; *Belew v. Jones*, 34 Ill. 342; *Deahler v. Beers*, 32 Ill. 342; 83 Am. Dec. 274.

2. *Johnson v. Osborne*, 11 Ad. & El. 549; *Masted v. Paine*, L. R. 4 Ex. 81, 403; *Coles v. Bristowe*, 17 W. R. 105; *Jackson Ins. Co. v. Partee*, 9 Helsk. (Tenn.) 296; *Cotton v. Miller*, 52 Miss. 7; *Randall v. Kehler*, 60 Me. 97; *Phillips v. Moir*, 69 Ill. 135; *Hatcher v. Comer*, 73 Ga. 418; *Kauffman v. Beasley*, 54 Tex. 563; *Goodenow v. Tyler*, 7 Mass. 96; s. c., 5 Am. Dec. 22; *Dwight v. Whitney*, 45 Pick. (Mass.) 179; *Roosevelt v. Doherty*, 129 Mass. 303; s. c., 37 Am. Rep. 356; *Frank v. Jenkins*, 22 Ohio St. 597.

He has an implied authority to do whatever is usual and necessary to effect the sale, and it is for the jury to decide what is usual. *Bayliffe v. Butterworth*, 1 Exch. 425; *Schuchardt v. Allens*, 1 Wall. (U. S.) 959; *Randall v. Kehler*, 60 Me. 97; *Upton v. Suffolk Co. Mills*, 11 Cush (Mass.) 586; *Smith v. Tracy*, 36 N. Y. 79; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Van Alen v. Vanderpool*, 6 Johns. N. Y. 70; *Palmer v. Hatch*, 46 Mo. 585.

Where goods are shipped to a consignee, and on account of an accident to the vessel carrying the goods it becomes necessary to execute a general average bond to the owners of the vessel, such consignee or factor has the right, and it is his duty to execute the bond, so as to carry out the instructions of his principal in regard to the shipment and sale of the goods. *Hardee v. Hall*, 12 Bush (Ky.), 327. But it is upon the factor to prove that his principal has knowledge of such usage, or that he assented to that method of doing his business. *Farmers', etc., Bank v. Sprague*, 52 N. Y. 605; *Bliss v. Arnold*, 8 Vt. 252; s. c., 30 Am. Dec. 467; *Duguid v. Edwards*, 50 Barb. (N. Y.) 288; *Banning v. Bleakley*, 27 La. Ann. 257.

A person, however, who deals in a particular market must be taken to deal according to the known general and uniform custom or usage of that market; he who employs another to act for him in that particular place or market must be taken as intending that the business to be done will be done according to the usage and custom of that place or market,

*May Sell in Their Own Name.*—Factors may sell in their own name the goods of their principals, and they may buy goods in like manner; and in each case the principal will be bound by their acts in the same way and to the same extent as if his own name were used.<sup>1</sup>

*May Sell on Credit.*—Where the usage of trade justifies it, a factor may sell either for cash or on credit; but where he sells on credit he is held to a very close examination of the credit of parties to whom he sells, and to the exercise of reasonable care as to the security when he takes negotiable paper in payment, and he will not be liable in case of loss where he has exercised such care.<sup>2</sup>

whether the principal in fact knew of the usage or custom or not. *Bailey v. Bensley* 87 Ill. 556; *Lyon v. Culbertson*, 83 Ill. 33; *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549.

Under the custom of trade in *Chicago*, a commission man to whom grain is consigned may dispose of the warehouse receipt given him for the same, although directed by the consignor not to sell, but to hold the grain for further orders, if he keeps on hand, ready for delivery when called on, other receipts for a like quantity and grade of grain. The receipts do not represent the consignor's property, but are merely evidences of debt to the consignee. If in such case the commission man, after losing the identity of the grain and disposing of the receipt, fails to keep warehouse receipts for the same amount and grade, it will not amount to a conversion of the grain. The only effect will be to bar his charges for storage and insurance. *Bailey v. Bensley*, 87 Ill. 556.

A factor, to whom wheat is consigned for storage in an elevator and for sale, may, in the absence of particular instructions, store it in a mass with other wheat of the same grade and quality. He is not responsible to his principal by reason of the established grades of grain being different in the market where he is to sell from the grades at other places. *Davis v. Kobe*, 30 N. Western Repr. (Minn.) 662.

1. Story on Ag. § 110; 3 Chitty Com. Law, 193; *Blood v. Palmer*, 11 Me. 414; s. c., 26 Am. Dec. 547; *Slack v. Tucker*, 23 Wall. (U. S.) 321; *Graham v. Duckwall*, 8 Bush (Ky.), 12.

2. *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69; s. c., 5 Am. Dec. 192; *Robertson v. Livingston*, 5 Cow. (N. Y.) 473; *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Rich v. Monroe*, 14 Barb. (N. Y.) 602; *Chandler v. Hogle*, 58 Ill. 46; *Foster v. Waller*, 75 Ill. 464; *Burton v. Goodspeed*, 69 Ill. 237; *Parker v. Fergus*, 43 Ill. 437; *Winne v. Hammond*, 37 Ill.

99; *McConnico v. Curzen*, 2 Call (Va.), 358; s. c., 1 Am. Dec. 540; *Daylight Burner v. Odlin*, 51 N. H. 56; s. c., 12 Am. Rep. 45; *James v. McCredie*, 1 Bay (S. Car.), 294; s. c., 1 Am. Dec. 617; *Greeley v. Bartlett*, 1 Greenl. (Me.) 172; s. c., 10 Am. Dec. 54; *Pinckham v. Crocker*, 77 Me. 563; *Goodenow v. Tyler*, 7 Mass. 36; s. c., 5 Am. Dec. 22; *Hapgood v. Batcheller*, 4 Metc. (Mass.) 576; *Roosevelt v. Doherty*, 129 Mass. 301; s. c., 37 Am. Rep. 356; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Laussatt v. Lippincott*, 6 S. & R. (Pa.) 386; *May v. Mitchell*, 5 Humph. (Tenn.) 365; *Ernest v. Stoller*, 5 Dill. (U. S.) 438; *Burrill v. Phillips*, 1 Gall. (U. S.) 360; *Forrestier v. Boardman*, 1 Story (U. S.) 43; *Marshall v. Williams*, 2 Biss. (U. S.) 255.

A factor may sell his principal's goods upon credit if there be no usage nor instructions to the contrary. But if a factor makes sales to irresponsible parties through want of care and diligence, or is not attentive to his principal's interests after the sale, he is liable to the principal for any loss sustained because of such neglect. *Pinkham v. Crocker*, 1 New Engl. Repr. 336.

Where he takes notes in payment payable to himself, exercising due care, and the purchaser becomes insolvent, the factor is not liable for the loss. *Greeley v. Bartlett*, 1 Greenl. (Me.) 172; s. c., 10 Am. Dec. 54; *Goodenow v. Tyler*, 7 Mass. 36; s. c., 5 Am. Dec. 22; *Gorman v. Wheeler*, 10 Gray (Mass.), 362; *Leach v. Beardslee*, 22 Conn. 404.

But he is bound to use due diligence in its collection, and if by a want of diligence on the part of the factor the note is lost, he will be personally liable for the amount. *Folsom v. Mussey*, 8 Greenl. (Me.) 400; s. c., 23 Am. Dec. 522; *Arrott v. Brown*, 6 Whart. (Pa.) 9.

Where a factor who has agreed not to sell on credit except to responsible par-

*Cannot Barter or Pledge.*—Factors have no incidental authority to barter the goods of their principals, or to pledge such goods for advances made to them on their own account or for debts due by themselves. The party receiving such pledge and advancing his money acquires no title as against the principal, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner.<sup>1</sup>

ties, and to take no paper except good, first-class collectable paper, and such as he is willing to guarantee, takes paper which he knows to be worthless, he makes himself a guarantor of the paper, and the principal need not return the paper to him as a condition precedent to judgment against him on such guaranty. *Clark v. Roberts*, 26 Mich. 506.

A factor or commission-merchant, while not a guarantor of the responsibility of the persons with whom he deals, is held to the same degree of care and diligence which a reasonably prudent man would exercise in the management of his own affairs. *Housel v. Thrall*, 25 N. Western Repr. (Neb.) 612.

A factor who takes notes in his own name for goods of his principal, and discounts them for his own accommodation, makes them his own, and will be liable to the principal for the amount of the sales in the event of the insolvency of the purchaser. *Myers v. Entriken*, 6 W. & S. (Pa.) 44; s. c., 40 Am. Dec. 538; *Morris v. Wallace*, 3 Pa. St. 319; *Goodenow v. Tyler*, 7 Mass. 36; s. c., 5 Am. Dec. 22; *Johnson v. O'Hara*, 5 Leigh (Va.) 456.

And where he takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same a debt due to himself, he makes himself responsible to his principal for the amount of the goods, as he has deprived him of the means of pursuing his claim against the debtor by extinguishing the debt due by simple contract. *Jackson v. Baker*, 1 Wash. (U.S.) 394.445.

All securities taken by the factor in payment for his principal's goods, even if taken in his own name, belong to the principal, and do not pass to the factor's assignees in case of his insolvency. *Thompson v. Perkins*, 3 Mason (U. S.), 232; *Kip v. Bank of N. Y.*, 10 Johns. (N. Y.) 63; *Messier v. Amery*, 1 Yeates (Pa.), 533; *Goodenow v. Tyler*, 7 Mass. 36; s. c., 5 Am. Dec. 22.

Where a factor has been induced by fraud to part with the goods of his principal to an insolvent purchaser, who before discovery of the fraud has placed them in such a condition that it is difficult, if not impossible, to follow them,

and where the factor, acting in good faith, takes security for the price, and thus affirms the sale, he is acting within the scope of his powers, and his principal is bound. *Joslin v. Cowee*, 52 N. Y. 90.

Where a factor who has sold on credit takes at the expiration of the credit a note in payment payable to himself, he becomes personally liable. *Hosmer v. Beebe*, 2 Mart. N. S. (La.) 368.

Where usage or instructions authorize only a sale for cash, a factor cannot sell on credit. *Harbert v. Neill*, 40 Tex. 143; *Kauffmann v. Beasley*, 54 Tex. 563; *Johnson v. Totten*, 3 Cal. 343; s. c., 58 Am. Dec. 412.

1. Story on Agency, § 113; Paley on Ag. (Dunlap's Ed.) 213; *Patterson v. Tash*, 2 Strange, 1178; *Gray v. Agnew*, 95 Ill. 315; *Wheeler, etc., Mfg. Co. v. Givan*, 65 Mo. 89; *Bowie v. Napier*, 1 McCord (S. Car.), 1; s. c., 10 Am. Dec. 641; *First Nat. Bank v. Nelson*, 38 Ga. 391; *Victor S. M. Co. v. Heller*, 44 Wis. 265; *McCreary v. Gaines*, 55 Tex. 485; *Kauffman v. Beasley*, 54 Tex. 563; s. c., 40 Am. Rep. 818; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Rodriguez v. Heffernan*, 5 Johns. Ch. (N. Y.) 417; *Walther v. Wetmore*, 1 E. D. Smith (N. Y.), 7; *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Odiorne v. Maxcy*, 13 Mass. 178; *Kinder v. Shaw*, 2 Mass. 398; *Nowell v. Pratt*, 5 Cush. (Mass.) 111; *Michigan State Bank v. Gardner*, 15 Gray (Mass.), 362; *Florence Sewing Machine Co. v. Warford*, 1 Sweeney (N. Y.), 433; *Macky v. Dillinger*, 73 Pa. St. 85; *Laus-sat v. Lippincott*, 6 S. & R. (Pa.) 391; *Newbold v. Wright*, 4 Rawle (Pa.), 195; *Hayes v. Campbell*, 55 Cal. 421; s. c., 36 Am. Rep. 43; *Wright v. Solomon*, 19 Cal. 64; s. c., 79 Am. Dec. 196; *Horr v. Barker*, 11 Cal. 393; s. c., 70 Am. Dec. 791; *Hutchinson v. Bours*, 6 Cal. 383; *Chicago Taylor Printing Press Co. v. Lowell*, 60 Cal. 454; *Bott v. McCoy*, 20 Ala. 578; s. c., 56 Am. Dec. 223; *Voss v. Robertson*, 46 Ala. 483; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Allen v. St. Louis Nat. Bank*, 7 Sup. Ct. Repr. 460; *Mechanics', etc., Ins. Co. v. Kiger*, 103 U. S. 352;



Van Amringe v. Peabody, 1 Mas. (U. S.) 440; Evans v. Potter, 2 Gall. (U. S.) 12; Warner v. Martin, 11 How. (U. S.) 209; Kelly v. Smith, 1 Blatchf. (U. S.) 290; Steiger v. Third Bank, 2 McCrary (U. S.), 494.

In Hutchinson v. Bours, 6 Cal. 385; Horr v. Barker, 11 Cal. 93; s. c., 70 Am. Dec. 791, and Glidden v. Lucas, 7 Cal. 26, the application of this rule was restricted to "technical" factors.

Local usage will be no defence against a pledge of goods by a factor. Newbold v. Wright, 4 Rawle (Pa.), 213.

As to Barter, see Guerreiro v. Peile, 3 B. & A. 646; Wing v. Neal, 2 Atl. Repr. (Me.) 881; Potter v. Dennison, 5 Gilm. (Ill.) 590.

Where notes are executed to a factor, and goods are shipped to him to be sold and the proceeds applied to the payment of the notes, a pledgee who takes the notes and the goods as collateral for advances, with notice that the pledgor is a factor, is bound to apply the proceeds of the goods to the payment of the notes; and these facts constitute a defence to an action on the notes by the pledgee against the maker. St. Louis Nat. Bank v. Ross, 9 Mo. App. 399.

The fact that the consignor invoiced the goods to the person so making the pledge, as purchaser, and not as factor, and that the consignor so directed for the purpose of concealing the fact that the goods were to be sold on commission from an association of which the consignor was a member, and which prohibited the sale of such goods on commission, would not operate to estop the owner from claiming the goods as against the pledgee, the latter having no knowledge of such facts at the time he received the pledge, and his action in respect thereto having in nowise been influenced by their existence. Gray v. Agnew, 95 Ill. 315.

A factor does not lose the power to sell by pledging the goods of his principal for his own debt; and if he afterwards sells and delivers the goods to a *bona fide* purchaser, and, the goods not being removed, the pledgee sells them and receives the proceeds, the latter is liable therefor on demand to the purchaser in an action of *assumpsit*. Nowell v. Pratt, 5 Cush. (Mass.) 111.

The purchase of property by a factor in his own name makes him to all the world the apparent owner, and as far as affects the rights of third persons, his power over the goods is unlimited, and he has the right to sell or pledge. Leet v. Wadsworth, 5 Cal. 404.

A factor cannot deliver the goods of his principal in payment of his own debts, or sell them in an irregular manner so as to pass title, and that not even where he has a lien on the goods to the full extent of their value. Benny v. Rhodes, 18 Mo. 147; s. c., 59 Am. Dec. 293; Benny v. Pegram, 18 Mo. 191; s. c., 59 Am. Dec., 298; Wheeler & Wilson Mfg. Co. v. Given, 65 Mo. 89; Warner v. Martin, 11 How. (U. S.) 209.

But he may pledge to the extent of a lien he has on the goods for expenses, advances, and commissions, the payment of duties or other charges justified by the usage of trade. Warner v. Martin, 11 How. (U. S.) 209; Evans v. Potter, 2 Gall. (U. S.) 12; Blair v. Childs, 10 Heisk. (Tenn.) 199; *Compare* Merchants' Nat. Bank v. Trenholm, 12 Heisk. (Tenn.) 520; Walther v. Wetmore, 1 E. D. Smith (N. Y.) 7.

Where a principal draws a sight draft upon his factor before the latter has sold the goods consigned, a pledge by the factor to secure a loan with which to meet the draft is valid. Boyce v. Bank of Commerce, 22 Fed. Repr. 53.

Although a factor has no right to pledge the goods of his principal, yet the amount sought to be recovered of an innocent pledgee of the factor by the consignor must be reduced by the sum due from him to the factor. If the pledgee has acted in good faith, the measure of damages is the actual loss sustained by the consignor, and therefore the amount due to the factor by the consignor must be deducted from his demand against the pledgee. First Nat. Bank of Louisville v. Boyce, 78 Ky. 42; s. c., 39 Am. Rep. 198.

Where goods were entrusted to a merchandise broker to sell not below a fixed price, and to deliver them and receive payment, and he deposited them in accordance with a usage with a commission merchant, connected with an auctioneer, taking his notes for them, and some of them were afterward sold below the price named, it was held that the deposit bound the principal, and that he could not bring trover for the goods. Laussatt v. Lippincott, 6 S. & R. (Pa.) 386.

A factor who has pledged his principal's goods cannot disaffirm his own tortious act. The violation of his authority is injurious to the principal alone, and he may ratify or confirm the act at his pleasure; but the factor is estopped by his act, and cannot be allowed to allege his own violation of authority to set aside the transfer or to recover the goods,

*Factors' Acts.*—In England and in most of the States, acts have been passed for the protection of third parties who in good faith, without any intention to defraud, advance money on the goods consigned to the factor. Some of those acts protect a third party only where he deals with the factor, not knowing that he is not the real owner of the property. Some protect him only for actual advances and not for antecedent debts, others protect him under all circumstances. These acts, however, do not affect the liability of the factor as to his principal, nor restrict the right of the principal to recover his goods upon payment of the advances.<sup>1</sup>

and he may not subsequently sell the goods and so enable the vendees to set aside the contract of pledge. *Bott v. McCoy*, 20 Ala. 578; s. c., 56 Am. Dec. 223.

Though a factor cannot pledge the goods of his principal as his own, yet he may deliver them to a third person as security, with notice of his lien, and as his agent to keep the possession for him in order to preserve that lien. Where A consigned a vessel and cargo to B at Liverpool, and advised him that he should make him secure for the acceptance of his bills, and sent him a power of attorney to sell the vessel, with directions to sell her in England, but if that could not be done, to procure a freight, or load her with as much salt as the funds of A were equal to, and send her to New York; and B loaded the vessel with coals, and having under the power from A executed a bill of sale of the vessel to C, of New York, and sent the vessel and cargo to C, with directions to reconvey and deliver them to A on his paying the balance due to B for advances; otherwise, to sell them and place the proceeds to the credit of B, paying over the balance that might remain to A, who was also informed by B of the transfer and consignment to C. A refused to accept the vessel and cargo from C, contending that B had made the vessel his own. It was held that B, not having followed the orders of A in relation to the cargo, it belonged to B, and that A was not bound to accept it, nor liable for any charges attending it; that the vessel being intended as security to B, he had a lien upon her for his advances; and that the assignment of C, being merely for the purpose of preserving that lien, and not an absolute sale, A was bound to accept the ship, and pay the premium for insurance and all the advances made by B for repairs, etc. *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103.

Where a principal receives money arising from sale of goods by his factor,

the factor having previously pledged the goods without authority to the plaintiff, this will not be regarded as a confirmation of the sale and as a disaffirmance of the pledge if the principal was ignorant of the source from which the money came at the time he received it. *Bott v. McCoy*, 20 Ala. 578; s. c., 56 Am. Dec. 223.

1. 5 & 6 Vict. c. 39, and the statutes of the various States. *Jennings v. Merrill*, 20 Wend. (N. Y.) 9; *Stevens v. Wilson*, 3 Denio (N. Y.) 472; *Cartwright v. Wilmerding*, 24 N. Y. 521; *First Nat. Bank v. Shaw*, 61 N. Y. 283; *Kinsey v. Leggett*, 71 N. Y. 387; *Covell v. Hill*, 6 N. Y. 374; *Wilson v. Nason*, 4 Bosw. (N. Y.) 155; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Howland v. Woodruff*, 60 N. Y. 73; *Walther v. Wetmore*, 1 E. D. Smith (N. Y.), 7; *Florence S. M. Co. v. Warford*, 1 *Sweeney* (N. Y.), 433; *Mechanics*, etc., *Bank v. F. & M. Bank*, 60 N. Y. 40; *Macky v. Dillinger*, 73 Pa. St. 85; *Steiger v. Third Nat. Bank*, 2 *McCrary* (U. S.), 494; *Mechanics*, etc., *Insurance Co. v. Kiger*, 103 U. S. 352; *Evans v. Potter*, 2 Gall. (U. S.) 13; *Van Amringe v. Peabody*, 1 *Mason* (U. S.), 440; *Kelly v. Smith*, 1 *Blatchf.* (U. S.) 290; *Brooks v. Hanover Nat. Bank*, 26 Fed. Repr. 301; *Allen v. St. Louis Nat. Bank*, 7 *Supr. Ct. Repr.* 460; *Price v. Wisconsin*, etc., *Ins. Co.*, 43 *Wis.* 267; *Victor*, etc., *Co. v. Heller*, 44 *Wis.* 265; *Davis v. Russell*, 52 *Cal.* 611; *Voss v. Robertson*, 46 *Ala.* 483; *Stollenwerck v. Thatcher*, 115 *Mass.* 224; *Michigan State Bank v. Gardner*, 15 *Gray* (Mass.), 362; *Nickerson v. Darrow*, 5 *Allen* (Mass.), 419; *Ullman v. Barnard*, 7 *Gray* (Mass.), 554.

The factors' acts protect only factors. Factors' clerks, warehousemen, bailees, are not factors within the meaning of the acts, and are not protected by them. *Zachrisson v. Ahman*, 2 *Sandf.* (N. Y.) 68; *Covill v. Hill*, 4 *Denio* (N. Y.), 323; *Manufacturers*, etc., *Bank v. Farmers*, etc., *Bank*, 2 *Th. & C.* (N. Y.) 395.

**Power to Insure.**—Although factors are under no obligation to insure the property of their principals, unless compelled by direct orders or the usage of trade, they are at liberty to do so, and to charge the latter with the premiums.<sup>1</sup>

**Power to Warrant.**—A factor has implied power to warrant, where the goods he sells are usually warranted as to quality and quantity.<sup>2</sup>

**Revocation of Authority.**—The authority of a factor, like that of any other agent, is revocable at any time except when coupled with an interest. Where the factor has made advances or incurred expenses, his power is irrevocable to the extent of his lien for such expenses or advances.<sup>3</sup>

1. *Shoenfeld v. Fleisher*, 73 Ill. 404; *Schaeffer v. Kirk*, 49 Ill. 251; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y.) 84; *Lee v. Adsit*, 37 N. Y. 78; *Etna Ins. Co. v. Jackson*, 16 B. Monr. (Ky.) 242; *Duncan v. Boye*, 17 La. Ann. 273; *Randolph v. Ware*, 3 Cranch (U. S.) 503.

Where he is bound to insure and neglects it, he becomes the insurer himself, and may charge the premiums. *De Tastett v. Croustillat*, 2 Wash. (U. S.) 132; *Gordon v. Wright*, 29 La. Ann. 812; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Waters v. Monarch, F. & L. Ins. Co.*, 5 El. & Bl. 870.

Where he has insured, but fails to collect the insurance money after loss, he becomes liable himself as insurer. *Gordon v. Wright*, 29 La. Ann. 812.

If a factor, without instructions to that effect, is in the habit of insuring goods consigned to him, and without the knowledge of the consignor he deviates from his custom, he will be held liable for consequent loss. Where such custom is known to the consignor by uniform charges for insurance in his accounts rendered, the factor will be deemed to have continued the practice until he gives notice of the change. *Area v. Milliken*, 35 La. Ann. 1150.

A contract by agents with their principal, respecting property delivered to the agents for sale, required the latter to "take out a policy or policies of insurance for the benefit" of the principal, and to pay the expense of the same. It further provided that any property unsold eight months after its consignment to the agents should be subject to the order of the principal. The contract was construed as not requiring the agents to keep the property insured, but only to insure it for a reasonable time, not exceeding eight months. Hence the agents were not liable for the value of such

property destroyed by fire, without their fault, three years after its consignment to them under such contract. *Milburn Wagon Co. v. Evans*, 30 Minn. 89.

Where a factor solicits consignments and states that the goods will be insured as soon as received, this will not him an insurer. It will be sufficient if he insures in good and reliable companies, and if they afterward fail not be liable in case of loss. *Johnson v. Campbell*, 120 Mass. 449.

The factor may insure in his own name, and where he has done so he may in case of loss recover the insurance for his principal. *Sargent B. & Ald.* 277; *Upsaricha East*, 332; *Shack v. Anthon* 573; *Johnson v. Campbell* 449.

2. *Schuchardt v. Allen*, 1 359; *Skinner v. Gunn*, 9 Po. 359; *Bradford v. Bush*, 10 Ala. 359; *Jameson*, 6 Fred. L. (1) 359; *Palmer v. Hatch*, 46 Mo. 51; *McClenahan*, 9 Ill. 85; *Kehlor*, 60 Me. 37; *Upton v. Mills*, 11 Cush (Mass.) 5; *Tracy*, 36 N. Y. 79; *Nelson v. Hill* (N. Y.) 336.

But a factor cannot bind himself by submitting to arbitration damages arising out of an implied warranty of the thing sold. *Carnochan v. Bailey L.* (9. Car.) 179; 1 Dec. 668.

3. *Bell v. Hannah*, 3 Bax. 359; *Mooney v. Musser*, 45 Ind. 359; *Smith*, 56 Mo. 314; *Nelson v. R. Co.*, 2 Ill. App. 11; *McGraw*, 14 Pet. (U. S.) 48.

Express or tacit revocation by principal, or by death, bankruptcy, will have no effect to deprive the factor of the benefit of his authority in extricating himself

**Duties of Factors.—Must Obey Instructions.**—Commercial agents, other agents, must obey the instructions of their principals. If they do not, they will be liable in damages for loss which may be caused by such disobedience.<sup>1</sup>

already begun, or from consequence of his having acted; or to dealers who have relied on his authority for the benefit of the transactions they have previously entered into, or even to disturb transactions into, while he still appeared to have authority undiminished. 1 Bell (Ed.) p. 489.

The authority of a factor is retained if he makes a sale before notice of revocation reaches him, and delivers the goods, the purchaser acquires the goods in preference to one to whom the principal has sold without notice. Jones v. Hodgkins, 61 Me. 389; Torre v. Thiele, 25 La.

v. Arnold, 8 Vt. 252; s. c., 30 Vt. 467; Bigelow v. Walker, 24 Vt. 58 Am. Dec. 156; Howatt v. Munf. (Va.) 34; s. c., 7 Am. 1; Pulsifer v. Shepard, 36 Ill. 51; Field v. Goodhue, 3 N. Y. 62; v. Littlefield, 12 Wend. (N. Y.) 15; v. Root, 7 N. Y. 186; Scott v. 31 N. Y. 676; Marfield v. 1 Sandf. (N. Y.) 360; Milbank v. 21 N. Y. 386; Day v. 13 Ga. 508; Gray v. Bass, 42 Heinkin v. Barbrey, 40 Ga. 249; v. Comer, 73 Ga. 418; Cotton v. 52 Miss. 7; Capes v. Phelps, 55 Ann. 562; Maggoffin v. Cowan, 55 N. 554; Poindexter v. King, 21 697; Weed v. Adams, 37 Conn. 55; v. Pease, 99 Mass. 555; v. Wade, 2 Baxt. (Tenn.) 480; Stewart, 9 Heisk. (Tenn.) 137; Gibney, 59 Md. 131; Field v. 10, 10 Wall. (U. S.) 141; Mar-Williams, 2 Biss. (U. S.) 255; Brook, 20 Fed. Repr. 611; McGraw, 14 Pet. (U. S.) 479; v. Pomeroy, 13 Mo. 620; Connett, 11 Mo. 88; Barks-rown, 1 Nott & M. (S. Car.) v. Campbell, 1 Bay (S. Car.), ine, etc., Co. v. Heintzman, 17 S. 56.

Instructions must be positive. Mann v. Laws, 117 Mass.

If a factor has received cotton to which a bill is drawn against it, and he receives order to sell before or after maturity of the bill, he must obey, and if he does so he will be held liable

for any loss accruing thereby. Johnson v. Wade, 2 Baxt. (Tenn.) 480.

Even where they disobey through mistake they are liable if loss occurs. Rundle v. Moore, 3 Johns. Cas. 37.

Or where the factor's motive is to promote the interests of his principal. Guy v. Oakley, 13 Johns. (N. Y.) 333; Hatcher v. Comer, 73 Ga. 418.

Usage or custom will be no defence where the factor disobeys his instructions. Hall v. Storrs, 7 Wis. 253; Barksdale v. Brown, 1 Nott & M. (S. Car.) 517; Hatcher v. Comer, 73 Ga. 418.

A commission-merchant, in giving terms on which sales would be made by him, wrote: "Will charge you 5 per cent, and send you the proceeds in cash." He sold the goods on a sixty-days' note. The maker failed, and it was held that the commission-merchant was liable, he having violated the terms of sale. Sheffield v. Linn, 28 N. Western Repr. (Mich.) 761.

When he is instructed to insure he must do so. De Tastett v. Crousillatt, 2 Wash. (U. S.) 132; Shoenfeld v. Fleisher, 73 Ill. 404; Thorne v. Deas, 4 Johns. (N. Y.) 84.

If a firm indebted to factors shipped to them cotton, with instructions to sell the same and apply the proceeds to the debt, and the factors failed to do so, and their debtors were thereby injured, the latter could recoup the amount of such damage against a suit on the debt. Hatcher v. Comer, 73 Ga. 418.

Where a commission-merchant in Omaha, doing business in San Francisco, caused commission goods to be consigned to another person in San Francisco, that person being one whom the consignor had stated to him he (the consignor) would have no dealings with, such commission-merchant could not release himself from liability resulting from the loss of the consigned property on the ground that the person to whom the goods were shipped was a sub-agent, for whose acts he could not be held responsible. And the fact that the goods were consigned to the objectionable person by the consignor would not change the application of this rule; it being shown that the commission-merchant was purchasing other goods of the consignor at the same time, and causing them to be shipped to such person in the same way. Housel v. Thrall, 25 N. Western Repr. (Neb.) 612.

*Place of Sale.*—Goods consigned to a factor are supposed to be sold at the place of residence of the factor, unless special instructions or the usage of trade direct differently.<sup>1</sup>

A consigned several lots of goods to B at different times, to be sold by B for A's account, at prices fixed in the invoices. On two certain days, B reported to A that he had sold the goods then on hand at prices below those limited in the invoices, both of which sales were promptly repudiated by A, by telegram and letter, and the reported sales were thereupon cancelled by B. Subsequently, B wrote to A, asking him to allow sales on the present market. A refused to give permission for such sales, and offered to pay back advances made on the goods by B and withdraw the consignment, if B was not willing to wait. Afterwards B, without further correspondence with A, sold the goods at prices less than he was authorized to do. A refused to approve the sale; and upon B declining to cancel the same, brought an action against him for breach of the contract. At the trial, B offered evidence to show that, in previous transactions between the parties, A had ratified sales by B at lower prices than those limited in the invoices. *Held*, that this evidence was properly excluded. *Loehnerberg v. Atherton*, 141 Mass. 578.

Factors at Kansas City were instructed by their principal to place the proceeds of a sale of cattle to his credit in the E. bank in Denver. The factors deposited the money in the M. Bank in Kansas City to the credit of the E. Bank. The M. Bank failed before the money was transmitted to the E. Bank. *Held*, that the factors were liable for the loss, in the absence of a usage between the banks in the two cities of transmitting money in this way. *Ernest v. Stoller*, 5 Dillon (U. S.) 438.

Where a factor is directed to sell for a fixed price at a certain day, and if not sold to ship, the factors have no right to take an order on the day named, to be accepted the next day. *Scott v. Rogers*, 4 Abb. Dec. (N. Y.) 157.

The owner of a horse placed him in the hands of a commission-merchant for sale. The commission-merchant exchanged him for another horse and \$25 in money. *Held*, that his authority as commission-merchant ceased and his liability to account to the owner accrued when that exchange was made; that the owner was not liable for losses arising from subsequent exchanges, nor for the board of horses after the first exchange. *Wing v. Neal*, 1 New Eng. Repr. 665.

Where a purchasing factor buys for his principal at a price exceeding the limit prescribed, and the principal upon learning the fact repudiate the purchase, the title to the goods becomes absolute in the factor, and none passes to the principal for whom the purchase was made. The *Sally Magee*, 3 Wall. (U. S.) 451.

Where a factor agreed with his principal to purchase for him 50,000 bushels of wheat, in consideration that the latter would immediately forward to him by express \$10,000, and the residue to pay for such purchase in four or five days, and where the principal wholly failed to forward the money though the factor had immediately purchased 20,000 bushels of the wheat, *held*, that the factor was under no obligation to purchase the residue of the 50,000 bushels. *Rice v. Montgomery*, 4 Biss. (U. S.) 75.

A factor purchased wheat for his principal, the latter agreeing to put up ten cents per bushel as a margin, and to put up more margin in case of a decline in price, the factor in the mean time to store the wheat and to hold it to secure his advances, until ordered to sell. The price did decline, and the factor asked for more margin or for instructions in regard to a sale, which the principal did not give, whereupon the factor sold the wheat at a loss. *Held*, that the factor had a right to sell, no margin being put up after demand. *Moeller v. McLagan*, 60 Ill. 317; *Hornsby v. Fielding*, 10 Heisk. (Tenn.) 367; *Kraft v. Fancher*, 44 Md. 204.

But such a factor cannot sell to protect himself from loss until reasonable notice given to his principal, or such notice as is required by the usages of trade; and where he sells against orders while there are sufficient margins in his hands and loss results, he will be liable to make good the loss and to return the full amount deposited as margins. *Denton v. Jackson*, 106 Ill. 433; *Larminie v. Carley*, 114 Ill. 196.

1. *Phillips v. Scott*, 43 Mo. 86; *Kauffman v. Beasley*, 54 Tex. 563; *Wallace v. Bradshaw*, 6 Dana (Ky.), 382; *Phy v. Clark*, 35 Ill. 377.

Where a factor reship goods consigned to him by his principal without the latter's advice, and the goods are sold at a loss, the factor will be liable for the difference in the price for which they were sold and the market value of the goods in the first port. *Grieff v. Cowguill*, 2 Disn. (Ohio) 58.

*Time of Sale.*—In the absence of special instructions, a factor is required to sell goods consigned to him within a reasonable time after he has received them; and if he fails to do so, and the goods depreciate on his hands, he will be liable for the value.<sup>1</sup>

*Price.*—A factor is not justified in selling at a price below that fixed by his principal from the single fact that he has made advances on the property.<sup>2</sup>

*May Protect his Own Interests After Demand.*—But if it becomes necessary for him to disobey his instructions and sell for a lower price in order to protect his interests and prevent the loss of his advances and other expenses, he may make a demand upon his principal for reimbursement; and in case such reimbursement is not made, he may sell at any time for the best price he can get, unless he is restrained by a special agreement.<sup>3</sup>

1. *Atkinson v. Burton*, 4 Bush (Ky.), 299.

Where, not being limited to a certain price, he sells them when in the exercise of a sound discretion, and the price they bring does not equal the amount of his advances, the principal will be liable for the difference. *Given v. Lemoine*, 35 Mo. 110.

2. *George v. McNeill*, 7 La. 124; s. c., 26 Am. Dec. 498; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Marfield v. Goodhue*, 3 N. Y. 62; *Gray v. Bass*, 42 Ga. 270.

And where he has made advances on the goods consigned to him, even to an amount beyond their value, he is yet bound to obey the instructions of his principal as to the time of sale; and if, being instructed to sell immediately, he refuse the first offer in expectation of a more favorable market, and afterward sell at less than the offer, he is liable, though he acted in perfect good faith. *Bell v. Palmer*, 6 Cow. (N. Y.) 128; *Howland v. Davis*, 40 Mich. 545.

3. *Blot v. Boicean*, 3 N. Y. 78; s. c., 51 Am. Dec. 345; *Milliken v. Dehon*, 27 N. Y. 364; *Blackmar v. Thomas*, 28 N. Y. 67; *Marfield v. Goodhue*, 3 Comst. (N. Y.) 62; *Frothingham v. Everton*, 12 N. H. 239; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Davis v. Kobe*, 30 N. Western Rep'r. (Minn.) 662; *Porter v. Patterson*, 15 Pa. St. 229; *Howland v. Davis*, 40 Mich. 545; *Butterfield v. Stephens*, 59 Iowa, 596; *Hallowell v. Fawcett*, 30 Iowa, 491; *Howard v. Smith*, 56 Mo. 314; *Mooney v. Musser*, 45 Ind. 115; *Brown v. McGraw*, 14 Pet. (U. S.) 479; *Feild v. Farrington*, 10 Wall. (U. S.) 141; *Bell v. Hannah*, 3 Baxt. (Tenn.) 47; *Hornsby v. Fielding*, 10 Heisk. (Tenn.) 367; *Beadles v. Hartmus*, 7 Baxt. (Tenn.) 476; *Whitney v. Wyman*, 24 Md. 131; *Ward v. Bledsoe*, 32 Tex. 251; *Cotton v. Hiller*, 52 Miss.

7; *Weed v. Adams*, 37 Conn. 378. *Compare Smart v. Sanders*, 5 M. G. & S. 895.

Where goods were consigned to a factor for sale, without instructions as to the price for which they were to be sold, and the factor advanced money to the consignor to an amount greater than the value of the goods, and, after such advances, the consignor instructed the factor not to sell for less than a certain price, as he could do better by having the goods returned, and the factor thereupon informed the consignor that the goods had not been sold, and that it was doubtful whether they could be sold at the price fixed, and that he would await further instructions, stating that, if the consignor wished to remove the goods, an account of the advances would be rendered, and the amount could be remitted at the time the goods were ordered to be removed, to which the consignor made no response; *held*, that after the lapse of a reasonable time the factor might sell the goods for the best price he could get in the market. *Mooney v. Musser*, 45 Ind. 115.

And even a previous demand may not be necessary where it would be impracticable or useless, as where the principal lives in another country or is insolvent. *Brown v. McGraw*, 14 Pet. (U. S.) 479.

He may in such a case, however, sell only as much of the goods as is necessary to cover the advances and expenses. *Butterfield v. Stephens*, 59 Iowa, 596; *Weed v. Adams*, 37 Conn. 378; *Fordyce v. Peper*, 16 Fed. Repr. 516.

Where a factor has made large advances to his principal upon the property consigned for sale, and the property becomes doubtful security for his reimbursement, and the principal refuses or neglects to comply with his reasonable demands to repay or secure him for such advances, the factor may, after reason.

able notice to his principal, in good faith, and with reasonable discretion, sell the property, although directed by the principal to hold it longer. *Davis v. Kobe*, 30 N. Western Repr. (Minn.) 662.

A factor who has made advances on the credit of the goods consigned to him for sale has a right to sell enough to reimburse his advances, unless restrained by some agreement with his consignor. If a cotton factor for a sufficient consideration agrees to hold the cotton of a consignor until the opening of the market the next year, he is bound to do so; and if he sells the cotton before that time without the consent of the consignor, he is liable for the difference between the price at the time he sold and the price at the time he was authorized to sell. *For-dyce v. Peper*, 16 Fed. Repr. 516. *Compare Smart v. Sanders*, 5 Man. G. & S. 895; *De Comas v. Prost*, 3 Moore P. C. N. S. 158.

Where a factor advanced money on a consignment of goods under an agreement that if the consignor should fail, in case of a decline in the price, to pay him a stipulated sum, the factor should be at liberty to sell at private or public sale or otherwise, such agreement may be enforced. *Milliken v. Dehon*, 27 N. Y. 364.

Where a factor who has made advances on a consignment of goods in his hands receives order from his principal to sell at once, he may disregard the order if the state of the market is such that the goods would not bring sufficient to cover his advances. *Blair v. Childs*, 10 Heisk. (Tenn.) 199; *Weed v. Adams*, 37 Conn. 378; *Howland v. Davis*, 40 Mich. 545.

Where factors have made large advances on account of a consignment, the principal cannot by any subsequent orders control their right to sell at such time as in the exercise of a sound discretion and in accordance with the usages of trade they may deem best to secure indemnity to themselves and to promote the interests of the consignor. *Feild v. Farrington*, 10 Wall. (U. S.) 141; *Rice v. Brook*, 20 Fed. Repr. 611; *Brown v. McGrau*, 14 Pet. (U. S.) 479; *Talcott v. Chew*, 27 Fed. Repr. 273; *Butterfield v. Stephens*, 59 Iowa, 596; *Cotton v. Hiller*, 52 Miss. 7; *Gihon v. Stanton*, 5 Seld. (N. Y.) 476; *Blackman v. Thomas*, 28 N. Y. 67; *Howard v. Smith*, 56 Mo. 314; *Denny v. Rhodes*, 18 Mo. 147; *Phillips v. Scott*, 43 Mo. 92. *Compare Ward v. Bledsoe*, 32 Tex. 251.

Except as to such surplus as is not necessary for the reimbursements of the advances. *Nelson v. Chicago, etc., R.*

*Co.*, 2 Ill. App. 180; *Bell v. Hannah*, 59 Tenn. 47; *Howard v. Smith*, 56 Mo. 314.

Under extraordinary circumstances a factor may disobey his principal's orders where the interests of the latter are protected by such disobedience. So where an order to a commission-merchant was given to sell at once, accepting a certain offer, he will be justified in refusing an offer to sell upon credit to a party whom he knows to be irresponsible, and he will not be liable in damages if the goods depreciate upon his hands before he can make a sale. *Durant v. Fish*, 40 Iowa, 559. And see *Joslin v. Cowee*, 52 N. Y. 90; *Drummond v. Wood*, 2 Cai. (N. Y.) 310; *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174; *Judson v. Sturgis*, 5 Day (Conn.) 556.

Or where the goods were of a perishable nature he may sell them at the best price he can get at once, even if he had instructions to sell only at a stipulated price, where a postponement of the sale would cause total or greater loss. *Story on Ag. § 141*.

A owned several lots of grain, which he had pledged as security for various loans, and which he consigned to his factor B to sell, with instructions to sell for a sum greater than the amount of the loans. One of the lots consisted of three boat-loads of corn which was pledged for a loan of \$23,000. One of the boat-loads became heated, and to save it B took it out of pledge, assuming the payment of the whole \$23,000. At the time the price of the corn was rising. *Held*, that this was within the authority of B; and even if he had not the authority, the emergency was such as to justify him in the act, and he was not liable to A for a loss resulting from the sale of the damaged corn. *Jervis v. Hoyt*, 5 Th. & C. (N. Y.) 199.

An agent to buy and ship wheat to Nashville shipped a quantity to Sander's Ferry, on the Cumberland River. The boat containing it sank when near its destination, and the agent sold the wheat to the carrier. *Held*, that the emergency did not authorize the sale. *Foster v. Smith*, 2 Cold. (Tenn.) 474.

A factor with orders not to sell below a certain price is not liable for a sale at a lower price, where a higher price than that at which the sale was made could not have been obtained at any time between the time of sale and inception of the suit, and if in addition the sale made was rather to the advantage than to the detriment of the principal. But the principal may show that he was actually injured. *George v. McNeill*, 7 La. 124;

**Measure of Damages.**—Where a factor sells in disregard of his instructions, as where he sells while ordered to hold on to the goods or where he sells for a lower price than the one set on the instructions by the principal, the measure of damages will be the actual loss sustained by the principal, which is the difference between the price for which the goods are actually sold and the price which they would have been obtained between the time of sale and the inception of the suit, perhaps down to the time of the trial,—not the difference in the price set by the principal and the one obtained. Where no loss has been sustained the principal will be entitled to nominal damages only.<sup>1</sup>

**Ratification.**—An unauthorized sale by a factor may be ratified by the principal either expressly or impliedly, as by receiving without objection the proceeds of the sale.<sup>2</sup>

16 Am. Dec. 498; *Blot v. Boiceau*, 1 N. Y. 78; s. c., 51 Am. Dec. 345. Where the principal's orders are not explicit, the factor is allowed to sell at his best discretion according to the current of trade. *Geyer v. Decker*, 1 Pa. 487; *Mann v. Laws*, 117 Pa. 293; *Bessent v. Harris*, 63 N. Y. 442; *Jervis v. Hoyt*, 5 Th. & C. 199; *Brown v. McGraw*, 14 Pet. 480.

In the absence of special instructions to sell for fair value or market price, if he sells or falsely accounts at a lower price, he is liable to make adequate compensation for the property. *W v. Walker*, 24 Vt. 149; s. c., 58 Am. Dec. 156. See *Adams v. Capron*, 186; s. c., 83 Am. Dec. 566.

Where one sends corn to a factor whose sole business it is to sell corn, the presumption is that the corn is sent to be sold, no instructions having been given; and if sold at a lower price than the true market value, and the proceeds remitted to the sender and apparent owner, the factor has performed his duty in the transaction. *Dows v. McCleary*, 14 Ill. 37.

A factor received cotton from his principal with order to sell immediately. He did not sell, but wrote to his principal, advising him to wait for a better market, and asking for immediate instructions. The principal did take no notice of the letter, sent no instructions, but repeated his order for an immediate sale. *Held*, that the factor was liable only for delay after the principal's last letter. *McLendon v. Wilson*, 41.

*Blot v. Boiceau*, 3 N. Y. 78; s. c., 51 Am. Dec. 345; *Hinde v. Smith*, 6 N. Y. 466; *Mills v. Gould*, 10 J. N. Y. 123; *Romaine v. Van Allen*, 1 N. Y. 315; *Davendorf v. Wert*, 42

Barb. (N. Y.) 229; *Frothingham v. Everton*, 12 N. H. 239; *Gray v. Bass*, 42 Ga. 270; *Dalby v. Stearns*, 132 Mass. 230; *Maynard v. Pease*, 99 Mass. 555; *For- dyce v. Peper*, 16 Fed. Repr. 516; *Anstill v. Crawford*, 7 Ala. 335; *Ainsworth v. Partillo*, 13 Ala. 460. And see *Whelan v. Lynch*, 60 N. Y. 469.

Where the consignment is of articles which have no market value, as antique paintings, statues, vases, etc., it seems that the principal may insist upon the prices named in the instructions without regard to the market. *Blot v. Boiceau*, 3 N. Y. 78; s. c., 51 Am. Dec. 345.

Where a factor to buy makes a purchase against his principal's orders and a loss occurs, he will be held only for actual, not for speculative damages. So where the owners of a brig sent her to Leghorn with orders to his factors to load her with tiles and wrapping-paper and send her to Havana, and the factors loaded her only with wrapping paper, which was sold at Havana at a loss, the factors were held liable in damages, the amount of damages being estimated by the difference in the price of the tiles at Leghorn and at Havana at the time of the transaction. *Bell v. Cunningham*, 3 Pet. (U. S.) 69.

2 *Meyer v. Morgan*, 51 Miss. 21; s. c., 24 Am. Rep. 617; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Woodward v. Suydam*, 11 Ohio, 363; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 304; *Bredin v. Dubarry*, 14 S. & R. (Pa.) 30; *Marshall v. Williams*, 2 Biss. (U. S.) 255; *Richmond Mfg. Co. v. Starks*, 4 Mas. (U. S.) 296; *Bray v. Gunn*, 53 Ga. 144; *Curtis v. Gibney*, 59 Md. 131.

After a long delay in the sale of wool consigned to a factor, if the consignor, with full knowledge of the facts, and uninfluenced by concealment or fraud on



**Must Act in Good Faith.**—A factor is required to act with the utmost good faith toward his principal in the discharge of his duties.<sup>1</sup>

**Must Use Reasonable Skill and Diligence.**—Factors are required to act with reasonable skill and diligence in the business entrusted to them. They must bestow such care upon it as prudent and careful business people are in the habit of bestowing upon their own affairs.<sup>2</sup>

his factor's part, authorizes the latter to sell at his discretion, he thereby ratifies the action of the factor in not having sold before. *Rice v. Brook*, 20 Fed. Repr. 611.

Where a party directed a commission-merchant to sell a lot of wheat for him at not less than \$1.05 per bushel, with the privilege to the seller to deliver the same at his option at any time during the current year, and the merchant sold the same at \$1.02½ per bushel, and immediately notified the principal, who made no reply, and expressed no intention to disaffirm the sale until about a month afterward, when wheat was considerably advanced, *held*, that a ratification of the sale was properly inferred from the circumstances. *Searing v. Butler*, 69 Ill. 575; *Hurd v. Marple*, 2 Bradw. (Ill.) 402.

See AGENCY (RATIFICATION), vol. i. p. 429 *et seq.*

1. *Babcock v. Orbison*, 25 Ind. 75; *Shaw v. Stone*, 1 Cush. (Mass.) 228, 248.

A stipulation in a mortgage given to secure a pre-existing debt drawing the highest conventional rate of interest and containing no covenant for advances, that the mortgagor would ship the mortgagee, who was a cotton factor, 700 bales of cotton for sale on commission, and that the mortgagor would pay the mortgagee commissions at the rate of \$1.25 per bale on the 700 bales whether shipped or not, is without consideration and void; and if the cotton is not shipped the factor cannot charge commissions for selling it. *Norman v. Peper*, 24 Fed. Repr. 403.

A factor who advances money on a consignment is still the agent of the consignor, and must act in good faith, so as to promote the latter's interest as well as to indemnify himself. *Rice v. Brook*, 20 Fed. Repr. 611.

He may not himself become the purchaser of his principal's goods unless the principal consents or afterward ratifies the sale. *Wadsworth v. Gay*, 118 Mass. 44; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; s. c., 71 Am. Dec. 600.

Neither can a factor to purchase buy

his own goods for his principal. *Tewksbury v. Spruance*, 75 Ill. 187.

Where goods consigned to a factor for sale are purchased by himself, the consignor may at his election either ratify or repudiate the sale, and may sue the factor as purchaser for goods sold and delivered. *Wadsworth v. Gay*, 118 Mass. 44.

He cannot act for both his principal and the buyer in the same transaction. *Bensley v. Moon*, 7 Ill. App. 415; *Talcott v. Chew*, 27 Fed. Repr. 273.

A factor cannot dispute his principal's title. *Marvin v. Ellwood*, 11 Paige (N. Y.), 365; *Barnard v. Kobbe*, 54 N. Y. 516; *Bain v. Clark*, 39 Mo. 352.

He cannot detain proceeds of a sale from his principal on account of claims of a third party against the principal in which he has no interest. *Aubery v. Fiske*, 36 N. Y. 47.

He may make no secret profit out of the transactions. So where he accepts bills drawn upon him by his principal, and settles with the holder of the bills in full payment thereof by giving him goods belonging to the consignment of less value than the amount of the bills, the profit arising from the transaction belongs to the principal. *Hidden v. Waldo*, 55 N. Y. 294; *Payne v. Waterston*, 16 La. Ann. 239.

2. *Gorman v. Wheeler*, 10 Gray (Mass.), 362; *Parkhill v. Imlay*, 15 Wend. (N. Y.) 431; *Van Alen v. Vanderpool*, 6 Johns (N. Y.) 69; s. c., 5 Am. Dec. 192; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Millbank v. Dennistoun*, 10 Bosw. (N. Y.) 382; *Grieff v. Cowguill*, 2 Disn (Ohio) 58; *Leach v. Bush*, 57 Ala. 145; *Howatt v. Davis*, 5 Munf. (Va.) 34; s. c., 7 Am. Dec. 681; *Mummy v. Haggerty*, 15 La. Ann. 268; *Phillips v. Moir*, 69 Ill. 155; *Deshler v. Beers*, 32 Ill. 368; *Chandler v. Hogle*, 58 Ill. 46; *Folsom v. Mussey*, 8 Greenl. (Me.) 400; s. c., 23 Am. Dec. 522; *Greeley v. Bartlett*, 1 Greenl. (Me.) 172; s. c., 10 Am. Dec. 54; *McCants v. Wells*, 3 S. Car. 569; *Dickson v. Screven*, 23 S. Car. 212; *Babcock v. Orbison*, 25 Ind. 75; *Housell v. Thrall*, 18 Neb. 484;

**Cannot Delegate His Authority.**—As a factor is employed for his superior skill and knowledge in the special branch of business in which he is engaged, he may not delegate his authority to others who are expressly or impliedly authorized to employ sub-agents.<sup>1</sup>

*See* *W. Burton*, 4 Bush (Ky.), 299; *W. Castleman*, 4 Bibb (Ky.), 282; *W. Phillips*, 1 Gall. (U. S.) 360; *W. Farrington*, 10 Wall. (U. S.) 141; *W. Stoller*, 5 Dill. (U. S.) 438; *W. Walker*, 24 Vt. 149; s. c., 38 Me. 156. *Compare* *Foster v. Walter*, 164.

Where an American merchant consigns goods to a London commission merchant which had a correspondent in London who was authorized to make advances upon such consignments, by drafts upon the London firm, if he would be responsible for all overdrafts, and where the correspondent made advances by drafts upon this London firm to the merchant upon the latter's agreeing to refund advances in excess of the net proceeds of the sale of goods, and where the advances were so largely in excess, that the merchant was liable by the correspondent against the merchant to recover this excess, it is held that if the London firm performed their duties as factors with due skill they have the right to be repaid to the full amount of their advances, and they may assert that right against their consignor, giving him credit for the proceeds of his consignment, or against their correspondent upon his assumption of that liability; and the merchant may be compelled to refund to either of the two other parties, but he can be held to make but one satisfaction. If the London firm were guilty of negligence or misconduct by which their consignment was lost, their right as well as the right of their correspondent to recover the excess of advances is only a single one, for the consignor may rely upon such negligence as a defence to any claim that either of them could make on the ground. The liability of the correspondent to the London firm is the true measure of his rights against the consignor, and his cause of action accrued against such consignor at the same time that he became liable to the London firm, and to such defences as the consignor may make on the ground of the correspondent's negligence or misconduct. *See* *W. Capron*, 21 Md. 186; s. c., 83 Me. 566.

Where a commission-merchant under the authority of his principal sold 5000 bushels of oats on time, and negligently failed to require a margin which in accord-

ance with the rules of the board of trade he had the right to require, or to give his principal notice of such right; and where he also failed to advise his principal of the fact that he sold the oats to parties who were operating a corner, which to be successful required to be maintained for 32 days longer, *held*, that upon the failure of the buyers, whereby his principal lost the benefit of the contract, the latter was entitled to recover from the commission-merchant the amount of such loss. *Howe v. Sutherland*, 39 Iowa, 484.

The skill required of factors is limited to the special branch of business in which they are engaged. *Thompson v. Woodruff*, 7 Coldw. (Tenn.) 401.

Where advances are made by the consignee or commission-merchant on goods consigned, the consignor cannot direct a sale at his pleasure, but the consignee has the right to sell at such time as he sees proper, to the extent and in payment of his advances. If, however, the consignor orders a sale, and the consignee neglects to sell, not because he has made advances, but because he is negligent, then he cannot protect himself on the ground that he has made advances; but this is a question of fact for the jury. *Butterfield v. Stephens*, 59 Iowa, 596.

The factor will not be liable for losses through circumstances not under his control, as long as he uses the care and diligence which good business men of their order and place would bestow upon their own affairs. *Parkhill v. Imlay*, 15 Wend. (N. Y.) 431.

Where the factor acts according to the known usages of trade and business he will not be held liable. *Phillips v. Moir*, 69 Ill. 155; *Randall v. Kehler*, 60 Me. 37.

A factor is not liable for an error in judgment if he acts in good faith and with reasonable prudence. *Millbank v. Denistown*, 21 N. Y. 386.

A remittance by a factor in Buffalo to his principal in Illinois of a draft from a banker in Buffalo on a house in New York, on the day of sale and in compliance with the custom of commission-merchants at Buffalo, is such an exercise of due diligence as to exempt the factor from liability when the draft is not honored. *Chandler v. Hogle*, 58 Ill. 46.

<sup>1</sup> *Loomis v. Simpson*, 13 Iowa, 532; *Merchants' Nat. Bank v. Trenholm*, 12

**Must Account.**—A factor is bound to account to his principal for all goods in his hands, or for the proceeds when the goods are sold.<sup>1</sup>

Heisk. (Tenn.) 520; *McMorris v. Simpson*, 21 Wend. (N.Y.) 610; *Desha v. Holland*, 12 Ala. 513; s. c., 46 Am. Dec. 261; *Grieff v. Cowguill*, 2 Disn. (Ohio) 58.

This does not refer, however, to mere ministerial acts, nor to the necessary employment of subordinates. *McMorris v. Simpson*, 21 Wend. (N.Y.) 610.

At the death of the factor the authority comes to an end, and does not pass to his executors or administrators. *Gage v. Allison*, 1 Brev. (S. Car.) 495; s. c., 2 Am. Dec. 682.

Where, however, a factor is authorized either by direct instructions or by usage of trade to employ a sub-agent, such sub-agent is accountable directly to the principal. The factor's deed revokes the authority of the sub-agent, and the funds in the latter's hands belong to the principal, and not to the administrator. *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

If a factor employs a sub-agent who sells the principal's goods for less than the amount of the factor's advances and expenses, the factor when he seeks to recover the deficiency from the principal must show that he faithfully imparted to his sub-agent the instructions under which he had authority to sell himself. *Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

In *Harralson v. Stein*, 50 Ala. 347, it was held that the principle that an agent cannot delegate his authority is not of universal application to factors and commission-merchants, and can only be invoked by the principal when sought to be charged by the sub-agent.

1. *Terwilliger v. Beals*, 6 Lans. (N.Y.) 403; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; s. c., 71 Am. Dec. 600; *Curtis v. Gibney*, 59 Md. 131; *Warriner v. People*, 74 Ill. 846.

A factor is bound to account for the goods consigned to him to his consignor, unless the true owner appears and establishes his right to the goods or the proceeds. *Bain v. Clark*, 39 Mo. 352.

A factor cannot be arrested in an action for the proceeds of goods sold by him, where it appears that notes of third persons have been given to the plaintiff in settlement of the account between them, and that plaintiff has collected some of the notes and has not offered to return the others. *Trunninger v. Busch*, 7 Daly (N.Y.) 124.

When a factor receives his principal's money and retains it without giving no-

tice to the principal until the currency in which it was received becomes worthless, he cannot relieve himself from liability for the loss by showing, merely, that he was not in default in an unreasonable detention of the money; he must also show that it remained in his hands as the property of the principal. If he mixes it with his own money, or uses it in his business, he is liable therefor. Thus, where a factor received in 1862 Confederate currency for his principal, and deposited it in bank to his own credit, giving no notice to the principal that he had received it, until some time after the Confederate currency had ceased to be of any value, *held*, that proof that he was not in default in his failure to give notice, and that he always had a balance in bank to his credit during the war, was not sufficient to relieve him from liability to his principal for the money. *Pinckney v. Dunn*, 2 S. Car. 314.

A factor who, by direction of his principal, invests the latter's funds in "cotton futures," is not accountable to the latter for the illegality of the transaction. *Allen v. Whetstone*, 35 La. Ann. 846.

A factor cannot be sued by his principal until after a demand for the goods or the money in his hands has been made, or after he has received instructions to remit. *Burns v. Pillsbury*, 17 N. H. 66; *Cooley v. Betts*, 24 Wend. (N.Y.) 203; *Halden v. Crafts*, 4 E. D. Smith (N.Y.) 490; *Ferris v. Paris*, 10 Johns. (N.Y.) 285; *Brink v. Dolsen*, 8 Barb. (N.Y.) 337; *Levrick v. Meigs*, 1 Cow. (N.Y.) 645, 664; *Wright v. People*, 61 Ill. 382. *Compare Clark v. Moody*, 17 Mass. 145.

The pledgee is the proper party to call a factor to account where he receives the goods with the understanding that he should dispose of them through a factor and credit the debtor with the amount of sales, and he accordingly commits them to a factor from whom he takes a receipt. *Bigelow v. Walker*, 24 Vt. 149; s. c., 58 Am. Dec. 156.

A factor or commission-merchant, having in his hands moneys arising from the sale of his principal's goods, is liable for interest on the balance due after demand made by the principal or his personal representative; but not until demand made, if he has promptly rendered an account of sales, unless a special usage of trade is shown, or a failure to remit according to instructions. *Tyree v. Par-*

**Factor's Rights.—Lien.**—Factors have a general lien upon any portion of the goods of their principal in their possession upon the price of such as are lawfully sold by them, and the charges given therefor, for the general balance of the accounts between them and their principal as well as for the charges and disbursements arising upon these particular goods.<sup>1</sup>

66 Ala. 424; Dodge v. Perkins, 9 (Mass.) 368; Clark v. Moody, 17 145. Compare Williams v. McCon-

4 Ala. 627. Where a factor's account is closed, and rendered at the end of the com-  
year and not objected to by his  
principal, showing a balance in the factor's  
account composed of accrued interest and  
principal on such balance, interest may  
be urged in any subsequent account-  
Sentell v. Kennedy, 29 La. Ann.

render a factor liable for conversion  
of goods, demand must be made while the  
goods or its proceeds are in his hands,  
and must be shown that he had notice of  
owner's rights, or of the want of  
consent of the party placing the goods in his  
hands. Roach v. Turk, 9 Heisk. (Tenn.)  
s. c., 24 Am. Rep. 360; overruling  
v. Pope, 5 Coldw. (Tenn.) 413.

Where a factor in remitting to his prin-  
cipal indorses a bill of exchange received  
for payment of goods sold, this raises  
a liability on his part toward the latter,  
and it may be shown that at the time  
of indorsement he intended to assume  
a personal liability. Sharp v.  
T, 5 Whart. (Pa.) 288; s. c., 34 Am.  
54.

Accepting the final account of a factor  
without objection discharges him from all  
liability to account for sales made  
on credit, the proceeds of which  
were not collected. Rion v. Gilly, 6  
(La.) 417; s. c., 12 Am. Dec. 483.  
Highler v. Savage Mfg. Co., 12 Md.  
s. c., 71 Am. Dec. 600.

Where goods consigned to a factor are  
marked inadvertently so marked as to  
lead the factor as to the ownership,  
and he paid the proceeds over to the  
principal, he will not be held liable to  
the owner. Hays v. Warren, 46 Mo.

Story on Ag. § 376; 2 Kent Com.  
Jarvis v. Rogers, 15 Mass. 389;  
Durant, 7 Allen (Mass.), 408; s. c.,  
11 Dec. 695; Weed v. Adams, 37  
378; Matthews v. Menedger, 2  
an (U. S.), 145; Gibson v. Stevens,  
v. (U. S.) 384, 400; Peisch v. Dick-  
Mason (U. S.), 9; Burrill v. Phil-  
Gall. (U. S.) 360; The Frances, 8

Cranch (U. S.), 419; Winne v. Hammond,  
37 Ill. 99; Eaton v. Truesdail, 52 Ill. 307;  
Brown v. Combs, 63 N. Y. 598; Rey-  
nolds v. Davis, 5 Sandf. (N. Y.) 267;  
Franklyn v. Sprague, 17 N. Y. Sup. Ct.  
589; Knapp v. Alvord, 10 Paige Ch. (N.  
Y.) 205; s. c., 40 Am. Dec. 241; Myer v.  
Jacobs, 1 Daly (N. Y.), 33; Holbrook v.  
Wright, 24 Wend. (N. Y.) 169; s. c., 35  
Am. Dec. 607; Bryce v. Brooks, 26  
Wend. (N. Y.) 367; Hoy v. Reade, 1  
Sweeney (N. Y.), 626; Patterson v. Mc-  
Gahay, 8 Mart. (La.) 486; s. c., 13 Am.  
Dec. 298; Cutters v. Baker, 2 La. Ann.  
572; Lambeth v. Turnbull, 5 Rob. (La.)  
264; s. c., 39 Am. Dec. 536; The General  
Quitman v. Packard, 22 La. Ann. 70;  
Smith v. Williams, 22 La. Ann. 268;  
Maxen v. Landrum, 21 La. Ann. 366;  
McKenzie v. Nevins, 22 Me. 138; s. c.,  
38 Am. Dec. 291; Sewall v. Nichols, 34  
Me. 582; Tift v. Newsom, 44 Ga. 600;  
Schiffer v. Feagin, 51 Ala. 335; Martin  
v. Pope, 6 Ala. 532; s. c., 41 Am. Dec.  
66; Sawyer v. Lorillard, 48 Ala. 332; Jordan  
v. James, 5 Ohio, 88, 99.

A factor who has received a consign-  
ment of cotton for sale from the guardian  
of a minor, knowing that the goods be-  
long to the minor, has no lien on the pro-  
ceeds for a private debt due him by the  
guardian. Succession of Norton, 24 La.  
Ann. 218. And see Bell v. Powell, 23  
La. Ann. 796.

Where the factor comes to the posses-  
sion of the goods of his principal after  
the debt has been created, and could have  
had no influence in creating the debt, his  
claim of lien must be subordinate to the  
true state of the ownership, whether  
known to him or not. Barry v. Bonin-  
ger, 46 Md. 59.

The lien extends to the amount re-  
ceived from an insurance company with  
whom the goods have been insured by  
the factor for the benefit of his principal  
for loss sustained. Johnson v. Camp-  
bell, 120 Mass. 449.

But the *bona fide* holder of a draft  
drawn against the goods, shipped with  
bill of lading assigned, has a lien upon  
the goods in the hands of the consignee,  
and can recover from him the proceeds  
of their sale, even though the consignor  
is indebted to the consignee on a gen-

eral account. *Lee v. Bowen*, 5 Biss. (U. S.) 154.

Factor accepting draft on the faith of goods consigned to him is making an advance on the goods, and has for the amount the same lien or privilege as though the money had been paid. *Lambeth v. Turnbull*, 5 Rob. (La.) 264; s. c., 39 Am. Dec. 536; *Eaton v. Truesdail*, 52 Ill. 307; *Vail v. Durant*, 7 Allen (Mass.), 408; s. c., 83 Am. Dec. 695; *Nesmith v. Dyeing, etc., Co.*, 1 Curt. (U. S.) 130.

The claim of the factor upon property consigned to him can, however, never exceed the extent of his lien. He has but a limited right, which is sometimes called a special property, but is never regarded as a general ownership. *United States v. Villalonga*, 90 U. S. 35; *Heard v. Brewer*, 4 Daly (N. Y.), 136; *Williams v. Tilt*, 36 N. Y. 319; *Jordan v. James*, 5 Ohio, 88, 99; *Hall v. Hinks*, 21 Md. 406.

Goods belonging to the principal cannot be attached for the personal debts of the factor, even though he has possession and the right to sell, as long as he is under obligation to account for them or the proceeds to his principal. *Loomis v. Barker*, 69 Ill. 360; *Holly v. Huggefords*, 8 Pick. (Mass.) 73; s. c., 19 Am. Dec. 303; *Blood v. Palmer*, 11 Me. 414; s. c., 26 Am. Dec. 547.

An agreement to consign goods to an insolvent for sale is not fraudulent in law as to creditors, and vests no property in the consignee subject to levy where such agreement provides for sale not below invoice prices, which are to be paid to the consignor, the consignee to keep all over that and return the goods remaining unsold. *McCullough v. Porter*, 4 W. & S. (Pa.) 177; s. c., 39 Am. Dec. 68.

The rule that one who receives goods, and has an option to return the identical goods or others equivalent, is a purchaser and not a bailee, does not apply to factors who act throughout for their principals, although they fulfil their duty if they pay over the price instead of the identical goods. *Blood v. Palmer*, 11 Me. 414; s. c., 26 Am. Dec. 547.

A factor who has grain consigned to him, but who advances or pays no money on the same, but who accepts and pays drafts on general account, will not have such a property in the grain, either general or special, as to give him a right to maintain an action against the carrier for damages resulting from a delay in transportation, especially when it is provided by contract that the grain must first pass inspection. *Cobb v. Ill. Cent. R. Co.*, 88 Ill. 394.

Under statutes, factors in Louisiana and Georgia may have a lien for money advanced to a planter to enable him to raise a crop, as well as for actual supplies. *The General Quitman v. Packard*, 22 La. Ann. 70; *Smith v. Williams*, 22 La. Ann. 268; *Richardson v. Dinkgrave*, 26 La. Ann. 651; *Tift v. Newsom*, 44 Ga. 600; *Thomason v. Poullain*, 54 Ga. 306. Compare *Moore v. Gray*, 22 La. Ann. 289; *Bres v. Cowan*, 22 La. Ann. 438.

But a factor can acquire no such lien in Louisiana, where the crops have been raised in Mississippi, where the statute does not provide for such a lien, and the crops were afterwards shipped to Louisiana. *Delop v. Windsor*, 26 La. Ann. 185.

And to have a right to the lien the party who makes the advances must allege in his affidavit that he is either a factor or a merchant. *Gunn v. Pattishall*, 48 Ga. 406.

But an agreement to consign and pay commissions on his entire crop to his factors was held not to be binding after their refusal to fulfil their stipulations as to paying certain drafts and taxes. *Nalle v. Conrad*, 30 La. Ann. pt. 1, 503.

A factor's lien extends to all sums for which a factor has become liable as a surety or otherwise for his principal, whether the suretyship has resulted from the nature of the agency, or it has been undertaken upon the footing of such a lien. But it does not extend to other independent debts contracted before and without reference to the agency. *Story on Agency*, § 376; *Drinkwater v. Goodwin*, Cowp. 251; *Hammonds v. Barkley*, 2 East. 227; *Hidden v. Waldo*, 55 N. Y. 294; *Stevens v. Robins*, 12 Mass. 182; *Nudd v. Burrows*, 91 U. S. 426; *Hodgson v. Payson*, 3 H. & J. (Md.) 339; s. c., 5 Am. Dec. 439.

A factor under a *del credere* commission made advances to his principal in the form of notes and acceptances, and failed. Held, that his receiver was entitled, as against the assignee and general creditors of the consignor, to retain the amounts arising from the sale of the goods, until such notes or acceptances were surrendered or destroyed. *Franklyn v. Sprague*, 17 N. Y. Sup. Ct. 580. See also *Cabot v. Etting*, 7 Phila. (Pa.) 437.

A factor agreed with a planter to pay to A. a certain sum upon receiving a certain number of hogsheads of sugar. Part of the sugar was received by the factor, but he had to pay and did pay certain liens on the other part aggregating to an amount which absorbed the entire proceeds of the latter portion. Held, that the factor was liable to A. only on the

**Lien of Purchasing Factor.**—A purchasing factor, like a factor for goods, has a lien on the goods in his hands not only for a claim for advances and expenses he may have against the identical goods, but also for a general balance of account.<sup>1</sup>

**Goods must be in Factor's Possession.**—A factor can only claim a lien on goods lawfully in his possession as a factor. Possession obtained by an illegal act or in bad faith sustains no lien.<sup>2</sup>

on, and thereon only to the extent of the proceeds thereof. *Moore v. Clapp*, 10 Ann. 690.

lien upon the goods or moneys received as the proceeds of the goods to protect factors against loss upon acceptance and indorsements for their principals not lost when they mingle such with other funds in their hands; they have done so, the subsequent payment of their estate in insolvency will not enable the consignors to maintain an action therefor as long as the lien upon the acceptances and indorsements continues. *Vail v. Durant*, 7 (Mass.), 408; s. c., 83 Am. Dec.

where the factor has accepted the consignment with instructions to pay the proceeds to a particular person or for a specific purpose, he has no lien for a general balance. *Goodhue v. McGraft*, 3 La. Ann. 58; *Frith v. Forbes*, 4 F. & J. 409.

the debtors shipped to their creditors factors, cotton, with directions to accept and pay a note held by them, and the factors did sell the cotton and it was not enough to pay off the note, this was an extinguishment of the debt, and the creditors could not thereafter recover it. *Hatcler v. Comer*, 73 Ga. 418.

where he has received cotton for a tenant, knowing that one-half of the cotton belongs to the tenant and the other half to the landlord, and with instructions to sell to the landlord's credit when sold, he cannot apply it to payment of advances made to the tenants. *Branch v. Huse*, 55 Gl. 21.

money having been advanced by a factor to purchase cotton, upon the sale of such cotton being shipped to the person receiving the advances, he cannot direct the proceeds of cotton so sold to be applied to another debt. The creditor, as factor, had a factor's lien upon the cotton in his possession, it having been purchased with money advanced by him, and he therefore had the right to apply the proceeds of its sale to the payment of his advances. *Frost v. Mathersbee*, 23 S. Car. 354.

*Story on Agency*, § 34; *Bryce v. Smith*, 26 Wend. (N. Y.) 367, 372;

*Stevens v. Robins*, 12 Mass. 182. Compare *Williams v. Littlefield*, 12 Wend. (N. Y.) 363, 370.

Where commercial correspondents, on the order of a principal, make a purchase of property ultimately for him, but on their own credit, or with their own funds, and such course is contemplated when the order is given, they may retain title in themselves until they are reimbursed. This may be done by taking the bill of sale in their own name, and when the property is shipped, taking from the carrier a bill of lading in such terms as to show that they retain the power of control and disposition of it. This bill of lading confers upon the person in whose favor it is issued or to whom it is transferred, the title to the goods; and this although the transaction is not intended to give the permanent ownership, but to furnish security for advances of money or discount of commercial paper made upon the faith of it. Third persons dealing with property thus shipped, though acting in good faith, in the regular course of business, and paying value, are affected by and chargeable with constructive notice of the contents of the bill of lading. *Farmers' & Mech. Bank v. Logan*, 74 N. Y. 568; *Farmers' & Mech. Bank v. Atkinson*, 74 N. Y. 587.

A factor has no lien upon the goods of his principal when the general balance of account is against him; and in such case advances made by the factor in the business will be deemed to have been made in liquidation of his indebtedness *pro tanto*. *McGraft v. Rugee*, 60 Wis. 406; s. c., 50 Am. Rep. 378; *Weed v. Adams*, 37 Conn. 378; *Jordan v. James*, 5 Ohio, 99; *Enoch v. Wehrkamp*, 3 Bosw. (N. Y.) 398; *Beebe v. Mead*, 33 N. Y. 587.

The burden of showing that a general balance against a factor is due to losses for which he is not responsible is upon the party asserting it, and it will not be presumed merely from the fact that the principal, after commencing an action to recover goods seized by the creditors of the factor, turns over to the factor the outstanding credits and accounts of the business. *McGraft v. Rugee*, 60 Wis. 406; s. c., 50 Am. Rep. 378.

2. *Bank of Rochester v. Jones*, 4 N. Y.

497; s. c., 55 Am. Dec. 290; *Winter v. Coit*, 7 N. Y. 288; s. c., 57 Am. Dec. 522; *Marine Bank v. Wright*, 48 N. Y. 1; *Thacher v. Hannahs*, 4 Robt. (N. Y.) 407; *Ryberg v. Snell*, 2 Wash. (U. S.) 403; *Hamilton v. Campbell*, 9 La. Ann. 531; *Brown v. Wiggin*, 16 N. H. 312; *Woodruff v. Nashville, etc.*, R. Co., 2 Head (Tenn.), 87; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482; *Elliot v. Bradley*, 23 Vt. 217; *Bruce v. Andrews*, 36 Mo. 593; *Byers v. Danley*, 27 Ark. 77; *Rice v. Austin*, 17 Mass. 197; *Allen v. Williams*, 12 Pick. (Mass.) 297; *Baker v. Fuller*, 21 Pick. (Mass.) 318; *Lewis v. Galena, etc.*, R. Co., 40 Ill. 281; *Strahorn v. Union Stockyard Co.*, 43 Ill. 424.

The equitable lien of an agent for advances and commissions only continues in him so long as he has possession of the lands or title papers and the debt remains unbarred by the Statute of Limitations. *Byers v. Danley*, 27 Ark. 77.

The possession may be constructive, as by an assignment of bills of lading, warehouse receipts, or other documents which show an intention to vest the title to the goods in the factor. *Davis v. Bradley*, 28 Vt. 118; s. c., 65 Am. Dec. 226; *Gibson v. Stevens*, 8 How. (U. S.) 384, 399; *Nesmith v. Dyeing, etc., Co.*, 1 Curt. (U. S.) 130; *Heard v. Brewer*, 4 Daly (N. Y.), 136; *Dows v. Greene*, 24 N. Y. 638; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; s. c., 35 Am. Dec. 607; *Bank of Rochester v. Jones*, 4 N. Y. 497; s. c., 55 Am. Dec. 290; *Bailey v. Hudson River R. Co.*, 49 N. Y. 70; *Hall v. Hinks*, 21 Md. 406; *Vallé v. Cerré*, 36 Mo. 575; *Lewis v. Galena, etc.*, R. Co., 40 Ill. 281; *Strahorn v. Union, etc., Co.*, 43 Ill. 424.

The mere agreement to ship goods in satisfaction of antecedent advances will not in general give the factor or consignee a lien upon them for his general balance until they come to his actual possession; but if there is a specific pledge or appropriation of certain goods, accompanied with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee, then the property is changed, and vests in the individual to whom they are to be delivered by the depository. *Desha v. Pope*, 6 Ala. 690; s. c., 41 Am. Dec. 76; *Strahorn v. Union, etc., Co.*, 43 Ill. 424; *Bruce v. Andrews*, 36 Mo. 593.

In *Bonner v. Marsh*, 10 S. & M. (Miss.) 376; s. c., 48 Am. Dec. 754, it was held that a consignment of goods by bill of lading vests the property in the consignee only when made in pursuance of a prior contract with the consignor; but where without any special contract it is consigned

to him as a factor to sell, and with the proceeds to pay a sum due him, if the property is seized under attachment against the consignor before it reaches the consignee, the bill of lading will vest no property in the consignee. See also *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482; *Delop v. Windsor*, 26 La. Ann. 185; *Chaffraix v. Harper*, 26 La. Ann. 22; *Walter v. Ross*, 2 Wash. (U. S.) 283; *Bailey v. Hudson River R. Co.*, 49 N. Y. 70.

To give a factor a lien upon goods consigned to him, but not actually received, the consignment must be in terms to the factor, and as against creditors and subsequent purchasers of the consignor it is required that the consignee should have made advances and acceptances upon the faith of the particular consignments. *Davis v. Bradley*, 28 Vt. 118; s. c., 65 Am. Dec. 226.

Where the principal is indebted to the factor for advances, and has agreed to ship the goods to the latter for sale, from the proceeds of which the advances are to be paid, the factor has no security against the goods in preference to a bank discounting a bill of exchange, drawn by the principal against the factor on the faith of a bill of lading. *Marine Bank v. Wright*, 48 N. Y. 5; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145; *Fifth Nat. Bank of Chicago v. Bayley*, 115 Mass. 228; *Newcomb v. Boston, etc., R. Co.*, 115 Mass. 230; *Alderman v. Eastern R. Co.*, 115 Mass. 233.

Placing goods upon drays of an agent of factors for the purpose of having them transferred to their warehouse, places them in the factors' possession sufficiently to support their lien from that time. *Burrus v. Kyle*, 56 Ga. 24.

In some cases it has been held that delivery of goods to a common carrier for transportation to the consignee, in pursuance of an agreement to consign, previously made, is such a delivery to the consignee as will cause his lien to attach for advances made. *Elliott v. Cox*, 48 Ga. 39; *Hardeman v. De Vaughn*, 49 Ga. 596; *Wade v. Hamilton*, 30 Ga. 450; *Nelson v. Chicago, etc., R. Co.*, 2 Bradw. (Ill.) 180.

Others hold that actual possession only will be sufficient, and that assignment of the bill of lading does not give such a constructive possession as to cause the lien to attach. *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482; *Woodruff v. Nashville, etc., R. Co.*, 2 Head (Tenn.), 87.

The lien of a factor for advances and liabilities incurred does not extend only to the property consigned, but when sold to

*How Lost.*—Where the lien once attaches it can only be lost by an act of the factor. It cannot be defeated by a levy of an attachment of the goods against his principal, nor by a sale by the principal. If he is wrongfully deprived of the goods he can recover them.<sup>1</sup>

*Waiver.*—The factor can waive his lien by voluntarily surrendering the property to which it attaches.<sup>2</sup>

the proceeds of the sale in the hands of the vendee, and the securities therefor in the hands of the factor. *Brander v. Phillips*, 16 Pet. (U. S.) 121, 129; *Brown v. McGrau*, 14 Pet. (U. S.) 479; *Daniel v. Swift*, 54 Ga. 113; *Brown v. Combs*, 63 N. Y. 598; *Houghton v. Matthews*, 3 B. & P. 489.

A factor does not lose his lien upon a crop for advances made towards its cultivation, where he buys the crop at a sheriff's sale. The lien is then transferred from the goods to the proceeds. *Howe v. Whited*, 21 La. Ann. 495.

The factor in making advances to his principal must act in good faith in order to sustain his lien. Where he advanced money to his principal whom he knew to be insolvent, to enable him to buy cattle to be shipped to him for sale, the proceeds to be credited to the principal, it was held that such transaction created the relation of debtor and creditor, and that factor had no lien which would give him a preference over the other creditors of the bankrupt. *Nudd v. Burrows*, 91 U. S. 426.

But where a factor had a lien for supplies under a Georgia statute upon the growing crop of a planter made in 1872, and the planter in the fall and winter succeeding delivered to a warehouseman 19 bales of cotton, with instructions to apply the proceeds to debts due C. and D. and the balance to a debt due the factor for 1871, which was done, and subsequently the planter delivered other 19 bales to the warehouseman with instructions to apply the proceeds to his lien upon the crop of 1872, it was held that proof that the warehouseman was the general agent of the factor did not render the transaction as to the first 19 bales such a fraud upon the judgment creditors of the planter as to postpone the factor's lien upon the second 19 bales to judgment liens against the planter. *Thomason v. Poullain*, 54 Ga. 306.

Where the plaintiff, a commission-merchant, receives consignments from the defendant, a manufacturer, who is the owner of three different mills, run under three different names, one being carried on in the name of defendant, the plaintiff

being ignorant that the three mills are owned by the defendant, and the accounts of the three concerns being kept separate, in an action brought by the plaintiff to recover the balance of an account with the mill run under the name of the defendant, where the answer is a general denial and payment, the defendant will not be allowed to show that a balance is due him upon the account between plaintiff and another of the mills which should be credited him in this suit, and such balance can only be availed of by way of set-off; and defendant cannot show that there were in the plaintiff's hands goods from the mill run in defendant's name which were not included in the account sued on. *Talcott v. Smith*, 8 N. Eastern Repr. (Mass.) 413.

1. *Grieff v. Cowguill*, 2 Cincinnati (Sup. Ct.), 58; 2 *Disney* (Ohio), 54; *Brownell v. Carnley*, 3 *Duer* (N. Y.), 9; *Cook v. Kelly*, 9 *Bosw.* (N. Y.), 358; *Green v. Clarke*, 12 N. Y. 343; *Muller v. Pondir*, 55 N. Y. 325; *Bank v. West*, 46 Me. 15; *Lambeth v. Turnbull*, 5 Rob. (La.) 264; s. c., 39 Am. Dec. 536; *Maxen v. Landrum*, 21 La. Ann. 366; *Eaton v. Truesdail*, 52 Ill. 307; *Drinkwater v. Goodwin*, Cowp. 251.

Where the lien attaches while the goods are in transit, the death of the principal during such transit does not defeat the lien where the factor has made actual advances or incurred expenses on the consignment. *Hammond v. Barclay*, 2 East, 227; *Lemprierer v. Palsley*, 2 T. R. 485.

But the principal may dissolve it by tendering the amount due. *Scarfe v. Morgan*, 4 Mees. & W. 270; *Jones v. Tarleton*, 9 Mees. & W. 675; *Gage v. Allison*, 1 Brev. (S. Car.) 495; s. c., 2 Am. Dec. 682; *Beebe v. Mead*, 33 N. Y. 587.

2. *Lickbarrow v. Mason*, 6 East, 21; *Bligh v. Davies*, 28 Beav. 211; *Sawyer v. Lorrillard*, 48 Ala. 332.

But where the delivery is conditional, and such that factor still retains control over the goods, the lien is not lost. *Matthews v. Menedger*, 2 *McLean* (U. S.), 145; *Winne v. Hammond*, 37 Ill. 99; *Jordan v. James*, 5 Ohio, 88; *Cator v. Merrill*, 16 La. Ann. 137; *Owen v.*



**Principal's Personal Security.**—In addition to the lien upon the goods of his principal, he also has a claim upon the personal security of his principal. The general lien of factors does not depend upon any express contract, but rests upon its manifest tendency to aid the interests of trade and commerce and to promote confidence and a liberal spirit on the part of factors in respect to advances to their principals. It is deemed to exist in all cases until the contrary presumption is clearly established. The factor may relinquish his lien on his principal's goods without at all affecting his personal remedy; and he may renounce his right to resort to the person and look alone to his lien for reimbursement of his advances.<sup>1</sup>

*Iglanor*, 4 Coldw. (Tenn.) 15; *Gragg v. Brown*, 44 Me. 157; *Davis v. Bradley*, 28 Vt. 118; s. c., 65 Am. Dec. 226; *Baker v. Fuller*, 21 Pick. (Mass.) 318; *Archer v. McMechan*, 21 Mo. 43; *Bull v. Sigerson*, 24 Mo. 53.

He also waives his lien by wrongfully selling or pledging the property. If he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken. *Holly v. Huggeford*, 8 Pick. (Mass.) 73; s. c., 19 Am. Dec. 303; *Jarvis v. Rogers*, 15 Mass. 389, 396.

Where a purchasing factor had transmitted two distinct orders for goods, and on the arrival of the first parcel delivered an invoice of the same to the principal, and accepted his draft for the amount thereof, payable at a future day. It was held that by so doing he had waived his lien, which otherwise would have existed on the first parcel for the price paid, or responsibility assumed on account of the second parcel, and upon his refusal to deliver up the first parcel an action of trover was held to lie against him. *Bryce v. Brooks*, 26 Wend. (N. Y.) 367.

A neglect to enforce the lien on the part of the factor will work as a waiver. *Grieff v. Cowguill*, 2 Dis. (Ohio) 54.

But a warehouseman and factor who has made advances on cotton stored with him is not estopped from claiming reimbursement out of the proceeds of the sale thereof, from a mere omission to inform a purchaser of the cotton that he had such claim, and where the purchaser left the receipts for the cotton with the factor, with instructions to sell it for his account. *Daniel v. Swift*, 54 Ga. 113.

A factor against whom a judgment has been rendered in favor of his principal for the price of goods sold by the factor

is thereby stopped from afterward suing the principal for expenses, freight advances and commissions upon the sale. *McCroskey v. Mabry*, 45 Ga. 327.

The factor's lien is special, and setting up another and untenable claim on the property defeats it. *Winter v. Coit*, N. Y. 288.

The factor may waive his lien by special contract at the time of the delivery of the goods. *Schiffer v. Feagin*, 51 Ala. 335; *Tison v. Howard*, 57 Ga. 410.

1. *Martin v. Pope*, 6 Ala. 532; s. c., 4 Am. Dec. 66; *Beckwith v. Sibley*, 1 Pick. (Mass.) 482; *Burrell v. Phillips*, Gall. (U. S.) 360; *Peisch v. Dickson*, Mason (U. S.), 9.

In *Corlies v. Cummings*, 6 Cow. (N. Y.) 181, it was held that he must first have resort to the fund if it can be made available before the principal is liable.

A factor may sue in equity to enforce his lien, and is entitled to judgment in such suit for any deficiency after the sale of such goods. *Whitman v. Horton*, 4 N. Y. Superior Ct. 531; *Gihon v. Stanton*, 9 N. Y. 476; *Strong v. Stewart*, Heisk. (Tenn.) 137; *Denney v. Wheelwright*, 60 Miss. 733.

A factor to purchase is not bound in the first instance to resort to the goods purchased for payment of the purchase money advanced by him. Such advance is a loan to the principal, for which, together with his disbursements, charges and commissions, he may after demand immediately sue the principal having the lien on the goods as a collateral security. *Hoy v. Reade*, 1 Sweeny (N. Y.), 626.

A factor who receives consignments of goods under an agreement by which he is to advance to his principal money from time to time as the latter requires to charge him interest on the advance at a certain rate, to sell the goods consigned at the market price, to charge certain commission for selling, and, after

*Lien a Personal Privilege.*—The factor's right to a lien is a personal privilege and cannot be transferred, nor can the question be between any one but the principal and the factor.<sup>1</sup>

*Bankrupt Acts—Fiduciary Debts.*—There has been considerable difference of opinion as to whether a factor who retained the money of his principal was a fiduciary debtor within the meaning of the United States Bankrupt Acts of 1841 and 1867 (repealed in 1878), acts providing that all persons owing debts "which shall not have been created in consequence of a defalcation as a public officer or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," might be declared bankrupts,<sup>2</sup> and that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer or while acting in any fiduciary character, shall be discharged in bankruptcy."<sup>3</sup>

*Commissions.*—A factor, like a broker, is entitled to a remuneration for his services in the form of a commission; but as a general rule no commissions are due before the whole service for which these commissions are to compensate are performed. But where the service is begun and an important part performed, and the factor prevented by some irresistible obstacle from completing it, and

retaining advances, interest, and commission, to pay the balance to the principal, and if, upon settlement, after all the goods are sold, a balance is found due to the principal, the principal is to pay it, may, having made large advances to the principal on account of goods not sold, which have been on hand for several months, sue the principal for the amount of the advances already made, without waiting until all the goods are sold. *Thompson v. Thompson*, 126 Mass. 183; *Metc. v. Lefavour*, 11 Metc. (Mass.)

by giving personal security on a note for the advances and supplies furnished a planter, liable him to raise a crop secured by a Georgia statutory lien does not operate as a waiver of the lien. *Story v. Story*, 55 Ga. 56; *Holly v. Huggefurd*, 8 Pick. (Mass.) 328; 19 Am. Dec. 303; *Ames v. Ames*, 42 Me. 197; s. c., 66 Am. Dec.

extends, however, to the factor's expenses and administrators. *Gage v. Gage*, 1 Brev. (S. Car.) 495; s. c., 2 Dec. 682. 5 U. S. Statutes at Large, 440; Bouvier's Law Dict., title Bankrupt Laws. U. S. Rev. Statutes, § 5117.

In the following cases it has been decided that they come not within the meaning of these acts, and that therefore a factor or commission-merchant does not act

in a fiduciary capacity. *Chapman v. Forsyth*, 2 How. (U. S.) 202; *In re Smith*, 9 Ben. (U. S.) 494; *Zeperink v. Card*, 11 Fed. Repr. 295; *Grover, etc., S. M. Co. v. Clinton*, 5 Biss. (U. S.) 324. *Owsley v. Cobin*, 15 Nat'l Bank Reg. 489; *Kinne v. Graff*, 17 Nat'l Bank Reg. 319; *Woolsey v. Cade*, 54 Ala. 378; s. c., 25 Am. Rep. 711; *Anstill v. Crawford*, 7 Ala. 335; *Hayman v. Pond*, 7 Metc. (Mass.) 328; *Cronan v. Cotting*, 104 Mass. 245; *Chipley v. Frierson*, 18 Fla. 639; *Du Pont v. Beck*, 81 Ind. 271; *Curtis v. Waring*, 92 Pa. St. 104; *Scott v. Porter*, 93 Pa. St. 38; s. c., 39 Am. Rep. 719; *Kauffman v. Alexander*, 53 Tex. 562; *Commercial Bank v. Buckner*, 2 La. Ann. 1023.

In the following cases a contrary view was held: *Matteson v. Kellogg*, 15 Ill. 547; *Flagg v. Ely*, 1 Edm. Sel. Cas. (N. Y.) 206; *Whitaker v. Chapman*, 3 Lans. (N. Y.) 155; *Hardenbrook v. Collison*, 24 Hun (N. Y.) 475; *In re Seymour*, 1 Ben. (U. S.) 348; *In re Kimball*, 2 Ben. (U. S.) 554; 6 Blatchf. 292; *Treadwell v. Holloway*, 12 Nat'l Bank Reg. 61; *Lemcke v. Booth*, 47 Mo. 385; s. c., 4 Am. Rep. 326; *Gay v. Farran*, 2 Cin. S. C. Rep. (Ohio) 426; *Meador v. Sharpe*, 54 Ga. 125; *Jones v. Russell*, 44 Ga. 460; *Banning v. Bleakley*, 27 La. Ann. 257; s. c., 21 Am. Rep. 554; *Desobry v. Tête*, 31 La. Ann. 809; s. c., 33 Am. Rep. 232; *Brown v. Garrard*, 28 La. Ann. 870; *Tate v. Laforest*, 25 La. Ann. 187.

is himself without fault, it would seem that he may demand a proportionate compensation.<sup>1</sup>

*Del Credere Commissions.*—Sales by a factor with a guaranty of the price from the factor to the owner are common in all commercial countries. In Europe they are commonly called *del credere* contracts, and the commission charged by the factor and intended to cover not only his services in selling but his risk in insuring the payments is called a *del credere* commission. Such a contract need not be in writing.<sup>2</sup>

*Principal Debtor or Surety.*—Although formerly a different doc-

1. Parsons on Contr. (7th Ed.) 109.

The parties entered into a contract by which defendants agreed to sell the goods manufactured by plaintiff on commission. Plaintiff guaranteed to supply defendants with goods to at least the value of a sum specified, and in case of failure so to do defendants were entitled to the agreed commissions on that sum. Either party had the right to terminate the agreement by giving to the other a year's notice. In an action to recover proceeds of sales in defendant's hands, the referee found that plaintiff was led, by acts and assurances of defendants, to believe that they would only charge commissions thereafter on actual shipments and were induced thereby to refrain from giving notice of a termination of the agreement. Held, that defendants were estopped from claiming thereafter commissions under the guaranty in the contract. *Belgian Glass Co. v. Pabst*, 101 N. Y. 621.

Where an agent or commission-merchant purchases grain for his principal on his order to do so, he can only recover of the latter his commissions, unless he has actually paid for the grain, or the loss legally sustained by the seller, in which event he may also recover what he has thus been required to pay. It is not sufficient that the agent purchasing may be legally liable, but he must have sustained damage by actual payment. *Brand v. Henderson*, 107 Ill. 141.

A factor or other agent, who is guilty of fraud or gross negligence in the conduct of his principal's business, forfeits all claim to commission or other compensation for his services. And where he knowingly transmits to his consignor a grossly false and fraudulent account of sales, and does not enter the sales on his books until months after they were made, and then enters them falsely, no credit will be given to the factor or his books. *Fordyce v. Peper*, 16 Fed. Repr. 516; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Beall v. January*, 62 Mo. 434; *Smith v. Crews*, 2 Mo. App. 269; *Vennum v.*

*Gregory*, 21 Iowa, 326; *Talcott v. Chew*, 27 Fed. Repr. 273; *Segar v. Parrish*, 20 Gratt. (Va.) 672; *White v. Chapman*, 1 Stark. 113.

A factor to whom goods have been consigned for sale is not entitled to commissions if he sells the goods and fails to render accounts, converting the proceeds to his own use. *Brannan v. Strauss*, 75 Ill. 234.

Nor where he violates his instructions as to the sale. *Zurn v. Noedel*, 113 Pa. St. 336; *Larminie v. Carley*, 114 Ill. 196.

Where a factor had made advances on the growing crop of a planter with the understanding that the entire crop should be shipped to him for sale, and the planter shipped part of the crop to another merchant, it was held that the factor could recover his commissions which he would have charged on the part of the crop shipped to the other merchant. *Thornhill v. Picard*, 24 La. Ann. 159.

2. 2 Parsons on Contr. (7th Ed.) 13; *Couturier v. Hastie*, 16 E. L. & Eq. 562; 8 Exch. 40; *Grove v. Dubois*, 1 T. R. 112; *Swan v. Nesmith*, 7 Pick. (Mass.) 220; *Dalton v. Goddard*, 104 Mass. 497; *Bradley v. Richardson*, 23 Vt. 720; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Cartwright v. Greene*, 47 Barb. (N. Y.) 9; *Wolff v. Koppell*, 5 Hill (N. Y.) 458; s. c., 2 Denio (N. Y.), 368; *Sherwood v. Stone*, 14 N. Y. 268; *Lewis v. Brehme*, 33 Md. 412; *Thompson v. Perkins*, 3 Mas. (U. S.) 232.

A consignment of goods under a special contract, in which the consignee gives his acceptances for their value payable at sight and partly at a future day, and agrees to account for the whole price, to guarantee the sales, and to receive a commission of 20 per cent, with other stipulations making him primarily liable for the price of the goods, is a consignment on sale as distinguished from a consignment on *del credere* guaranty. *Exp. Flannagans*, 12 Bank. Reg. 230.

trine was held, it is now well settled that a factor under a *del credere* commission is not liable to his principal as a principal debtor. He merely guarantees the payment of the purchase-money, and recourse must be had to the buyer, on whose default only the factor is liable; not that the employer must sue the buyer before he sues the factor, but that he can sue the factor only because the buyer neglects or refuses to pay, and when he so neglects or refuses.<sup>1</sup>

*To be Indemnified*—A factor is also entitled to be indemnified by his principal for all losses he may have sustained without his fault, and in transactions made for his principal.<sup>2</sup>

1. 1 Parsons on Contr. (7th Ed.) 101; Story on Agency (9th Ed.) § 215; 1 Chitty on Contr. (11th Am. Ed.) 275; Wharton on Agency, § 784; Wolff v. Koppell, 5 Hill (N. Y.), 458; s. c., 43 Am. Dec. 751. See also opinion of Senator Hand in this case, 2 Denio, 368; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Sherwood v. Stone, 14 N. Y. 267; Holbrook v. Wight, 24 Wend. (N. Y.) 169; s. c., 35 Am. Dec. 607; Thompson v. Perkins, 3 Mas. (U. S.) 232; Bradley v. Richardson, 23 Vt. 720; Swan v. Nesmith, 7 Pick. (Mass.) 220; Morris v. Cleasby, 4 M. & Selw. 574; Couturier v. Hastie, 16 E. L. & Eq. 562; 8 Exch. 40. Compare Lewis v. Brehme, 33 Md. 412; s. c., 3 Am. Rep. 190.

He guarantees the payment of the purchase-money, but where he collects it and remits to his principal in negotiable paper he will not be liable where through intervening insolvency of the maker it becomes worthless, unless he has been negligent in selecting the paper. Muller v. Bohlens, 2 Wash. (U. S.) 378; Sharp v. Emmet, 5 Whart. (Pa.) 288; s. c., 34 Am. Dec. 554; Leverick v. Meigs, 1 Cow. (N. Y.) 645.

Unless he remits without previous authority or direction from his principal, or unless he guarantees the safe arrival of his remittance and the payment of the paper for an additional commission. Heuback v. Rother, 2 Duer (N. Y.), 227.

But where he takes worthless paper in payment he will be liable. Dunnell v. Mason, 1 Story (U. S.) 543.

If a *del credere* factor makes a remittance to his principal by bill of exchange before the expiration of the term of credit on which the goods were sold, it will be considered as a remittance of his own funds in discharge of a personal debt, and therefore at his own risk. Heuback v. Rother, 2 Duer (N. Y.), 227.

The title to the unpaid purchase-money for the principal's goods is in the princi-

pal not in the *del credere* factor. Moore v. Hillabrand, 37 Hun (N. Y.), 491.

Even in the case of bankruptcy of the factor. Merrill v. Thomas, 7 Daly (N. Y.), 393; Thompson v. Perkins, 3 Mas. (U. S.) 232.

A factor under a *del credere* commission is not by this fact relieved from the ordinary skill, care, and diligence required of other factors. Wharton on Agency, § 785.

Factors wrote to traders who proposed to consign goods to them for sale that they were satisfied that they were taking no risk in advancing 80 per cent on the invoice, and requested that the goods might be sent to them. After receiving the goods they wrote again asking if the consignors understood that the invoice prices were to be guaranteed. The consignors replied that they did not expect the factors to guarantee over 80 per cent, and drew on them for that amount. The factors paid the draft and then sold the goods for a sum which, after deducting their commissions and other charges, would yield less than 80 per cent of the invoice prices. Held, that in accounting with the consignors they were not entitled to be allowed any charges, by way of commissions or otherwise, which would reduce the proceeds of the goods to the consignors below 80 per cent. Dalton v. Goddard, 104 Mass. 497.

A *del credere* commission is not due where the factor made a sale on credit, but received cash in consideration of a reduction in price. Kingston v. Wilson, 4 Wash. (U. S.) 310.

2. Where a commission-merchant, by direction of his principal, sold for the latter 5000 bushels of wheat to be delivered at any time during the current year at the seller's option, and after an advance in the price the principal refused to stand to the contract, and the merchant settled with the buyer by paying him the difference between the contract

**5. Relation of Factor to Third Parties.—May Sue in his Own Name.**—Where a factor sells the goods of his principal he may sue for the price in his own name. This does not interfere, however, with the right of the principal also to enter suit, even where his name was not disclosed in the transaction.<sup>1</sup>

price and the market value, the principal being unknown to the purchaser, it was held that the principal was liable to his agent for the sum so paid by him, and also for his commissions. *Searing v. Butler*, 69 Ill. 575.

A consignee who, after selling goods for his principal and remitting the proceeds, is obliged to take the goods back as not being equal to sample, cannot, without at once notifying his principal and demanding repayment, require to be indemnified for loss he may have sustained because he had to sell the goods at a lower price. *Maxwell v. Andinwood*, 15 Hun (N. Y.), 111. And see *Beach v. Branch*, 57 Ga. 362.

Where it is the usual course of business for a factor to accept bills drawn by his principal, and return them to him, to be used for raising money as he pleases, the factor's possession of such bills bearing the blank indorsement of the principal, is sufficient *prima facie* evidence of ownership to enable the factor to recover from the principal the money paid thereon at maturity in the absence of proof of unlawful diversion. *Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37.

In an action against the defendant, a manufacturer, by a commission-merchant, to recover a balance due for advances on manufactured goods, the latter will be allowed to charge in his account for printing the goods, it appearing that this was done under the usage of commission-merchants, and was a necessary charge. *Talcott v. Smith*, 8 N. Eastn. Repr. (Mass.) 413.

<sup>1</sup> *Girard v. Taggard*, 5 S. & R. (Pa.) 19; *Ilseley v. Merriam*, 7 Cush. (Mass.) 242; s. c., 54 Am. Dec. 721; *Earle v. De Witt*, 6 Allen (Mass.), 520; *Barry v. Page*, 10 Gray (Mass.), 398; *Lerned v. Johns*, 9 Allen (Mass.), 419; *Roosevelt v. Doherty*, 129 Mass. 301; s. c., 37 Am. Rep. 356; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Grinnell v. Schmidt*, 2 Sandf. (N. Y.) 706; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *White v. Chouteau*, 10 Barb. (N. Y.) 202; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Graham v. Duckwall*, 8 Bush. (Ky.) 12; *Burton v. Goodspeed*, 69 Ill. 237; *Leach v. Bush*, 57 Ala. 145; *Sadler*

*v. Leigh*, 4 Camp. 194; *Drinkwater v. Goodwin*, Cowp. 251.

And the same principle holds good in a suit for damages for breach of contract. *Groover v. Warfield*, 50 Ga. 644. Or in a suit for trespass and tort committed on the goods while in his hands. Story on Agency, § 401 a. Wharton on Agency, § 755. *United States v. Villalonga*, 90 U. S. 35.

A factor may maintain trover or replevin where the goods are unlawfully taken from him. *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; s. c., 35 Am. Dec. 607; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *Villalonga v. U. S.*, 8 Ct. of Cl. 452.

Where a suit is brought by a factor on a contract made by him in the name of his principal, the defendant may avail himself of any defence he may have been entitled to had the suit been brought by the principal. *Atkins v. Ambler*, 2 Esp. 493.

But no set-off of a debt due the buyer from the principal can be allowed so as to defeat the factor's lien. The factor can recover to the extent of the lien in spite of the set-off. *Drinkwater v. Goodwin*, Cowp. 256.

The factor must, however, give the purchaser notice of his lien before the right of set-off attaches. Story on Agency, § 407; *Drinkwater v. Goodwin*, Cowp. 251; *Atkins v. Amber*, 2 Esp. 493; *Coppin v. Walker*, 7 Taunt. 237.

In a suit by the principal for the purchase-money for goods sold in his name, a debt from the factor to the vendee cannot be set off unless the factor had been held out as principal. *Guy v. Oakley*, 13 Johns. (N. Y.) 331; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Browne v. Robinson*, 2 Cal. Cas. (N. Y.) 341; *Gordon v. Church*, 2 Cal. Cas. (N. Y.) 299; *Miller v. Lea*, 35 Md. 396; s. c., 6 Am. Rep. 417; *Merrick's Estate*, 5 W. & S. (Pa.) 9.

Although an undisclosed principal may maintain an action in his own name against one who has purchased his goods through a factor, yet the purchaser is entitled to all the equities and defences he would have had if the action had been brought in the name of the factor, where the principal has permitted his factor to act as the apparent principal in the transaction. *Roosevelt v. Doherty*, 129

**Factors of Foreign Principals.**—It has sometimes been said that a sale is made by a factor for a foreign principal the latter cannot sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the act. But the later and better opinion is that there is no such presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by the factor, as it is made affirmatively to appear that exclusive credit was given to the agent by proof other than the mere fact that the principal resided in another State or country.<sup>1</sup>

1801; s. c., 37 Am. Rep. 356; *Hunt v. Knox*, 7 Cush. (Mass.) 371; *Page*, 10 Gray (Mass.) 398; *Lewis* 124 Mass. 1, 7; *Parker v. Aldson*, 2 W. & S. (Pa.) 9; *Gardner*, 6 Ala. 187.

If the purchaser had reason to believe that the factor acted for a principal, and he knew that they were generally acting as commission merchants, no set-off can be set off on a suit by the principal for the purchase-money. *Lea*, 35 Md. 396; s. c., 6 Am. Rep. 17; *Ladd v. Arkell*, 40 N. Y. Ct. 150; *Stewart v. Woodward*, 183.

If one buys from a factor under the apprehension that he was a principal in the transaction, which misapprehension was not brought about by the factor, no such set-off will be allowed. *Morris*, 83 N. Car. 251.

A well-established rule of law that a factor creates a contract between the owner and the purchaser. If the purchaser pays the factor for goods so sold, such payment will discharge the purchaser from the demand of the owner, unless the latter had formerly paid the factor; but if the purchaser pays the owner, in accordance with the wishes and against the advice of the factor, such payment will be binding. *Golden v. Levy*, 1 Car. L. Repos. 527; s. c., 6 Am. Dec. 555; *Munson*, 7 Mass. 319; s. c., 5 Am. Dec. 47.

A factor cannot by settling with his principal avoid a liability to a third party for expenses incurred in forwarding the goods. *Johnson v. McCampbell*, 6 Baxt. 294.

A factor buying in his own name for an undisclosed principal makes himself personally liable, and this although the principal supposes the purchaser is acting for him. It is not sufficient to clear the

factor from liability that the seller has the means of ascertaining the name of the principal; he must have actual knowledge. *Cobb v. Knapp*, 71 N. Y. 348; *Raymond v. Crown and Eagle Mills*, 2 Metc. (Mass.) 319; *Nixon v. Downey*, 49 Iowa, 166; *Baldwin v. Leonard*, 39 Vt. 260; *Gillot v. Offor*, 18 C. B. 913.

The principal when discovered may, however, also be held liable. *Pentz v. Stanton*, 10 Wend. (N. Y.) 271; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *McGraw v. Godfrey*, 14 Abb. Pr. N. S. (N. Y.) 397; *Raymond v. Crown and Eagle Mills*, 2 Metc. (Mass.) 319.

A principal is not liable to the seller for goods bought by his factor, in the factor's own name, where he has paid the price to the factor. *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449.

A third party dealing with the factor may estop himself from using his remedy against the principal, as where he takes the factor's individual note, or where he in any other way indicates that he will look to the factor exclusively. *Paige v. Stone*, 10 Metc. (Mass.) 160; *Trench v. Price*, 24 Pick. (Mass.) 13.

Draft by consignor on his consignee for sum payable to third persons out of the proceeds of the goods when sold is a specific appropriation to the use of the latter, and binds the consignee to retain so much of the proceeds as is necessary to meet the draft; and the obligation of the consignee to the payee is not discharged by failure of the payee to present the draft for payment for several months, and an agreement in the meantime between the consignor and consignee for a new appropriation of the fund for the benefit of the latter. *Lowery v. Steward*, 25 N. Y. 239; s. c., 82 Am. Dec. 346.

1. *Barry v. Page*, 10 Gray (Mass.), 398; *Bray v. Kettell*, 1 Allen (Mass.), 80; *New Castle Mfg. Co. v. Red River R.*

**6. Rights of Principals.—Principal May Follow his Goods as Long as They Can be Distinguished**—Where a principal can trace his property into the hands of a factor, whether it be the identical article which first came to his hands, or other property purchased for the principal by the factor with the proceeds, he may follow it either into the hands of the factor or of his legal representatives, or of his assignees, if he should become insolvent, unless such representatives or assignees should pay away the same before notice of the claim of the principal.<sup>1</sup>

Co., 1 Rob. (La.) 145; s. c., 36 Am. Dec. 686; *McKenzie v. Nevins*, 22 Me. 138; s. c., 38 Am. Dec. 291; *Rogers v. March*, 33 Me. 106; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Oelricks v. Ford*, 23 How. (U. S.) 49, 65; *Green v. Kopke*, 36 Eng. L. & Eq. 396.

See vol. i, p. 404.

1. *Veil v. Mitchell*, 4 Wash. (U. S.) 105; *Thompson v. Perkins*, 3 Mason (U. S.), 232; *Warner v. Martin*, 11 How. (U. S.) 209; *Hourquebie v. Girard*, 2 Wash. (U. S.) 212; *Price v. Ralston*, 2 Dallas (Pa.), 60; s. c., 1 Am. Dec. 260; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7; s. c., 16 Am. Dec. 367; *Kelley v. Munson*, 7 Mass. 319; *Holly v. Huggefurd*, 8 Pick. (Mass.) 73; s. c., 19 Am. Dec. 303; *Blackman v. Green*, 24 Vt. 17; *Potter v. Denison*, 10 Ill. 590; *Fahnestock v. Bailey*, 3 Metc. (Ky.) 48; s. c., 77 Am. Dec. 161; *Beach v. Forsyth*, 14 Barb. (N. Y.) 499; *Benny v. Rhodes*, 18 Mo. 147; *Benny v. Pegram*, 18 Mo. 191.

A principal consigned wheat for sale to his factor, who accepted a draft against it. The factor sold the wheat and lent the money to S., who promised to return it before the draft was due. The draft was not paid. *Held*, that the principal could recover the money from S., as the proceeds of the wheat belonged to him until the draft was paid. *Sheffer v. Montgomery*, 65 Pa. St. 329. See *Farmers', etc., Bank v. King*, 57 Pa. St. 202; *Pitts v. Mower*, 18 Me. 361.

If the goods are in the factor's hands so as to make it appear that they were his property, the principal may lose the goods. *Hamilton v. Bell*, 10 Exch. 545; *Livesay v. Hood*, 2 Camp. 83; *Shaw v. Harvey*, 1 Ad. & El. 920.

Where a factor keeps the funds arising from his business, as such, separate from his individual funds, by depositing in bank, to a separate "brokerage account," the drafts received for goods sold for his customers, the fact that these drafts include his commissions on such sales is

not such a mingling of his own with the trust fund as will prevent the owner of the goods sold from following the fund, nor such as will enable the factor's general creditors to reach it by attachment. *Richardson v. St. Louis National Bank*, 10 Mo. App. 246.

The relation between a commission agent for the sale of goods and his principal is fiduciary; and, in the absence of an express agreement or one implied by the course of business or dealing between them, giving the former the right to appropriate to his own use the proceeds of sales of his principal's goods, such proceeds belong to the principal, subject to the lien of the agent for commissions, advances, and other charges, and the principal may follow and reclaim them so long as the identity is not lost, subject to the rights of a *bona fide* purchaser for value. Where a firm of commission-merchants, which was insolvent, for the purpose of protecting its principals, opened a bank account in the name of the firm, with the word "agent" added, the bank having knowledge of such purpose, and deposited to the credit of that account the proceeds of sales of goods of a principal, and upon settlement gave to him a check for the balance belonging to him; *held*, that the bank had no right to charge against the account an individual debt of the firm, even with its consent; that the right of the principal was not affected by the fact that the agents used the specific proceeds of the sales and deposited other moneys to make up the amount so used; that such deposits, being substituted for the original proceeds, became impressed with the trust, and subject to the same equities. Also *held*, it was immaterial that the proceeds of sales of goods belonging to other principals were deposited in the same account; that, in the absence of proof to the contrary, the presumption was that the fund was adequate to protect all interests, and the check operated as a setting apart of so much to satisfy the claim of the principal.

**Factor of Several Principals.**—A factor may sell the goods of several principals in one sale, and has authority to take a note for the whole sum from the purchaser, and may hold the note for the benefit of his principals.<sup>1</sup>

**General Agent.**—A factor known as such is a general agent, and consequently his principal is bound by any contract he may make in the name in the line of his business, even where he violates his instructions.<sup>2</sup>

whom it was delivered. *Baker v. Nat. Exch. Bank*, 100 N. Y. 31; *Ex. Lewis*, 14 Bankr. Reg. 543.

Where a factor becomes bankrupt the principal may recover his goods when unsold, or when sold, if the proceeds are deposited in other goods which can be discovered, or where the proceeds are kept separate from the goods of the factor, as where they are deposited in a separate bank account, or in separate bags. As long as the goods or proceeds can be discovered, they may be recovered by the principal. *Scott v. Boardman*, Willes, 400; *Hall v. Boardman*, 4 N. H. 38; *Price v. Ralston*, 2 U. S. 60; *Denston v. Perkins*, 2 Mass. 86; *Chesterfield Mfg. v. Pick*, (Mass.) 7.

The right of the principal to recover the goods or the proceeds is, however, lost if they cannot be traced. In such case the factor becomes personally liable. *Ward v. Brandt*, 11 Martin 31; s. c., 13 Am. Dec. 352.

Where an act of selling goods, obtained by an unauthorized agent, with no notice of the principal's title, will render a factor liable for a conversion. *Roach v. Turk*, 9 Heisk. (Tenn.)

*Roosevelt v. Doherty*, 129 Mass. 37; s. c., 37 Am. Rep. 356; *Goodenow v. Debon*, 5 Pick. (Mass.) 7; *Weston Manuf. Co. v. Searle*, 15 Pick. 225; *Hapgood v. Batcheller*, 4 Mass. 573; *Hamilton v. Cunningham Brock*, (U. S.) 350; *Corlies v. Cummings*, 6 Cow. (N. Y.) 181, *Beawes* (5th Ed.) 45.

A factor may sell his own goods with those of his principal, and take a note which includes the amount due for both. *Good v. Batcheller*, 4 Metc. 573.

Where a factor under an entire contract for a gross sum sells goods, some of which belong to himself and some to his principal, the principal cannot maintain an action against the purchaser for the value of his goods. *Roosevelt v. Doherty*, 129 Mass. 37; s. c., 37 Am. Rep. 356.

But where he takes in payment one note for the whole payable to himself, he will not *per se* render himself liable. Each principal is left to his own remedy against the debtor in cases where the note does not work as an extinguishment of the debt. *Corlies v. Cummings*, 6 Cow. (N. Y.) 181.

And even in cases where the original indebtedness is merged in the note, the relation of the factor and the principal is not changed. *Goodenow v. Tyler*, 7 Mass. 36.

The principal's goods in the hands of a factor are not subject to attachment for the factor's debts, even where he sells his own goods in connection with the goods of his principal. *Whitfield v. Brand*, 16 M. & W. 282; *Carruthers v. Payne*, 2 M. & P. 441.

Where according to a custom of trade the factor took one note in payment of goods belonging to several principals, and discounted it for the benefit of his principals, it was held that by this act he made himself personally liable. *Johnson v. O'Hara*, 5 Leigh (Va.), 456.

2. Story on Agency, § 131; *Lobdell v. Baker*, 1 Metc. (Mass.) 193; s. c., 35 Am. Dec. 358; *Daylight Burner Co. v. Odlin*, 51 N. H. 56; s. c., 12 Am. Rep. 45; *Dias v. Chickering*, 64 Md. 348; *Higgins v. McCrea*, 6 Supr. Ct. Repr. 557.

But a person dealing with a factor or broker is bound to know that by law a factor or broker, although a general agent, is not clothed with authority to pledge, deposit, or transfer the property of his principal for his own debts; and if he receives such a deposit or pledge the title is invalid, and the property may be reclaimed by the principal. And in such a case it is wholly immaterial whether the pledgee knew that the party with whom he was dealing was a factor or broker, or not. Story on Agency, § 225; *Kauffman v. Heasley*, 54 Tex. 563; *Muller v. Pondir*, 6 Lans. (N. Y.) 472.



**COMMON.**—1. A profit which a man has in the land of another; as to feed his beasts, catch fish, dig turf, cut wood, or the like. It is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers. It may also be either appendant, appurtenant, or in gross.<sup>1</sup>

2. Belonging equally to more than one;<sup>2</sup> public,<sup>3</sup> ordinary.

1. 2 Bla. Com. 32. Commons are little known in the United States, though there are some regulations and decisions on the subject. 1 Bouv. Inst. 1644. There are a few instances in this country of true commons, where the right to the profits of certain public or proprietary land was vested in the inhabitants of a certain town or city. The law on the subject of these rights, which is only of little more than antiquarian or local interest and value, will be found in the following cases: *Van Rensselaer v. Radcliffe*, 10 Wend. (N. Y.) 639; *Watts v. Coffin*, 11 Ins. (N. Y.) 495; *Leyman v. Abeel*, 16 Ins. (N. Y.) 30; *Livingston v. Ten Broeck*, 16 Ins. (N. Y.) 14; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Westn. Univ. v. Robinson*, 12 S. & R. (Pa.) 29; *Carr v. Wallace*, 7 Watts (Pa.), 394; *Bell v. O. & Pa. R. Co.*, 25 Pa. St. 161; *Alleghany v. O. & Pa. R. Co.*, 26 Pa. St. 355; *Thomas v. Marshfield*, 10 Pick. (Mass.) 364.

In many cities and towns of Massachusetts there were set apart at their foundation tracks of land for the general use of the inhabitants, which were variously called "commons," "common lands," "general fields," the title to which was a joint one in the inhabitants or proprietors. *Rogers v. Goodman*, 2 Mass. 475; *Marshfield v. Hawkes*, 14 Mass. 440; *Folger v. Mitchell*, 3 Pick. (Mass.) 396.

In *White v. Smith*, 37 Mich. 291, "common" was said to be land in a town or city belonging or dedicated to the public.

The term is also applied to the common fields of the French and Spanish villages of the Louisiana Territory. "The inhabitants of Upper Louisiana resided in villages almost exclusively and cultivated common fields, enclosed by only one fence; each person who cultivated the soil having assigned to him by the syndic of the town a certain portion of land to cultivate." These common fields were confirmed to the villages by act of Congress June 13 1812. See, in reference to them, *Mackey v. Dillon*, 7 Mo. 7; *Swartz v. Page*, 13 Mo. 603; *Robbins v. Eckler*, 36 Mo. 494; *Harrison v. Page*,

16 Mo. 182; *State v. McReynolds*, 61 Mo. 210; *Fair v. Pub., Schl.*, 39 Mo. 59; *Vasquez v. Ewing*, 42 Mo. 247; *Chouteau v. Eckhart*, 2 How. (U. S.) 344; *Mackay v. Dillon*, 4 How. (U. S.) 421; *Carondelet v. St. Louis*, 1 Blk. (U. S.) 179; *Glasgow v. Horitz*, 1 Blk. (U. S.) 595; *Dent v. Emmeger*, 14 Wall. (U. S.) 358; *Lovell v. Strobel*, 89 Ill. 370; *Hops v. Hewitt*, 97 Ill. 498.

2. "Common control," in the first section of the act of Congress Feb. 4, 1887, to regulate commerce, means "a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one." *Ex parte Koehler*, 30 Feb. Rep. 870.

3. A "common gaming table" was held to mean a public gaming table, in *U. S. v. Smith*, 4 Cr. C. C. 635.

**Common School.**—A public school, a free school; one not confined to a class, but open to all in a certain locality. *Le Conteulx v. Buffalo*, 33 N. Y. 333; *Jenkins v. Andover*, 103 Mass. 94; *Roach v. The Board*, 7 Mo. App. 567. "They are supported by general taxation, are open to all, free of expense, and are under the immediate control and superintendence of agents of each town and city." *Merrick v. Inhab. of Amherst* 12 Allen (Mass.), 508. A Roman Catholic orphan's asylum is not a common school. *People v. Bradford*, 13 Barb. (N. Y.) 400.

"Common" in this connection is said to have no reference to the studies to be taught. *Roach v. The Board*, 7 Mo. App. 567. On the other hand, it is held that common school has a well-settled signification, and is never applied to higher seminaries of learning, such as incorporated academies and colleges. *Merrick v. Inhab. of Amherst*, 12 Allen (Mass.), 508. "Without being able to give any accurate definition of a 'common school,' it is safe to say that common understanding is, it is a school that begins with the rudimental elements of an education, whatever else it may embrace, as contradistinguished from academies and universities devoted exclusively to teaching advanced pupils in the classics, and in all

habitual.<sup>1</sup>

**COMMON LAW.**—The common law includes those principles, and rules of action applicable to the government and of person and property, which do not rest for their authority upon any express and positive declaration of the will of legislature.<sup>2</sup>

branches of study usually in the curriculum of the colleges." Board of Education, 97 Ill. 378. These are used with this meaning in session "common-school educa-

**Sewer.**—A sewer laid by a city only to carry off sewage from streets and houses, but also to divert the flow of a brook, is a common sewer within the provisions of a charter authorizing the city to lay such. *Bennett v. City of Boston*, 110 Mass. 434.

The word is used in this sense in many phrases as common barrator, common drunkard, common gambler, common seller of intoxicating liquors, and common thief, which see the articles on the phrases to which they correspond. A common thief is one who has been convicted of larceny. What shall constitute a common thief is defined by statute. In *Massachusetts* every person who shall be convicted of larceny shall be considered a common thief. In *Hoggett v. Commonwealth*, 3 Metc. 1. In *v. Hope*, 22 Pick. 1. A similar definition is given to "common utterer of counterfeit coin." *Murray v. Commonwealth*, 13 Mass. 516; 4 Bl. Com. 100. In the term "common thief" has a meaning similar to the other parallel terms enumerated above. A former conviction is not necessary to constitute this; the act only requires that the thief shall be habitually and by practice a thief. *World v. State*, 50 Md. 49.

**Assurances.**—The legal evidence of the translation of property, by which every person's estate is assured and all controversies, doubts, and questions are either prevented or removed. There are of four kinds: by matter of deed, by matter of record, by custom, by devise. *Whar. L. L.*; 200.

An instrument whereby A acknowledged the receipt from B of four bushels of rye, to be sown, for which he was to turn four and one half bushels, and sell the crop without the restriction that B should be paid out of it, is an assurance within an act punishing

the unlawful or malicious tearing of such. *State v. Farraud*, 3 Halst. (N. J.) 353.

**Common Labor**, in acts forbidding secular work on Sunday, means habitual or usual employment. *Cincinnati v. Rice*, 15 Ohio, 225; *Voglesong v. State*, 9 Ind. 112; *Foltz v. State*, 33 Ind. 215. The simple making of a contract is not common labor. *Horacek v. Keebler*, 5 Neb. 355; *Bloom v. Richards*, 2 Ohio, St. 368; *Johnson v. Brown*, 13 Kan. 529. Nor is gaming. *State v. Conger*, 14 Ind. 396.

**Common Pleas.**—All civil actions between subject and subject. 3 Bl. Com. 40. Such as are brought by private persons against private persons, or by the government where the cause of action is of a civil nature. *Dallett v. Feltus*, 7 Phila. (Pa.) 628.

**Common Proceeding**, in an act defining a civil action as "a common proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong," means "that kind of proceeding which is instituted and conducted in a manner common to other civil actions." *Brown v. Crego*, 29 Iowa, 323.

**Common Tools** of a debtor, which are by statute exempt from levy and sale on execution, do not include a lawyer's library. *Lenoir v. Weeks*, 20 Ga. 596.

§. 1 Kent's Com. 533.

A system of elementary principles and of general judicial truths which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce and the mechanic arts, and the exigencies and usages of the country. *Peirce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227; s. c., 14 Am. Rep. 667.

**State Courts.**—In the several States of the Union the term "common law" means both the common law of England as opposed to written or statute law and the statutes passed before the emigration of the first settlers of America. *Patterson v. Winn*, 5 Pet. (U. S.) 241; *Commonwealth v. Leach*, 1 Mass. 61; *Coburn v. Harvey*, 18 Wis. 147; *O'Ferrall v.*

**Definition.**

**COMMON LAW.**

**Definition.**

Simplott, 4 Iowa, 341; *Powell v. Brandon*, 24 Miss. 343; *State v. Cummings*, 33 Conn. 260.

The common law constitutes the basis of the State jurisprudence except as modified by statute. *Van Maren v. Johnson*, 15 Col. 308; *Bogardus v. Trinity Church*, 4 Paige (N. Y.), 178; *Horton v. Sledge*, 29 Ala. 478; *Sibley v. Williams*, 3 Gill & J. (Md.) 62; *Card v. Grimman*, 5 Conn. 168. But only so far as it conforms or is applicable to our institutions and form of government. *Boyer v. Sweet*, 3 Scam. (Ill.) 120; *Middleton v. Pritchard*, 3 Scam. (Ill.) 510; *Lindsley v. Coats*, 1 Ohio, 245; *Barlow v. Lambert*, 28 Ala. 704; *Wagner v. Bissell*, 3 Iowa, 396; *Stout v. Keyes*, 2 Dougl. (Mich.) 184; *Morgan v. King*, 30 Barb. (N. Y.) 9.

All the States except *Louisiana* have in some form or other adopted the common law. *Sawyer v. E. Steamboat Co.*, 46 Me. 400. In *Illinois*, *Indiana*, *Ohio*, *Iowa*, and *Nevada* by statute. *O'Ferrall v. Simplott*, 4 Iowa, 381; *State v. Two-good*, 7 Iowa, 252; *Hamilton v. Kneeland*, 1 Nev. 40; *Crawford v. Chapman*, 17 Ohio, 452; *Dawson v. Coffman*, 23 Ind. 220; *Fisher v. Deering*, 60 Ill. 114. The statute in *Ohio* was subsequently repealed. In *California* and *Tennessee* the courts have held that the common law governs, and that rules created by the English law since its adoption are to be disregarded. *Porter v. State*, Mart. & Yerg. (Tenn.) 226; *Johnson v. Fall*, 6 Cal. 359.

Whatever of the common law was brought over by the colonists, such statutes passed since the emigration since adopted in practice and such usages as probably originated from laws of the colonial legislature constitute the common law of *Massachusetts* except as changed by statute. *Commonwealth v. Knowlton*, 2 Mass. 530.

The courts of this country are bound to enforce all the clearly established principles of the common law not repealed by statute. *Powell v. Brandon*, 24 Miss. 343.

**Federal Courts.**—The courts of the United States conform to the law of the States where they are situated. *People v. Folsom*, 5 Cal. 374. A Federal court will look to the State where the controversy originated in deciding upon the assertion of a common-law right. *Wheaton v. Peters*, 8 Pet. (U. S.) 658; *Kendall v. United States*, 12 Pet. (U. S.) 524; *Lorman v. Clarke*, 2 McLean (U. S. C. C.), 568.

The Seventh Amendment to the con-

stitution refers to the common law of England, and is used in distinction from equity or admiralty jurisdiction. *Parsons v. Bedford*, 3 Pet. (U. S.) 446; *U. S. v. Wanson*, 1 Gall. (U. S.) 20.

**English Common Law.**—Generally the English common law as used in the United States comprises the immemorial customs declared by the courts and particular local customs; the law merchant, or that part not defined by statute and the canon and ecclesiastical law. *Eddie v. East India Co.*, 2 Burr. 1216; *Barnett v. Brandão*, 6 Man. & Gr. 630; *Cook v. Renick*, 19 Ill. 598; *Donegan v. Wood*, 49 Ala. 242; *Crump v. Morgan*, 3 Ired. Eq. (N. Car.) 9; *Le Barron v. Le Barron*, 35 Vt. 365.

**Scope.**—The common law develops new principles and extends old ones by analogy, so adapting itself to changes in times and circumstances. *Jacob v. State*, 3 Humph. 493; *Hightower v. Fitzpatrick's Heirs*, 42 Ala. 597.

**Presumed Existence.**—Unless the contrary is proved, the common law is presumed to exist in the original colonial States. *Brown v. Pratt*, 3 Jones Eq. (N. Car.) 202; *Stokes v. Maken*, 62 Barb. (N. Y.) 145; *White v. Knapp*, 47 Barb. (N. Y.) 549; *Crouch v. Hall*, 15 Ill. 263; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Walker v. Walker*, 41 Ala. 353; *Thompson v. Monrow*, 2 Cal. 99; *Shepherd v. Nabors*, 6 Ala. 631. So, too, of States the population of which has been formed by emigration from the original States.

*Louisiana*, *Florida*, and *Texas* are accordingly exceptions. *Norris v. Harris*, 15 Cal. 226.

**Permanency.**—The common law, as established by decisions of courts, has the force of the law of the land, and cannot be changed by subsequent rulings, and even when wrongly applied, if rights have vested under such decisions, they will be sustained. *Henry v. Bank of Salina*, 5 Hill (N. Y.) 535; *Sydnor v. Gascoigne*, 11 Tex. 449; *Lamp v. Hastings*, 4 Greene (Iowa), 448; *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis. 351; *N. Y., etc., R. Co. v. Ketchum*, 34 How. (N. Y.) 302; *Thomason v. Dill*, 34 Ala. 175; *Gray v. Gray*, 34 Ga. 449; *Barn v. Wick*, 6 Ohio St. 13; *Dugan v. Hollins*, 13 Md. 149.

While statutes which vary the common law take precedence over it in the decision of a case, no repeal of any established rule at the common law can be made by implication merely. *Goodwin v. Thompson*, 2 G. Gr. 329. So all acts altering or making any innovation on the common law must be strictly construed. *Hooper v. Mayor of Baltimore*, 12 Md.

**Definition.****COMMUNICATE—COMMUNITY.****Definition.**

**COMMUNICATE.**—To impart mediately or immediately;<sup>1</sup> to converse.<sup>2</sup>

**COMMUNICATION.**—That which is communicated or imparted.<sup>3</sup>

**COMMUNITY.**—A society of people living in the same place, under the same laws and regulations, and who have common rights and privileges.<sup>4</sup>

464; *Keech v. Baltimore & Wabash R. Co.*, 17 Md. 82. When, however, the legal intendment of the legislature appears plainly and obviously in contradiction to the common law, the latter is done away with. *State v. McGrew*, 11 Iowa.

Unless made exclusive, the remedy provided by a statute is cumulative with one already existing at common law. *People v. Craycroft*, 2 Cal. 243; *Candee v. Hayward*, 37 N. Y. 653.

**Proof.**—Tradition, usage, reports, books of approved authority, furnish the proof of a rule at common law. *Commonwealth v. Churchill*, 2 Metc. (Mass.) 118. They are simply evidence, however, and must be clear and well established. *Robert v. West*, 15 Ga. 122; *State v. Buchanan*, 5 H. & J. (Md.) 358.

The rule of the common law once determined, the courts will take judicial notice of its introduction to this country and to the original States, except as modified by statute, and that it was put in force in the Northwest Territories by the ordinances of 1787. Statutes changing it are, however, under the same rule as all other statutes. *Johnson v. Chambers*, 12 Ind. 102.

For a fuller discussion of this subject, see *Wait's Actions and Defences*, vol. ii., p. 276.

1. Under a statute which makes a railroad company liable for any injury done to any building or other property by fire communicated by a locomotive engine, the liability of the railroad is not confined to cases where the very particles of fire which fall upon and kindle the flame in the building injured emanate directly from the engine, without the intervention of any other object; it includes all injury resulting from fire, originating in the engine and extending by natural and ordinary means. *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99; *Perley v. Eastern R. Co.*, 98 Mass. 418; *Safford v. B. & M. R. Co.*, 103 Mass. 584.

2. A law requiring the officers in charge of a jury to be sworn not to *communicate* with the jurors nor to permit any one else to communicate with them, is sufficiently complied with where the officers are sworn not to *converse* with the jurors, etc. *Scott v. State*, 7 Lea (Tenn.), 232.

3. Webster.

Under a statute making it a misdemeanor to send an indecent letter and communication to a female, an indictment for sending an indecent letter or communication is not bad. "There is nothing incongruous or inconsistent in describing it as a letter and communication, for it was both." *Lorison v. State*, 9 Atl. Rep. (N. J.) 700.

A question, contained in interrogatories for the deposition of a witness outside the State, whether he had had any communications with the defendant on the subject-matter of the deposition, and if so what communications, does not include the ground covered by a second question, whether he had received or seen any letters respecting the same matter, and if so, what were their contents. The terms "communications" and "letters" did not mean the same thing. *Amherst Bank v. Conkey*, 4 Metc. (Mass.) 459.

4. Wharton's Law Lexicon.

**Confidence of the Community.**—A physician of a country village in an agreement transferring his practice and goodwill to another physician for a certain sum, stipulated "that no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless the purchaser should commit some act which shall forfeit to him the confidence of the community." *Held*, that the agreement was not too uncertain and insensible to support an action. "The 'community,'" said the court, "by forfeiting whose confidence the plaintiff was to lose his right to recover against the defendant, interpreted according to the subject-matter, would probably be held to be the population residing in the village and its vicinity, among which the defendant practised his profession at the time of his contract with the plaintiff. Conduct on the part of the plaintiff, which should lead to a forfeiture of the confidence of the community in him, might reasonably be construed to be incompetency, immorality, or acts of such a nature as to induce reasonable persons to forbear employing him in the practice of his profession." *Gilman v. Dwight*, 13 Gray (Mass.), 356, 359.

**COMMUNITY PROPERTY.** (See also HUSBAND AND WIFE).*Definition and Characteristics*, 350.*Origin and History*, 354.*Presumptions*, 354.*Rights, Powers, and Liabilities of the Husband*, 357.*Rights, Powers, and Liabilities of the**Wife*, 360.*Rights, Powers, and Liabilities of the Survivor*, 361.*Rights of the Heirs*, 363.*Rights of Creditors*, 364.

**1. Definition and Characteristics.**—Community property includes the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly with them both, or by purchases, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.<sup>1</sup> Conventional community is that which is formed by express agreement in the contract by marriage.<sup>2</sup> Legal community is that which, in the absence of any agreement, exists by force of law as soon as the marriage relation is established.<sup>3</sup> The central idea of the community system

1. *Clark v. Norwood*, 12 La. Ann. 598.

2. La. Civ. Code, 2393.

3. Abb. L. Dict. 255.

**What Is and What Is Not Community Property.**—All property acquired by the husband or wife during marriage is community property. *Hames v. Castro*, 5 Cal. 109; *Buchanan's Estate*, 8 Cal. 507; *Johnson v. Johnson*, 11 Cal. 200; *Tustin v. Fought*, 23 Cal. 237; *Johns v. Race*, 18 La. Ann. 105; *Succession of Fortin*, 10 La. Ann. 739; *City Ins. Co. v. The Lizzie Simmons*, 19 La. Ann. 249; *T. C. Ry. Co. v. Burnett*, 61 Tex. 638; *Durham v. Williams*, 32 La. Ann. 162; *Chapman v. Woodward*, 16 La. Ann. 167; *Fitzpatrick v. Pope*, 39 Tex. 315; *Parker v. Chance*, 11 Tex. 513.

The increase of animals belongs to the community. *Bonner v. Gill*, 5 La. Ann. 629; *Howard v. York*, 20 Tex. 670; *Bateman v. Bateman*, 25 Tex. 270.

Property purchased during marriage, whether by the husband or wife, is community property, and not the separate estate of the purchaser, unless made with separate funds. *Cox v. Miller*, 54 Tex. 16. See also *Althof v. Conheim*, 38 Cal. 230; *S. P. Martin*, 52 Cal. 235; *Hussey v. Castle*, 41 Cal. 239; *Peck v. Brummagim*, 31 Cal. 440; *Ewald v. Corbett*, 32 Cal. 493; *Buchanan's Estate*, 8 Cal. 507; *Johnson v. Johnson*, 11 Cal. 201; *Smith v. Smith*, 12 Cal. 216; *Meyer v. Kinzer*, 12 Cal. 247; s. c., 73 Am. Dec. 539; *Tompkins v. Tompkins*, 12 Cal. 114;

*Pixley v. Huggins*, 15 Cal. 127; *Burton v. Lies*, 21 Cal. 87; *Adams v. Knowlton*, 22 Cal. 283; *Riley v. Pehl*, 23 Cal. 70; *Succession of Planchet*, 29 La. Ann. 520; *Repplyer v. Gow*, 1 La. 478; *Bostwick v. Gasquet*, 11 La. 537; *Ford v. Ford*, 1 La. 207; *Forbes v. Forbes*, 11 La. Ann. 326; *Webb v. Peck*, 7 La. Ann. 92; *Troxler v. Colley*, 33 La. Ann. 425; *Smalley v. Lawrence*, 9 Rob. 211; *Tally v. Heffner*, 29 La. Ann. 583; *Dees v. Seale*, 5 La. Ann. 688; *Chapman v. Allen*, 15 Tex. 278; *Love v. Robertson*, 7 Tex. 6; s. c., 56 Am. Dec. 41; *Lott v. Keach*, 5 Tex. 394; *Houston v. Civil*, 8 Tex. 240; *Gilliard v. Chessney*, 13 Tex. 337; *Zorn v. Barber*, 45 Tex. 519; *Wheat v. Owens*, 15 Tex. 243; *Story v. Marshall*, 24 Tex. 307; *Smith v. Boguet*, 27 Tex. 507; *Routh v. Routh*, 57 Tex. 589.

It is immaterial whether the property stands in the name of both of them. *Ramsdell v. Fuller*, 28 Cal. 37; *Tally v. Heffner*, 29 La. Ann. 583; *Huston v. Curl*, 8 Tex. 240. Or of the husband. *Buchanan v. Buchanan*, 8 Cal. 507; *Succession of Planchet*, 29 La. Ann. 520; *Hughey v. Barrow*, 4 La. Ann. 248; *Lacroix v. Derbigny*, 18 La. Ann. 27; *Le Blanc v. Le Blanc*, 20 La. Ann. 206; *Zimpelman v. Robb*, 53 Tex. 274. Or of the wife. *Pixley v. Huggins*, 15 Cal. 127; *Donald v. Badger*, 23 Cal. 393; *Riley v. Pehl*, 23 Cal. 70; *Mott v. Smith*, 16 Cal. 533; *Troxler v. Colley*, 33 La. Ann. 425; *Beigel v. Lange*, 19 La. Ann. 112; *Love*

*v. Robertson*, 7 Tex. 6; *Wells v. Cochran*, 13 Tex. 127.

The defendant before his marriage was in possession, without right, of a tract of land; and after his marriage he made a deed and gave up possession of a portion thereof to the rightful owners; and induced thereby, the owners conveyed the fee of a portion of said land to the defendant. *Held*, that the land thus acquired by the defendant was community property. *Pancoast v. Pancoast*, 57 Cal. 320.

Lands purchased in the name of the wife, and paid partly with her paraphernal funds under the administration of the husband, and partly with funds of the community, fall into the community. *Burns v. Thompson*, 1 Southern Rep'r (La.), 913.

It is not necessary to prove that property is in fact the product of the joint efforts of husband and wife, in order that it may be declared community estate. If it is acquired after marriage by efforts of the husband alone, but not by gift, devise, or descent, or by the exchange of his individual property, or from the rents, issues, and profits of his separate estate, it belongs to the community. *Lake v. Lake*, 4 Pac. Repr. (Nev.) 711.

Land purchased after the death of the wife and paid for with community funds becomes community property. The surviving husband and children hold as tenants in common. *McAlister v. Farley*, 39 Tex. 552.

A crop growing at the time of the dissolution of the marriage is community property. *Harrell v. Harrell*, 12 La. Ann. 549; *Wilcox v. Henderson*, 9 La. Ann. 347.

**Separate and Community Property Distinguished.**—No property acquired by the wife during coverture becomes her separate estate, except such as is derived by gift, devise, or descent; all acquired in any other manner is community property. *Ezell v. Dodson*, 60 Tex. 331.

In *California* property acquired after marriage becomes community property, unless it be acquired by gift, descent, devise, or bequest, or on the credit of the separate estate. *Schuyler v. Broughton*, 11 Pac. Rep. 719. But the rents, issues, and profits of the separate estate remain separate property. *Shumway v. Leakey*, 8 Pac. Rep. 12; *In re Higgins*, 4 Pac. Rep. 389.

Where a man purchased property at a partition sale, and paid for it by means of his heritable share, *held*, that it was his separate property, and that it did not become community as property acquired

during marriage. *Troxler v. Colley*, 33 La. Ann. 425. See also *Gravenberg v. Savoie*, 8 La. Ann. 499; *Morales v. Marigny*, 14 La. Ann. 855. Compare *Breaux v. Carmouche*, 15 La. Ann. 588.

Where a husband bought property during the community, paying for it with his separate funds under circumstances clearly showing an intention to buy for his separate account, *held*, that the property was his separate estate. *Young v. Young*, 5 La. Ann. 611. See *Bass v. Larche*, 7 La. Ann. 104.

If a wife desires to have separate property distinguished from community, or to make an exception to the rules which govern purchases during coverture, she should purchase herself, or through an agent, and in her own name. *Dees v. Seale*, 5 La. Ann. 688; *Squier v. Stockton*, 5 La. Ann. 742; *Shaw v. Hill*, 20 La. Ann. 531. See also *Stroud v. Humble*, 2 La. Ann. 930; *Ellis v. Rush*, 5 La. Ann. 116; *De Young v. De Young*, 6 La. Ann. 787; *Succession of Vanrensellaer*, 6 La. Ann. 803; *Metcalf v. Clark*, 8 La. Ann. 286; *Clark v. Norwood*, 12 La. Ann. 598; *Spalding v. Godard*, 15 La. Ann. 277; *Waterer v. Brumfield*, 25 La. Ann. 210; *Reid v. Rochereau*, 2 Woods, 151; *Denègre v. Denègre*, 30 La. Ann. Pt. I. 275; *Durham v. Williams*, 32 La. Ann. 162; *Troxler v. Colley*, 33 La. Ann. 425; *Merrick's Succession*, 35 La. Ann. 296; *McCay v. Boatner*, 22 La. Ann. 435; *Fisk v. Flores*, 43 Tex. 340; *McAfee v. Robertsson*, 43 Tex. 591; *Martin v. Martin*, 52 Cal. 235; *Lake v. Lake*, 52 Cal. 428; *Remington v. Higgins*, 54 Cal. 620; *Re Higgins*, 65 Cal. 407.

In *Texas* the increase of all separate property, except the "increase of lands," is community property. *Magee v. White*, 23 Tex. 191; *McIntyre v. Chappell*, 4 Tex. 187; *Love v. Robertson*, 7 Tex. 6; a. c., 56 Am. Dec. 41; *Cartwright v. Cartwright*, 18 Tex. 626; *De Blane v. Lynch*, 23 Tex. 25; *White v. Lynch*, 26 Tex. 195; *De Garca v. Galvan*, 55 Tex. 56; *Marx v. Lange*, 61 Tex. 547; *Braden v. Gose*, 57 Tex. 37. But see *Carr v. Tucker*, 42 Tex. 330.

For a discussion of the meaning of the term "increase of land," see *De Blane v. Lynch*, 23 Tex. 25; *Forbes v. Dunham*, 24 Tex. 612; *Portis v. Parker*, 22 Tex. 702; *Bateman v. Bateman*, 25 Tex. 270; *Carr v. Tucker*, 42 Tex. 337; *White v. Lynch*, 26 Tex. 195.

In *Smith v. Bailey*, 1 S. W. Repr. 627, the court said: "Several principles well settled by this court come to our aid in passing upon this question. First, the profits arising from an investment of a

married woman's property become the community estate of herself and husband. *Braden v. Gose*, 57 Tex. 41; *Green v. Ferguson*, 62 Tex. 529; *Epperson v. Jones*, 6 Tex. Law Rev. 86; *Cleveland v. Cole* (Galveston Term, 1886). Another principle, equally well settled, is that the wife's separate property may undergo mutations and changes, yet retain its separate character; but the proof to trace and identify it in its changed condition must be clear and satisfactory. *Love v. Robertson*, 7 Tex. 6; *Rose v. Houston*, 11 Tex. 326; *Chapman v. Allen*, 15 Tex. 278; *Philipowski v. Spencer*, 63 Tex. 604. It is also true that, to the extent that the wife's separate means enters into the purchase of other property, the latter is to be treated as her separate estate; and the same rules apply to the community property and the husband's separate estate." See also *Claiborne v. Tanner*, 18 Tex. 69; *Braden v. Gose*, 57 Tex. 37; *Parker v. Coop*, 60 Tex. 112; *Schuyler v. Broughton*, 11 Pac. Repr. (Cal.) 719.

Property purchased during coverture by a wife with the rents and profits of her separate estate are not subject to any marital rights of her husband. *Woffenden v. Charouleau*, 11 Pac. Repr. (Ariz.) 117.

Under the statute of 1865 the rents, issues, and profits of a married man's separate estate do not become common property with his wife. *Lake v. Lake*, 4 Pac. Repr. (Nev.) 711; *Lake v. Bender*, 18 Nev. 361.

In *California* the increase and profits of the separate estate of husband and wife are separate property. *George v. Ransom*, 15 Cal. 322; s. c., 76 Am. Dec. 490; *Lewis v. Johns*, 24 Cal. 629; s. c., 85 Am. Dec. 49; *Spear v. Ward*, 20 Cal. 674; *Marlow v. Barlew*, 53 Cal. 459; *Beaudry v. Felch*, 47 Cal. 183; *Smith v. Smith*, 12 Cal. 224; s. c., 73 Am. Dec. 533; *Est. of Higgins*, 65 Cal. 407. Compare *Lewis v. Lewis*, 18 Cal. 654.

Loans made to the wife upon the faith of her separate property are, in *California*, separate property. *Schuyler v. Broughton*, 11 Pac. Rep. (Cal.) 719.

But in *Texas* they are community property. *Heidenheimer v. McKeen*, 63 Tex. 229.

In *Louisiana* the increase of separate property becomes community property. *Fisher v. Gordy*, 2 La. Ann. 762; *Webb v. Peet*, 7 La. Ann. 92; *Glenn v. Elam*, 3 La. Ann. 611; *Werner v. Kelley*, 9 La. Ann. 60. But see *Waterer v. Brumfield*, 25 La. Ann. 210.

Where improvements are made on the separate estate of one of the spouses,

during coverture, the community can only be allowed the actual cost of the improvements, although the property may have increased in value. *Succession of McClelland*, 14 La. Ann. 762; *Depas v. Riez*, 2 La. Ann. 30; *Childers v. Johnson*, 6 La. Ann. 634; *Rice v. Rice*, 21 Tex. 58.

If the husband use his separate funds to benefit and enrich the community, it will constitute a debt of the community in favor of the husband or his succession to the amount of the fund used. *Denègre v. Denègre*, 30 La. Ann. Part I. 275; *Merrick's Succession*, 35 La. Ann. 296.

Where a man, before marriage, purchased real estate, which increased in value afterwards, and upon which community funds were expended, *held*, that it was separate property which could be disposed of by will, but that this separate estate could be charged with the community money expended on it. *Patton's Est.* Myr. Cal. 241. See also *Moore v. Stancet*, 36 La. Ann. 819.

Merchandise which was not acquired by the wife, either by gift, devise, or descent, nor by the exchange of property thus acquired, nor by money derived through the sale of property thus acquired, but which was purchased by the wife with money borrowed upon the faith of her separate property as security, is not the separate property of the wife, but the community property of the husband and wife. The transaction is not equivalent to an exchange of the wife's separate property for the merchandise. *Heidenheimer v. McKeen*, 63 Tex. 229.

A wife furnished her husband with a bale of hay raised on community land, and a sum of money, both of which she supposed were separate estate, to purchase a piano for their daughter. He purchased the instrument, paying therefor in cash nearly all the money he had so received on account, and drew a draft on his commission-merchant, to whom the bale of hay, with other hay, had been consigned, for the balance. About fifteen years before that, the wife had received quite a large sum of money from her father's estate, but there was no evidence that that which had been expended on account of the purchase of the piano was a portion of that identical money, nor was there any evidence to show from what particular source she derived it. The inference drawn from the facts was that it was the proceeds of property in which the money acquired by the death of her father had been invested, and which had become community property. Neither was there any evidence to show out of what specific

money the draft was paid. *Held*, that the piano was community property, and not the separate estate of the wife. *Connor v. Hawkins*, 2 S. W. Repr. (Tex.) 520.

The earnings of both husband and wife are community property. 61 Tex. 642; *Isaacson v. Mentz*, 33 La. Ann. 595; *Mehner v. Dietrich*, 36 La. Ann. 390; *Prennergast v. Cassidy*, 8 La. Ann. 96; *Ford v. Brooks*, 35 La. Ann. 157; *Fuller v. Ferguson*, 26 Cal. 547; *Meyer v. Kinzer*, 12 Cal. 252; s. c., 73 Am. Dec. 538. *Compare Marlow v. Barlew*, 53 Cal. 459; *Fisk v. Flores*, 43 Tex. 340.

If a wife purchases property with her earnings, it is community property, unless it is proven that the husband intended to give her the proceeds of her earnings; in such a case the property would be the separate property of the wife. *Johnson v. Burford*, 39 Tex. 242.

Where a husband took out a life-assurance policy in favor of his wife, *held*, that the proceeds do not become a part of the community, but belong exclusively to the wife and her heirs. Succession of *Bofenschen*, 29 La. Ann. 711. See also *Webb's Est. Myr. Cal.* 241.

**Public Lands.**—In *Hodge v. Donald*, 55 Tex. 344, the court said: "The policy of Texas has ever been to induce by grants of land both married and single men to immigrate and become citizens. In consonance with the objects sought, greater inducements have been held out to the former class, as shown by the increased amount of land given. Although the certificate or title, under the law, issued to the husband as the head of the family, yet in consideration of the joint toils, privations, and dangers undergone by the wife also, it has been repeatedly decided by this court that under our system it would constitute community property of the husband and wife, one half of which, charged with the debts of the community, would, on the death of the wife, descend to her children. *Yates v. Houston*, 3 Tex. 433; *Wilkinson v. Wilkinson*, 20 Tex. 237.

"This accords with the general policy of our law upon the subject of marital rights, and an exception to it should not be allowed unless the facts of the particular case clearly demand it. In some cases where the wife died soon after her arrival into Texas the subsequent grant to the husband has been held to be his separate property, and not community, as in *Webb v. Webb*, 15 Tex. 274.

"These cases will be found to be those in which the death of the wife occurred before there had been a sufficient compliance with the conditions upon which the

land was offered to have then entitled either the husband or the wife to demand it, upon equitable principles or under the terms of the law; and the subsequent grant to the husband was held to be his separate property, upon the ground that the consideration passed from him alone, and not from both him and the deceased wife. In other cases, in which the death of the wife occurred subsequently to a substantial compliance with the conditions upon which the grant was offered, it has been decided that it was community property. *Yates v. Houston*, 3 Tex. 433; *Wilkinson v. Wilkinson*, 20 Tex. 237.

"The true test, as we deduce from the authorities, is this: First, Did the surviving husband receive the grant by reason of such emigration, settlement, and residence on his own part as would under the law entitle him to it independent of his status as a married man at the date of his wife's death? If so, it was his separate property.

"Second, Was the increased quantity of land over that to which a single man, not the head of a family, was entitled, given to the surviving husband by reason of the fact that at the date of the death of the wife he was then a married man? If so, then it was community property, and the half interest of the wife subject to the debts of the community would descend to her children." See also *Rudd v. Johnson*, 60 Tex. 91; *Yates v. Houston*, 3 Tex. 433; *Manchaca v. Field*, 62 Tex. 135; *Allen v. Harper*, 19 Tex. 502; *Might v. McGinty*, 37 Tex. 733.

It has been decided that a Mexican-land grant is a gift, and therefore the separate property of the donee; for the conditions attached to the grants are held not to be onerous, because the money and labor are expended on the land itself, and exclusively for the benefit of the grantee. *Noe v. Card*, 14 Cal. 578; *Panaud v. Jones*, 1 Cal. 514; *Scott v. Ward*, 13 Cal. 459; *Fuller v. Ferguson*, 26 Cal. 547; *Wilson v. Castro*, 31 Cal. 120. See also *Hughey v. Barrow*, 4 La. Ann. 248; *Wilkinson v. American Iron Co.*, 20 Mo. 122.

Land granted by the republic to one because of his being a married man, was the community property of his wife and of himself, though the grant bore date after her death; one-half interest therein descended to her heirs, subject to the payment of community debts. *Caruth v. Grigsby*, 57 Tex. 259. See also *Burris v. Wideman*, 6 Tex. 232; *Parker v. Chance*, 11 Tex. 513; *Thomas v. Chance*, 11 Tex. 637; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Cannon v. Murphy*, 31 Tex.



is that marriage creates a partnership in property between husband and wife, and that all property resulting from the labor of both or either of them, and all property vesting in them or either of them except by gift, devise, bequest, or descent, inures to the benefit of both of them; and though community property has not all the incidents of partnership property, it has many of them, and is commonly spoken of as partnership property.<sup>1</sup>

**2. Origin and History.**—The doctrine of community property has its origin in the civil law, but those States and Territories which have adopted it took it directly from the old French, Spanish, or Mexican law.<sup>2</sup> The doctrine is at present recognized by statute in *California*,<sup>3</sup> *Louisiana*,<sup>4</sup> *Nevada*,<sup>5</sup> *Texas*,<sup>6</sup> and in *Arizona*,<sup>7</sup> *Idaho*,<sup>8</sup> *Montana*,<sup>9</sup> and *Washington*.<sup>10</sup> Territories. It formerly existed in *Missouri*.<sup>11</sup> The various statutes are to a large extent declaratory of previously existing law, and are construed alike in the several States.<sup>12</sup> These statutes take effect only in the absence of agreement between the parties, as they may establish the property rights by contract.<sup>13</sup>

**3. Presumptions.**—All property acquired during the existence of

405; *Wright v. McGinty*, 37 Tex. 733; *Carter v. Wise*, 39 Tex. 273; *Hodge v. Donald*, 55 Tex. 344; *Rudd v. Johnson*, 60 Tex. 91.

*Prima facie* an unconditional certificate is the separate property of him to whom it issued, the conditional certificate having issued to him as a single man. *Porter v. Burnett*, 60 Tex. 220. See also *Hodge v. Donald*, 55 Tex. 344.

Where a wife, before her marriage, was the holder of a pre-emption right to land, which she paid for with funds loaned her upon her personal faith and credit, and, after her marriage, a patent was issued to her by the United States, the patent relates back to the date of her entry; and in an action for divorce, and a moiety of the land, brought by the husband, the land will be adjudged the separate property of the wife, free from all claim, interest, or control of the husband. *Harris v. Harris*, 12 Pac. (Cal.) 274. See also *Simien v. Perrodin*, 35 La. Ann. 931; *Eslinger v. Eslinger*, 47 Cal. 62.

A warrant was issued to a man during marriage, which authorized him to enter public lands already offered for sale. He located it on lands which were partly occupied by his family. These lands were not offered for sale until after his wife's death. He afterward purchased other lands under pre-emption claims acquired during the life of the wife. *Held*, that the lands were not community, and a purchaser from the husband without notice is unaffected by the equitable claims

of the wife's heirs. *Sexton v. McGill*, La. Ann. 190.

1. *De Blane v. Lynch*, 23 Tex. 24; *Wilkinson v. Wilkinson*, 20 Tex. 24; *Cartwright v. Hollis*, 5 Tex. 163; *Johnson v. Jones*, 15 Tex. 143; *Woodley v. Adams*, 55 Tex. 526; *Panaud v. Jones*, 1 Cal. 514. Compare *Baird v. Lemee*, 23 La. Ann. 424.

2. *Buchanan's Estate*, 8 Cal. 507, 510; *Fuller v. Ferguson*, 26 Cal. 246; *Meyer v. Kinzer*, 12 Cal. 247; s. c., 73 Am. Dec. 439; *Packard v. Arellanes*, 17 Cal. 53; *Saul v. Creditors*, 5 Martin N. S. (La.) 569; s. c., 16 Am. Dec. 212; *Morales Marigny*, 14 La. Ann. 855; *Hall v. Hall*, 52 Tex. 298; *Burr v. Wilson*, 18 Tex. 370; *Edrington v. Mayfield*, 5 Tex. 36; *Hall v. Dotson*, 55 Tex. 522.

3. *Buchanan's Estate*, 8 Cal. 507, 520.

4. La. Civ. Code, 1875, § 2399 *et seq.*

5. Nevada C. L. 1873, § 151 *et seq.*

6. Texas R. S. 1879, §§ 1653, 1654, 2851, *et seq.*

7. *Stiles v. Lord*, 11 Pac. Repr. (Ariz.) 314.

8. *Ray v. Ray*, 1 Idaho N. S. 566.

9. Mon. Prob. C. 551.

10. *Holyoke v. Jackson*, 3 Pac. Repr. (Wash.) 841.

11. *Childress v. Cutler*, 16 Mo. 24, 40.

12. *Buchanan's Estate*, 8 Cal. 507.

13. *Marlow v. Barlow*, 53 Cal. 456; La. Civ. Code, 1878, § 2424; Nev. C. L. 1873, § 176; *Le Breton v. Miles*, 8 Page (N. Y.), 261; *Desobry v. Schlater*, 25 La. Ann. 425. Compare *Cox v. Miller*, Tex. 16; *Green v. Ferguson*, 62 Tex. 52.

community, and all property in the possession of either spouse during coverture, is presumed to be community property.<sup>1</sup> These presumptions may be rebutted, but it must be by clear and satisfactory evidence, and the burden of proof is upon the party alleging that the property is separate property.<sup>2</sup>

The court said in *Wallace v. Campbell*, 54 Tex. 87: "It has long been settled by this court that property acquired during coverture, by purchase or apparent title, whether the conveyance be in the name of the husband or wife, or will be presumed to be community property." See also *Cox v. Miller*, 54 Tex. 16; *Connor v. Hawkins*, 2 S. W. (Tex.) 500; *Johnson v. Burford*, 39 Tex. 42; *Chapman v. Allen*, 15 Tex. 278; *Wheeler*, 7 Tex. 20; *Lott v. L.*, 5 Tex. 394; *Huston v. Curl*, 8 Tex. 42, s. c., 58 Am. Dec. 110; *Gilliard v. Jessney*, 13 Tex. 337; *Claiborne v. L.*, 18 Tex. 69; *Cook v. Bremond*, 2 Tex. 457; *Yates v. Houston*, 3 Tex. 10; *Scott v. Maynard*, *Dallam*, 548; *Ell v. Marr*, 26 Tex. 329; *Allen v. L.*, 19 Tex. 502; *Veramendi v. L.*, 48 Tex. 531; *Browder v. L.*, 61 Tex. 587; *Smith v. Bailey*, 7 Tex. Repr. (Tex.) 627; *Smith v. Smith*, 11 Tex. 216; s. c., 73 Am. Dec. 533; *Ward*, 13 Cal. 471; *Tryon v. Sutcliffe*, 13 Cal. 483; *Burton v. Lies*, 21 Cal. 233; *Althof v. Conheim*, 38 Cal. 233; *L. v. Kinzer*, 12 Cal. 247; s. c., 73 Am. Dec. 538; *Pixley v. Huggins*, 15 Cal. 131; *Mott v. Smith*, 16 Cal. 533; *L. v. Ashenauer*, 17 Cal. 581; *Adams v. Bolton*, 22 Cal. 288; *McDonald v. L.*, 23 Cal. 398; *Ramsdell v. Fuller*, 24 Cal. 42; *Shuler v. Savings and Loan*, 1 W. Coast Repr. 125; *Johnson v. L.*, 11 Cal. 205; *Peck v. Vandenberg*, 30 Cal. 11; *Schuyler v. Broughton*, 11 Pac. Repr. 719; *Riley v. Pehl*, 23 Cal. 40; *Peck v. Brummagin*, 31 Cal. 40; *Alt v. Austin*, 36 Cal. 691; *Wedel v. L.*, 59 Cal. 507; *Smalley v. Law*, 9 Rob. (La.) 210; *Ford v. Ford*, 11 La. Ann. 9; *Bryan v. Moore*, 11 Mart. (La.) 13; 13 Am. Dec. 347; *Webb v. Peet*, 9 La. Ann. 9; *Bachino v. Coste*, 35 La. Ann. 570; *Moore v. Stancet*, 36 La. Ann. 290; *Dominguez v. Lee*, 17 La. Ann. 290; *L. v. Gordy*, 1 La. Ann. 763; *Davidson v. Stuart*, 10 La. Ann. 146; *Corneau v. L.*, 19 La. Ann. 406; *Provost v. Mahoussaye*, 5 La. Ann. 610; *Prenst v. Cassidy*, 8 La. Ann. 96; *Anderson v. Bradley*, 10 La. Ann. 606; *Forbes v. L.*, 11 La. Ann. 326; *Murphy v. L.*, 2 So. Repr. (La.) 575; *Burns v. L.*, 1 So. Repr. (La.) 913; *Hart*

*v. Gottwald*, 15 La. Ann. 13; *Lake v. Lake*, 4 West Coast Repr. (Nev.) 159; *Lemon v. Waterman*, 2 Wash. 485.

**Community Property.**—When the money which formed the consideration for the deed was money collected two years after marriage, due for services as a school-teacher performed by the wife, it will be presumed to be community property. The fact that the husband collected it, and made the deed to reimburse the wife without her knowledge, or that, as between themselves, he regarded the money as her separate property, would not change its character. *Pearce v. Jackson*, 61 Tex. 642.

**2. Against Whom these Presumptions May be Rebutted.**—Land conveyed to husband or wife, or both, by deed of purchase is presumed to be community property, and parol evidence is not admissible to explain or modify such deeds so as to ingraft upon the property after it has passed to innocent purchasers a trust to their detriment; though as between the parties to such deeds, their privies in blood, or purchasers without value or with notice, their legal import may be affected by parol evidence. *Cooke v. Bremond*, 27 Tex. 457; s. c., 86 Am. Dec. 626. See also *French v. Strumberg*, 52 Tex. 109; *Kirk v. Navigation Co.*, 49 Tex. 213; *Smith v. Boguet*, 27 Tex. 507; *Wallace v. Campbell*, 54 Tex. 89; *Parker v. Coop*, 60 Tex. 111; *McDaniel v. Weiss*, 53 Tex. 263; *Lorn v. Tarver*, 45 Tex. 519; *John v. Battle*, 58 Tex. 591; *Edwards v. Brown*, 4 S. W. Repr. (Tex.) 380.

In *California* a purchaser from the husband of land deeded to the wife for a valuable consideration does so at his peril, and it may be shown that the property was the separate property of the wife. *Moore v. Jones*, 63 Cal. 12. See also *Ramsdell v. Fuller*, 28 Cal. 37; *Alverson v. Jones*, 10 Cal. 12.

**Admissibility of Parol Evidence in Rebutting these Presumptions.**—The court said in *Schuyler v. Broughton*, 11 Pac. Repr. (Cal.) 719. "It is true that the legal presumption which arises from the face of the deed may be overcome by extrinsic proof that the consideration paid was the separate funds of the wife. *McDonald v. Badger*, 23 Cal. 393; *Tustin v. Faught*, 23 Cal. 241; *Landers v. Bolton*,

26 Cal. 393." See also *Peck v. Vandenberg*, 30 Cal. 11; *Peck v. Brummagim*, 31 Cal. 440; *Higgins v. Higgins*, 46 Cal. 259; *Dunham v. Chatham*, 21 Tex. 244.

Parol evidence is admissible to show an understanding between the husband and wife, that real estate conveyed to her during coverture should be her separate property. *T. & P. R. Co. v. Dunett*, 57 Tex. 48.

It has been held, however, that the presumption that property is community cannot be rebutted by parol evidence that it is the separate property of the wife against *bona fide* purchasers from the husband for a valuable consideration. *Cooke v. Bremond*, 27 Tex. 457; s. c., 86 Am. Dec. 626.

**Recitals in Deeds.**—The fact that a deed of lands was made to a wife "for her separate estate," even if construed to mean that the consideration money was paid from her separate property, only creates a separate estate in her *prima facie*, and does not preclude one claiming under her husband from showing that the purchase-money was paid from community funds. *McComb v. Spangler*, 12 Pac. Repr. (Cal.) 347.

A deed which recited a consideration of money paid, as well as love and affection, was presumed to be a deed of community property. *Tustin v. Faught*, 23 Cal. 237.

In *Louisiana* a recital in a deed has no effect upon the presumption that it is a deed of community property. *Forbes v. Forbes*, 11 La. Ann. 326; *Bachino v. Coste*, 35 La. Ann. 570.

"Property conveyed to the wife during coverture, and limited by the terms of the deed to her sole and separate use, becomes the separate property of the wife, and this whether the consideration paid for its acquisition was with separate or community funds. In such case the intention to make such property the separate property of the wife is apparent on the face of the deed, charging all who have knowledge of its existence with notice." *Morrison v. Clark*, 55 Tex. 437.

**Where Property is Purchased with the Separate Property of the Husband, but in the Name of the Wife.**—Where it is shown that the consideration in a deed taken in the name of the wife was the separate property of the husband, the presumption is that it was the intention of the husband to make a gift of the property to his wife. *Smith v. Strahan*, 16 Tex. 314; s. c., 67 Am. Dec. 622; *Dunham v. Chatham*, 21 Tex. 244; *Tucker v. Carr*, 39 Tex. 98; *Baldrige v. Scott*, 48 Tex. 189.

It may be shown, however, that the

husband made the purchase for his own benefit. *Higgins v. Johnson*, 20 Tex. 389; s. c., 70 Am. Dec. 394; *Peck v. Vandenberg*, 30 Cal. 11.

**Conveyance by the Husband to the Wife.**—The husband may convey his separate or the community property directly to his wife, and there is then no presumption that the property so conveyed is community, but it becomes the separate property of the wife. *Fitts v. Fitts*, 14 Tex. 444; *Hall v. Hall*, 52 Tex. 299; *Story v. Marshall*, 24 Tex. 307; *Klumpke v. Baker*, 10 Pac. Repr. (Cal.) 197; *Kohner v. Ashenauer*, 17 Cal. 581; *Barker v. Koneman*, 13 Cal. 10; *Peck v. Brummagim*, 31 Cal. 440; *Fuller v. Ferguson*, 26 Cal. 547; *Hussey v. Castle*, 41 Cal. 239.

A conveyance to the wife by the husband will not stand against a prior unrecorded deed. *Pearce v. Jackson*, 61 Tex. 642.

No third party can question the validity of a conveyance from the husband to the wife, unless he was a creditor of the husband before the conveyance was made, or was a subsequent purchaser without notice. The declarations of a husband, introduced in a suit to which the wife is a party, to impeach a conveyance made by him to his wife, when made after the execution of the deed, cannot constitute such proof as to form the basis of a judgment, even though no objection be made at the time of their introduction in evidence. *De Garca v. Galvan*, 55 Tex. 53.

A donation by the husband to the wife, or by the wife to the husband, may be revoked during the lifetime of the donor, but not after. *Labbe's Heirs v. Abat*, 2 La. 553; s. c., 22 Am. Dec. 151; *Fuller v. Ferguson*, 26 Cal. 546.

**Declarations of the Husband.**—For the purpose of showing that the money used in making a purchase was the separate money of the wife, declarations of the husband made prior to the conveyance by him are competent evidence. *Moore v. Jones*, 63 Cal. 12. See also *Smith v. Strahan*, 16 Tex. 314; s. c., 67 Am. Dec. 622; *Johnson v. Burford*, 39 Tex. 242; *De Garca v. Galvan*, 55 Tex. 53; *Baker v. Baker*, 55 Tex. 577.

The court remarked in *Coats v. Elliot*, 23 Tex. 613, that "the declarations of the husband are the weakest and most unsatisfactory kind of evidence."

**Intention of the Parties.**—The effect of a deed of community property depends on the intention of him or them who at the date of its execution have the right to control it. In arriving at that intention all contemporaneous circumstances and declarations are evidence of the most

#### 4. Rights, Powers, and Liabilities of the Husband.—The husband and wife have equal interests in the community,<sup>1</sup> though during

satisfactory character. *Baker v. Baker*, 55 Tex. 577. See also *Hall v. Hall*, 52 Tex. 299; *Peters v. Clements*, 46 Tex. 125; *Johnson v. Burford*, 39 Tex. 242; *Dunham v. Chatham*, 21 Tex. 244; *Higgins v. Johnson's Heirs*, 20 Tex. 389; s. c., 70 Am. Dec. 394; *T. & P. R. Co. v. Dunett*, 57 Tex. 53; *Hatchett v. Connor*, 30 Tex. 104; *Smith v. Strahan*, 16 Tex. 314; s. c., 67 Am. Dec. 622; *Peck v. Brummagin*, 31 Cal. 440; *Higgins v. Higgins*, 46 Cal. 259; *Read v. Rahm*, 65 Cal. 343.

**Sufficiency and Burden of Proof.**—The presumption that property purchased during marriage is community property is very cogent, and can only be repelled by clear and conclusive proof; but where it is established clearly and conclusively that the property was purchased with the separate money of one of the parties, it remains the separate property of the party with whose money it was purchased. *Love v. Robertson*, 7 Tex. 6; s. c., 56 Am. Dec. 41.

In *Ramsdell v. Fuller*, 23 Cal. 42, Sawyer, J., said: "It is much easier for the party purchasing the land to show affirmatively that the funds used were separate property of the party purchasing, than for others interested to show negatively that they were not. The evidence is peculiarly within the knowledge and control of such party. For these and other reasons, when the fact is required to be proved, the law throws the burden of identifying the funds as a part of the separate estate upon the party claiming the benefit of such estate." See also *Higgins v. Higgins*, 46 Cal. 259; *McDonald v. Badger*, 23 Cal. 393; s. c., 83 Am. Dec. 123; *Adams v. Knowlton*, 22 Cal. 283; *Mott v. Smith*, 16 Cal. 533; *Smith v. Smith*, 12 Cal. 216; s. c., 73 Am. Dec. 533; *Meyer v. Kinzer*, 12 Cal. 247; s. c., 73 Am. Dec. 538; *Block v. Melville*, 22 La. Ann. 147; *Bachino v. Coste*, 35 La. Ann. 570; *Webb v. Peet*, 7 La. Ann. 92; *Fisher v. Gorde*, 2 La. Ann. 762; *Ford v. Ford*, 1 La. Ann. 201; *Lake v. Lake*, 4 Pac. Repr. (Nev.) 711; *Cox v. Miller*, 54 Tex. 25; *Coats v. Elliot*, 23 Tex. 613; *Castro v. Illies*, 22 Tex. 479; s. c., 73 Am. Dec. 277; *Dunham v. Chatham*, 21 Tex. 244; *Chapman v. Allen*, 15 Tex. 283; *Mitchell v. Marr*, 26 Tex. 331; *Zorn v. Tarver*, 45 Tex. 519, 521; *Huston v. Curl*, 8 Tex. 239; *Schmeltz v. Garey*, 49 Tex. 61; *Lott v. Keach*, 5 Tex. 304; *Scott v. Maynard*, Dallam, 551; *McAfee v. Robertson*, 43 Tex. 591.

The language of the court in *State v.*

*Voorhies*, 2 Southern Repr. (La.) 36, was: "Apparently, the theory on which the defence rests is that it is enough to show that the husband inherited certain sums, and that from this circumstance must be deduced the fact that the community was *pro tanto* benefited and that he has remained a creditor for as much of the conjugal partnership; but this is a fallacy. The law demands substantial proof that the amounts were actually invested in the community by the husband, and the record is barren of all evidence that he has done so. The real estate acquired during the first community, and which was inventoried as part of its assets, does not appear, either on the face of the titles or otherwise, to have been paid for out of his separate funds. The price paid ought to have been traced back to the inheritance. This was essential to constitute him a creditor of the community. *Babin v. Nolan*, 6 Rob. (La.) 508; *Stewart v. Pickard*, 10 Rob. (La.) 18; *Doğrin v. Wiltz*, 11 La. Ann. 514; *Succession of Viand*, 11 La. Ann. 297; *Downs v. Morrison*, 13 La. Ann. 379; *Belair v. Dominguez*, 26 La. Ann. 605; *Denègre v. Denègre*, 30 La. Ann. 277; *Succession of Merrick*, 35 La. Ann. 296; *Bachino v. Coste*, 35 La. Ann. 570. The adverse opinion in the case of *Falgout v. Daspit*, 6 La. Ann. 174, is no authority, and must be considered as overruled."

Property acquired during a marriage in the name of the husband is presumed to belong to the community; nor will such presumption be rebutted by proof that he acquired the property with the money of his children by a former marriage; nor will such fact affect the title of the community to the property, though it may create a debt against it. *Murphy v. Jury*, 2 Southern Repr. (La.) 575.

Where at the time of the marriage the husband had much money and the wife nothing, and during the marriage relation the parties decreased in fortune, it was held that the statutory presumption that property acquired during marriage was community, was not rebutted unless the purchase money be explicitly traced to the husband's separate property. *Schmeltz v. Garey*, 49 Tex. 49.

1. "It is settled law in this [Texas] State that the interests of the husband and wife in the community property are equal, whether the deed be taken in the name of either, or the names of both. *Veramendi v. Hutchins*, 48 Tex. 531; *Cooke v. Bremond*, 27 Tex. 460; *Mit-*

coverture the wife's rights are passive,<sup>1</sup> and he has full management and control of the property,<sup>2</sup> and may deal with it almost as if it were his own.<sup>3</sup> He is its sole representative, and is liable for its debts.<sup>4</sup> It is liable for his separate debts.<sup>5</sup> He has full power to dispose of it absolutely without her consent;<sup>6</sup> his sole deed passes community realty;<sup>7</sup> his sole signature assigns community promissory notes,<sup>8</sup> though standing in her name;<sup>9</sup> in his sole name he sues in ejectment,<sup>10</sup> and enforces a promissory note;<sup>11</sup> he may give the property away,<sup>12</sup> but not with the intent to defraud her of her

chell v. Marr, 26 Tex. 330; Higgins v. Johnson, 20 Tex. 389. And there are decisions of our courts in which the title of the wife or of her heirs in the common estate, held in the name of the husband, is denominated a legal title. Johnson v. Harrison, 48 Tex. 268; Garner v. Thompson, 1 Tex. Law Rev. 286." Edwards v. Brown, 4 S. W. Repr. (Tex.) 380; Bell v. Schwarz, 56 Tex. 353; Zimpelman v. Robb, 53 Tex. 274; Wright v. Hays, 10 Tex. 130; s. c., 60 Am. Dec. 200; Yancy v. Batte, 48 Tex. 46; De Godey v. De Godey, 39 Cal. 157.

1. Wright v. Hays, 10 Tex. 130; s. c., 60 Am. Dec. 200.

2. Althof v. Conheim, 38 Cal. 230; Peck v. Brummagim, 31 Cal. 440; Mott v. Smith, 16 Cal. 535; Cheek v. Bellows, 17 Tex. 616.

3. Lord v. Hough, 43 Cal. 581; Pixley v. Huggins, 15 Cal. 127.

4. Kelly v. Robertson, 10 La. Ann. 313; Hawley v. Crescent City Bank, 26 La. Ann. 230; Ford v. Brooks, 35 La. Ann. 157; Chaffe v. McIntosh, 36 La. Ann. 824; Carter v. Conner, 60 Tex. 52.

5. McDonald v. Badger, 23 Cal. 393; Adams v. Knowlton, 22 Cal. 283; Tompkins v. Tompkins, 12 Cal. 114; Glasscock v. Green, 4 La. Ann. 146; Chauviere v. Fliege, 6 La. Ann. 57; Forbes v. Dunham, 24 Tex. 611; Jones v. Jones, 15 Tex. 143; Edrington v. Mayfield, 5 Tex. 363; Lott v. Keach, 5 Tex. 394.

6. Althof v. Conheim, 38 Cal. 230; Pixley v. Huggins, 15 Cal. 127; Van Maren v. Johnson, 15 Cal. 312; Wolf v. Wolf, 12 La. Ann. 520; Glenn v. Elam, 3 La. Ann. 611; Guice v. Lawrence, 2 La. Ann. 226; Trahan v. Trahan, 8 La. Ann. 455; Walters v. Jewett, 28 Tex. 192; Brewer v. Wall, 23 Tex. 588; Berry v. Wright, 14 Tex. 274.

A husband has the absolute power to dispose of the common property to the same extent and in the same manner as his separate property, until a legal separation has been effected by a competent court and a division made under the direction thereof. Ray v. Ray, 1 Idaho N. S. 566. Compare the following:

"Since the husband and wife, act of 1879, a husband cannot, without his wife joining, make a valid contract to sell community property; and if at the time of making the supposed contract the would-be purchaser knows it to be in breach of fiduciary duty, it is absolutely void, and cannot be the foundation of any liability whatever." Holyoke v. Jackson, 3 Pac. Repr. (Wash.) 841.

Code Wash. T. § 2410, prohibits a husband from selling or incumbering the community property of himself and wife. Held, that the contract of the husband to lease such property, made without the wife joining in the contract, is an incumbrance, within the meaning of the section, and, it appearing that the lessee knew that the land was community property, that the lease is void. Hoover v. Chambers, 13 Pac. Repr. (Wash.) 547.

7. "The husband may convey and incumber all community real estate which is not the homestead or has not been designated as the homestead. Mabry v. Harrison, 44 Tex. 286.

A married man, to whom was issued, as such, a land certificate for a league and labor of land, in 1838, transferred it during the lifetime of the wife by the following assignment: "I, for myself, my heirs, legal representatives and assigns, sell, relinquish, and dispossess myself of all my right, title, and interest for the within claim to Wm. M. Shepherd, his heirs and assigns." In a suit against the claimants of the entire league and labor under that assignment, brought by those claiming the community interest of the wife, held, (1) the certificate being community property, the husband's right to dispose of it was absolute; (2) his conveyance of "all his right" was a conveyance of the entire certificate. Poe v. Brownrigg, 55 Tex. 133; Mabry v. Harrison, 44 Tex. 286.

8. Hemmingway v. Matthews, 10 Tex. 207.

9. Pixley v. Huggins, 15 Cal. 127.

10. Mott v. Smith, 16 Cal. 535.

11. Wells v. Cochrum, 13 Tex. 127.

12. Lord v. Hough, 43 Cal. 581; Colton

rights, in view of divorce or of death,<sup>1</sup> though her remedy in such case seems confined to a bill *quia timet*.<sup>2</sup> So he may give or assign community property to his wife to be her separate property where no fraud on creditors exists;<sup>3</sup> and the property and his widow are bound by his estoppel.<sup>4</sup> The husband cannot affect the interest of the wife by will, or by any instrument to take effect after his death;<sup>5</sup> and after the death of the wife he cannot dispose of the community except to pay the debts thereof or to the extent of his own interest.<sup>6</sup> Divorce proceedings alone do not affect his rights, though his abandonment of his wife may give her important powers.<sup>7</sup> In case of divorce the property is di-

*v. Colton*, 34 La. Ann. 858. Compare *Bister v. Menge*, 21 La. Ann. 216.

1. *De Godey v. De Godey*, 39 Cal. 164; *Peck v. Brummagim*, 31 Cal. 447; *Smith v. Smith*, 12 Cal. 216; s. c., 73 Am. Dec. 533; *Cotton v. Cotton*, 34 La. Ann. 857; *Belden v. Hanlon*, 32 La. Ann. 85; *Edwards v. James*, 7 Tex. 38; *Scott v. Maynard*, Dail. 548.

2. Probably an action would be maintainable by the wife, while the coverture exists, of the character of a bill *quia timet*, to procure an injunction to restrain the husband from carrying out a threatened fraudulent transfer of such property which would result in loss to her, or to compel the fraudulent donee or grantee, with notice of the fraudulent intent, to give security to satisfy any claim which she may be found to have to it on the settlement of the affairs of the community, when the marriage tie has been dissolved. *Greiner v. Greiner*, 58 Cal. 118.

3. *Peck v. Brummagim*, 31 Cal. 440; *Morrison v. Seiler*, 22 La. Ann. 327.

4. *Ranny v. Miller*, 51 Tex. 263.

5. *Greiner v. Greiner*, 58 Cal. 115; *Guttman v. Scannell*, 7 Cal. 455; *Buchanan's Estate*, 8 Cal. 510; *Smith v. Smith*, 12 Cal. 228; s. c., 73 Am. Dec. 533; *Scott v. Ward*, 13 Cal. 469; *Payne v. Payne*, 18 Cal. 301; *De Godey v. De Godey*, 39 Cal. 164.

Where a husband disposes by will of an entire tract of land owned by himself and his wife jointly as community property, allotting to the wife a certain portion including the homestead, which she would not have been entitled to except under the will, and she subsequently conveys the portion so allotted her, *held*, conclusive evidence that she knew of the disposition made by the will, and elected to take under it. *Rogers v. Trevathan*, 3 S. W. Rep'r (Tex.), 569. See also *Morrison v. Bowman*, 29 Cal. 348.

While the husband cannot dispose, by will, of his wife's community interest, yet if he attempts to do so, and she

should elect to take under the will, she would be thereby estopped from afterwards asserting her right to the community. . . . The husband made a deed, conveying community land, which was not delivered. *Held*, that the wife who, as executrix, after the husband's death, refused to deliver the deed (there being no fraudulent intent on her part), could not be made liable to parties claiming under the deed for the value of their interest in the land lost thereby. *Moss v. Helsley*, 60 Tex. 426.

6. In the case of *Johnson v. Harrison*, 48 Tex. 268, it was said: "If there be community debts, the survivor of the community may appropriate community property to their payment; and his power to wind up the community affairs is so far recognized, that sales fairly made by him for that purpose will not be set aside. His power to sell is dependent on the existence of some claim against the community, and whoever purchases from him must see to it that the facts exist which authorize the sale. See also *Robinson v. McDonald*, 11 Tex. 385; *Veramendi v. Hutchins*, 48 Tex. 531.

On the death of the wife her interest in the homestead descends and vests in her heirs, subject to administration and to the right of the husband to wind up the community affairs. This right of the husband must be limited chiefly to paying the community debts, and a purchaser from him does not acquire the interest of the children of the marriage when there were no debts of the community to be paid. A sale to support the children will not be sufficient to pass title to their interest in the homestead. *Bell v. Schwarz*, 56 Tex. 353. See also *Bennett v. Fuller*, 29 La. Ann. 663; *Billgery v. Billgery*, 34 La. Ann. 287.

7. *Lord v. Hough*, 43 Cal. 581. Compare Texas R. S. 1879, § 2867.

"When the husband deserts the wife, ceases to discharge his marital duties, and contributes nothing to her support

vided;<sup>1</sup> a mere cause for divorce does not forfeit the rights of either party,<sup>2</sup> and after divorce the husband has no powers over the wife's interest.<sup>3</sup>

**5. Rights, Powers, and Liabilities of the Wife.**—The wife's rights over the community are as well defined and ascertained as those of the husband; though once called "a mere expectancy," her interest is equal to that of her husband, and she may protect herself by all the remedial processes afforded to any one.<sup>4</sup> During coverture she cannot dispose of the community without his consent; her mortgage thereof even as to her interest is void in California, though if she survives her husband it may be enforced against her

and to the support of the children, the power to manage, control, and dispose of the community property for purposes of support is transferred to the wife. In such a case the discretion exercised by the wife in selling the community property will not be reviewed, unless it has been used to perpetrate a fraud on the husband's rights." *Zimpelman v. Robb*, 53 Tex. 274.

The abandonment of a wife by her husband perfects all her rights in and to the community property as effectually as if he were dead. *Cullers v. James*, 1 S. W. Rep'r (Tex.), 314; *Slater v. Neal*, 64 Tex. 222; *Carothers v. McNese*, 43 Tex. 224; *Forbes v. Moore*, 32 Tex. 199; *Fullerton v. Doyle*, 18 Tex. 12; *Exell v. Dodson*, 60 Tex. 331.

"The sentence of a husband to the penitentiary, and his confinement there, is equivalent to an abandonment of the wife, and authorizes her to manage and dispose of the common property, at least so far as to secure a support for herself and children." *Slator v. Neal*, 64 Tex. 222.

1. *De Godey v. De Godey*, 39 Cal. 157; *Mann v. Mann*, 24 La. Ann. 437; *Rice v. Rice*, 21 Tex. 58.

2. E., the second wife of her deceased husband, while living in another State, and before his removal to Texas, was guilty of such outrages toward him as rendered their living together insupportable. By mutual consent, the husband separated from her without a decree of divorce, and after removing to Texas with the children of his first marriage, he married a third time to one who was ignorant of the fact that he had then a wife living. Afterwards, during coverture with his third wife, he acquired real estate in Texas, and died. In a suit between E., claiming a community interest in the land thus acquired in Texas, and a child of the first marriage, *held*, (1) the matrimonial relation, when once formed, continues until terminated by

death or judicial decree; (2) that relation when once established, secures to the wife a community interest in all the property that may be thereafter acquired by either of the parties, except such as may be obtained by gift, devise, or descent; (3) the rights of the parties resulting from the marriage relation are fixed by statutory law, and have remained unaffected by civil-law rules applicable to putative marriages since 1840, when the common law and the marital-rights system of Texas were both adopted by act of the republic of Texas; (4) the separation of E. from her husband did not, under the circumstances above stated, work a forfeiture of her subsequently acquired community rights to land purchased by him in Texas; (5) the rights in the estate of the last wife, who married in ignorance of the former subsisting marriage, are not involved in this decision. *Routh v. Routh*, 57 Tex. 589.

3. *De Godey v. De Godey*, 39 Cal. 157; *Bennett v. Fuller*, 29 La. Ann. 663; *Ben-den v. Hanlon*, 32 La. Ann. 85.

4. *De Godey v. De Godey*, 39 Cal. 157; *Van Maren v. Johnson*, 15 Cal. 308; *Blanc v. Le Blanc*, 20 La. Ann. 206; *Zimpelman v. Robb*, 53 Tex. 274; *Wright v. Hays*, 10 Tex. 130; s. c., 60 Am. Dec. 200; *Caruth v. Grigsby*, 57 Tex. 259.

A wife, under the liberal provisions of the constitution and laws of Texas for the protection of her separate property, may, in her own name, maintain a suit by attachment levied on community property belonging to herself and her husband, to secure payment of a debt which is her separate property due from the husband. To secure such a debt she is entitled to all remedial process afforded by the law to any one. While this is true, such a claim, sought to be enforced by attachment, should be closely scrutinized, to guard against fraud and collusion between husband and wife to defeat other creditors. *Ryan v. Ryan*, 61 Tex. 473.

5. *Hemmingway v. Matthews*, 10 Tex.

On her husband's death her rights spring into activity, and she has all the power of a *feme sole* over her interest;<sup>1</sup> so, under the various statutes she may, for cause, have a separation of property, partition of the community, or may be awarded alimony out of it. She may have a divorce with a division of the property.<sup>2</sup> So if her husband abandons her and refuses to support her, her rights in the community quicken into vigorous activity; she may deal with it in his place, and she may even in her own name convey real estate standing in his name, so that subsequent *bona fide* purchasers from him will get nothing.<sup>3</sup>

**Rights, Powers, and Liabilities of the Survivor.**—The survivor has at least one half of the community property after all the community debts are paid,<sup>4</sup> the community property being a primary fund for

<sup>1</sup> *Remington v. Higgins*, 54 Cal. 620, 12 Cal. 3d 334; Civ. Code, 1881, § 167; *Pany v. Pany*, 52 Cal. 334.

<sup>2</sup> Under the first and succeeding statutes the powers of the wife under a community property marriage have been made to cease with her widowhood; but while single she has all the rights and powers of a *feme sole*, and she may deal with herself personally as well as the community property. On a second marriage she ceases to be a free agent and is shorn of these powers, and she cannot convey the community property more than she could have conveyed in the legal estate. This is the policy of the statutes." *Davis v. McCartney*, 15 Cal. 584. See also *Cordrer v. Cage*, 15 Cal. 532; *Orr v. O'Brien*, 55 Tex. 149; *Wright v. Abercrombie*, 61 Tex. 60; *Wood v. Arnold*, 1 S. W. Repr. 173; *Womack v. Shelton*, 31 Tex. 173; *Beckman v. Thompson*, 24 La. Ann. 151; *Dickson v. Dickson*, 37 La. Ann. 915; *Carite v. Trotot*, 105 U. S. 751; *Ray v. Ray*, 1 Idaho N. S. 566; *Hendricks v. Hendricks*, 33 La. Ann. 1051; *Compton v. Compton*, 33 La. Ann. 685; *Belden v. Belden*, 32 La. Ann. 85; *Succession of Succession of*, 28 La. Ann. 151; *Heyman v. Heyman*, 27 La. Ann. 195; *Meyer v. Smith*, 27 La. Ann. 153; *Webb v. Bell*, 24 La. Ann. 153; *Spires v. McKelvy*, 23 La. Ann. 153; *Alford v. Thorn*, 15 La. Ann. 83; *Alford v. Bordelon*, 14 La. Ann. 618; *Alford v. Barbin*, 13 La. Ann. 474; *Alford v. Brady*, 11 La. Ann. 696; *Alford v. Yarborough*, 11 La. Ann. 533; *Alford v. Kennedy*, 11 La. Ann. 32; *Wolf v. Wolf*, 10 La. Ann. 273; *Penn v. Crock*, 10 La. Ann. 343; *Jones v. Morgan*, 6 La. Ann. 632; *Davock v. Darcy*, 6 Rob. 12; *Longino v. Blackstone*, 4 La. Ann. 13; *Handy v. Sterling*, 1 La. Ann. 13; *Louis University v. Proud*, 21 La. Ann. 525; *Caulk v. Picont*, 21 La. Ann. 277; Cal. Civ. Code, 1881, §§ 146-148; Nev. C. L. 1873, § 162.

<sup>3</sup> "From an examination of the cases it will be seen that the rule is well settled that when the husband abandons the wife and fails to provide for the family, this authorizes the wife to manage, control, and dispose of the common property so as to secure a support for herself and children. And it seems from the cases of *Wright v. Hays*, and *Fullerton v. Doyle*, that where the facts exist which would authorize the wife to assume the management, control, and disposition of the common property, she has the same unlimited power in these particulars as would the husband if present and in control of the property." *Slator v. Neal*, 64 Tex. 222; *Wright v. Hays*, 10 Tex. 130; s. c., 60 Am. Dec. 200; *Fullerton v. Doyle*, 18 Tex. 12; *Forbes v. Moore*, 32 Tex. 199; *Carothers v. McNese*, 43 Tex. 224; *Zimpleman v. Robb*, 53 Tex. 274; *Walker v. Strongfellow*, 30 Tex. 570; *Cheek v. Bellows*, 17 Tex. 613. See **RIGHTS, etc., OF HUSBAND**, note 7, p. 359.

<sup>4</sup> *Broad v. Murray*, 44 Cal. 228; *Broad v. Broad*, 40 Cal. 493; *Tompkins v. Tompkins*, 12 Cal. 114; *Beard v. Knox*, 5 Cal. 252; *Payne v. Payne*, 18 Cal. 291; *Scott v. Ward*, 13 Cal. 458; *Hart v. Robertson*, 21 Cal. 346; *Cummings v. Chevrer*, 10 Cal. 519; *Kellar v. Blanchard*, 21 La. Ann. 38; *Cockburn v. Wilson*, 20 La. Ann. 39; *Moore v. Moore*, 20 La. Ann. 159; *Fleming v. Fleming*, 18 La. Ann. 726; *Waring v. Zunts*, 16 La. Ann. 49; *Chapman v. Woodward*, 16 La. Ann. 167; *Holmes v. Barbin*, 13 La. Ann. 553; *Holmes v. Dobbs*, 15 La. Ann. 501; *Succession of Fitzwilliams*, 3 La. Ann. 489; *Succession of Bunge*, 4 La. Ann. 389; *Salvy v. Chexnandre*, 14 La. Ann. 567; *Massey v. Steeg*, 13 La. Ann. 350; *Succession of Viand*, 11 La. Ann. 297; *Grayson v. Sanford*, 12 La. Ann. 646; *Succession of Planchet*, 29 La. Ann. 520; *Bell v. Schwartz*, 56 Tex. 353; *Carter*



the settlement of community debts.<sup>1</sup> The survivor may generally settle up the community with or without statutory authority, and with or without going into court.<sup>2</sup> The survivor or the heirs of

*v. Conner*, 60 Tex. 52; *Barrett v. Nash*, Dallam, 497; *Ellington v. Ellington*, 29 Tex. 2; *Conner v. Davis*, 33 Tex. 208; *Robinson v. McDonald*, 11 Tex. 385; *Wall v. Clark*, 19 Tex. 321; *Griffin v. Ford*, 60 Tex. 501; *Johnson v. Harrison*, 48 Tex. 257.

1. *Christmas v. Smith*, 10 Tex. 123; *Sanger v. Moody*, 60 Tex. 96; *Richey v. Hare*, 41 Tex. 336; *Johnson v. Harrison*, 48 Tex. 257; *Tompkins Estate*, 12 Cal. 114; *Durham v. Williams*, 32 La. Ann. 162.

2. In *Sanger v. Moody*, 60 Tex. 96, the language of the court was: "Under the repeated decisions of this court it must be held as conclusively settled, that the survivor of the marital relation, without administration upon the estate of the deceased member in any of the modes expressly provided by statute, has power as survivor to sell the community property for the purpose of paying debts which are a charge upon it, and by law such property is charged with the payment of debts contracted during the marriage. Pasch. Dig. 4646.

"It has been properly held that the act of 1856 did not withdraw such power from the survivor; but that the act was intended to enlarge the powers of the survivor. *Wenar v. Stenzel*, 48 Tex. 489; *Dawson v. Holt*, 44 Tex. 178; *Lumpkin v. Murrell*, 46 Tex. 58.

"The act itself seems to recognize in the survivor such a power, and that its exercise will not be disturbed upon failure to comply with the act, unless upon complaint by some one having an interest in the estate. Pasch. Dig. 4649, 4650.

"And it would seem that, when those interested in an estate interpose no objection to the management and control of a community estate by the survivor without qualification under the statute, that purchasers from such survivor, if there be community debts bearing a reasonable proportion to the value of the property sold by a survivor, ought not to be disturbed in their titles acquired in good faith; for, in the absence of such interposition, purchasers may well believe that those interested in the estate are content that the survivor shall exercise the powers which he possesses to sell property to raise means with which to discharge debts which are a charge upon such property, and for which the survivor is liable personally, without reference

to whether there be community property or not, and without the satisfaction of which heirs, as against the survivor, have no right, either legal or equitable, to take and hold any part of the common property."

See also *Johnson v. Harrison*, 48 Tex. 266; *Veramendi v. Hutchins*, 48 Tex. 552; *Manchaca v. Field*, 62 Tex. 135; *Ford v. Cowan*, 64 Tex. 129; *Walker v. Howard*, 34 Tex. 478; *Hawley v. Crescent City Bank*, 26 La. Ann. 230; *Williams v. Fuller*, 27 La. Ann. 634; *Magee v. Rice*, 37 Tex. 483.

The surviving husband or wife, upon giving bond as such, and taking possession of the community estate, becomes a trustee thereof for the creditors and distributees, and is vested with ample powers and a very broad discretion. *Leatherwood v. Arnold*, 1 S. W. Repr. (Tex.) 173.

"One owning community property with the wife, on her death sold it, without qualifying under the statute so as to administer it. He sold for the purpose of paying community debts, and afterwards qualified under the statute as survivor, and conveyed by deed the same property to the purchaser from his vendee in the first sale. In a suit between the heirs of his deceased wife and the party claiming title under the last deed, held, (1) The fact that the surviving husband may have parted with his individual interest by the first deed could not impair his right, after qualifying as survivor, to administer the residue of the community interest, title to which passed by the second deed (2) A verbal partition between the heir of the deceased wife and the party claiming under the deed, made before the surviving husband qualified, conferred no right on the heir to any portion set apart to such heir by the partition. The parties had no power to withdraw any portion of the property from administration by the husband. (3) It was the right of the surviving husband to sell for the payment of community debts, even though the property brought more than enough for that purpose. The right of the heir of the deceased wife to the interest in the excess derived by inheritance from the mother is secured by the bond of the surviving husband." *Watkins v. Hall*, 57 Tex. 1. See also *Bell v. Schwartz*, 56 Tex. 353; *Woodley v. Adams*, 55 Tex. 526; *Cordier v. Cage*,

the deceased can assign their respective interests, but not by metes and bounds, as dissolution of the marriage turns the community into tenancy in common.<sup>1</sup> Either spouse may by will dispose of such part of the community as would go to his or her representatives, but neither can by will affect the interests of the other.<sup>2</sup> In *Louisiana* the surviving wife may enjoy the use of the community during widowhood,<sup>3</sup> and the survivor has a usufruct of so much of the community as may be inherited by his or her issue proceeding from the marriage.<sup>4</sup>

**7. Rights of the Heirs.**—Upon the death of either spouse the heirs of the deceased take one half of the community property subject to the payment of community debts, the survivor's homestead rights, and the survivor's right of administration.<sup>5</sup> They

44 Tex. 533; *Orr v. O'Brien*, 55 Tex. 149; *Jordan v. Imthum*, 51 Tex. 276; *Long v. Walker*, 47 Tex. 173; *Green v. Griscom*, 53 Tex. 432; *Carter v. Conner*, 60 Tex. 52; *Primm v. Barton*, 18 Tex. 206. *Packard v. Arellanes*, 17 Cal. 525; *Cook v. Norman*, 50 Cal. 633.

The statute (Pasch. Dig. 4648) which gave to the surviving husband power to sell the community estate after the filing of an inventory, on the death of the wife, must be strictly construed; and such filing could not give validity to a sale made after the death of the wife and before compliance by the husband with the terms of the statute. *Griffin v. Ford*, 60 Tex. 501. See also *Kirkland v. Little*, 41 Tex. 456.

On the granting of letters of administration to a third party, the wife's control over the community estate ceases, and the estate passes under the jurisdiction of the county court for administration and settlement; along with it also passes the liability for all debts that are a charge on such estate. *Hollingsworth v. Davis*, 62 Tex. 438.

By the marriage of the surviving widow she loses control of the community property, and execution upon the property in her hands, subject to administration, cannot be issued on a judgment against her in a suit brought before but rendered after the second marriage. *Pucket v. Johnson*, 48 Tex. 550.

In *Louisiana* the surviving wife has thirty days within which she must renounce or accept the succession of her husband. After this delay she still has the right to renounce, and the right continues until she is compelled by an action to make choice. *Titche v. Lee*, 22 La. Ann. 436. See also *Monget v. Pate*, 3 La. Ann. 269; *Andrich v. Lamothe*, 12 La. Ann. 76; *Kelley v. Robertson*, 10 La. Ann. 306.

The wife cannot renounce the succession if she takes an active concern in the effects of the community. *Collins v. Babin*, 16 La. An. 290; *Ludeling v. Felton*, 29 La. An. 719.

The interest of the widow in the community property after the husband's death is a vested one, but she cannot by her acceptance of the community take the administration out of the hands of the husband's executor or administrator any more than the heir could by a like acceptance. *Succession of McLean*, 12 La. An. 222.

1. *Caruth v. Grisby*, 57 Tex. 259; *Good v. Combs*, 28 Tex. 34; *Broad v. Murray*, 44 Cal. 228; *Hickman v. Thompson*, 24 La. Ann. 264; *Dickson v. Dickson*, 36 La. Ann. 453.

2. A married woman may dispose of her property by will, subject to the liability of her community property for the payment of community debts. *Brown v. Prigden*, 56 Tex. 124. See also *Walker v. Howard*, 34 Tex. 478; *Greiner v. Greiner*, 58 Cal. 115; *Beard v. Knox*, 5 Cal. 252; s. c., 63 Am. Dec. 125; *Buchanan's Estate*, 8 Cal. 507; *De Godey v. De Godey*, 39 Cal. 157.

3. *Boyle v. Sibley*, 22 La. Ann. 446; *Succession of Davis*, 22 La. Ann. 497.

4. *Forstall v. Forstall*, 28 La. Ann. 197; *Succession of Planchet*, 29 La. Ann. 520.

5. The heirs of the wife become vested with a title to her share of the community property at the moment of her death; and though they receive it subject to the payment of the community debt, they are bound to await a liquidation of the community before resorting to an action to recover it. *Tugwell v. Tugwell*, 32 La. Ann. 848; *Glasscock v. Clark*, 33 La. Ann. 584, reaffirmed. Nor, in such action, petitory in its character, is the indebtedness of the community, or its financial condition when dissolved, a legitimate

may apply to the court to restrain the survivor from wasting or improperly disposing of the property.<sup>1</sup> In *Louisiana* the heirs may accept or renounce the succession.<sup>2</sup> The heirs also have a claim for any separate property of the deceased which has been taken into the community or by the survivor.<sup>3</sup>

**8. Rights of Creditors.**—The community property is liable for the wife's ante-nuptial debts, but not on any contract of hers made during coverture, except for necessities.<sup>4</sup> It is likewise liable for all ante-nuptial and post-nuptial debts of the husband; as he can dispose of it absolutely, he can absolutely charge it with his debts.<sup>5</sup>

subject of inquiry. *Murphy v. Jury*, 2 Southern Repr (La.) 575. See also *Broad v. Murray*, 44 Cal. 228.

The children of a deceased mother are tenants in common of the legal title with their father to the community property, with power in the father to convey or mortgage the whole estate so far as is necessary to provide for the debts of the community. *Johnston v. San Francisco Savings Union*, 63 Cal. 556; *McAlister v. Farley*, 39 Tex. 552.

As has been often said, heirs take community property charged with the debts against it; and if it be sold by the survivor for the purpose of paying community debts, or for the purpose of reimbursing the survivor for separate means used in discharge of such debts, then the purchaser will be protected in his purchase. *Wilson v. Helms*, 59 Tex. 680; *Burleson v. Burleson*, 28 Tex. 383; *Johnson v. Harrison*, 48 Tex. 257; *Wenar v. Stenzel*, 48 Tex. 484; *Jones v. Jones*, 15 Tex. 143. See also *Morrison v. Covington*, 2 La. Ann. 259; *Sadler v. Kimbrough*, 24 La. Ann. 534; *Succession of Kerley*, 18 La. Ann. 583.

On the death of the wife her interest in the homestead descends and vests in her heirs, subject to administration and to the right of the husband to wind up the community affairs. This right of the husband must be limited chiefly to paying the community debts, and a purchaser from him does not acquire the interest of the children of the marriage when there were no debts of the community to be paid. A sale to support the children will not be sufficient to pass title to their interest in the homestead. *Bell v. Schwartz*, 56 Tex. 353. See also *Belcher v. Fox*, 60 Tex. 527; *Bell v. Schwartz*, 37 Tex. 572; *Jones v. Jones*, 15 Tex. 143; *Walker v. Young*, 37 Tex. 519; *Carter v. Conner*, 60 Tex. 52; *Ord v. De La Guerra*, 18 Cal. 67; *Smith v. Dorsey*, 5 La. Ann. 381; *Guillotte v. Lafayette*, 5 La. Ann. 382.

In *Louisiana* a child cannot, since the

passage of the laws of 1844, sue for her deceased father's community interest while her mother remains a widow. *Day v. Collins*, 5 La. Ann. 588.

Where a wife dies seized of community estate, and leaving children, her interest in such community estate descends to and vests wholly in her surviving children, to the exclusion of surviving grandchildren whose parents died before the ancestress did. *Cartwright v. Moore*, 1 S. W. Repr. (Tex.) 263.

1. After the surviving husband has regularly filed his inventory, if it appear that he is about to waste the property, the heirs may apply to the court and have their rights protected. *Pasch. Dig.* 4650. *Griffin v. Ford*, 60 Tex. 501. See also *Hawley v. Crescent City Bank*, 26 La. Ann. 230.

2. *Stratton v. Rogers*, 11 La. Ann. 380; *Succession of Planche*, 8 La. Ann. 575.

3. *Smith v. Creditors*, 21 La. Ann. 241.

4. The community property is liable for the sole debt of the wife contracted before marriage. *Vlantin v. Bumpus*, 35 Cal. 214; *Van Maren v. Johnson*, 15 Cal. 308. See also *Remington v. Higgins*, 54 Cal. 620; *Taylor v. Murphy*, 50 Tex. 291; *Nash v. George*, 6 Tex. 234; *Portis v. Parker*, 22 Tex. 699; *Christmas v. Smith*, 10 Tex. 123; *Edrington v. Mayfield*, 5 Tex. 363. Interest paid on a stock loan which was a personal debt of the wife was charged to the community. *Barbet v. Roth*, 16 La. Ann. 271.

5. The community is liable for debts of the husband contracted before marriage. *Davis v. Compton*, 13 La. Ann. 396; *Portis v. Parker*, 22 Tex. 699. See also *Forbes v. Dunham*, 24 Tex. 611; *Jones v. Jones*, 15 Tex. 143; *Hawley v. Crescent City Bank*, 26 La. Ann. 230; *McDonald v. Badger*, 23 Cal. 393; *Adams v. Knowlton*, 22 Cal. 283; *Tompkins v. Tompkins*, 12 Cal. 114; *Lott v. Keach*, 5 Tex. 394; *Edrington v. Mayfield*, 5 Tex. 363.

An attaching creditor of the community estate, or one who, through operation

## COMMUNITY PROPERTY—COMMUTATION—COMPACT.

As an entirety, it is not liable for any debt contracted after the dissolution of the marriage.<sup>1</sup> All the debts for which it is liable must be settled before the survivor or the heirs of the deceased have personally any interest.<sup>2</sup> In *Louisiana*, if the widow accept the community, she or her estate is liable for one half of the debts, but if she renounce the same, neither she nor her estate can be held liable at all.<sup>3</sup> A judgment against both husband and wife can be enforced against the community property or against the separate property of either one; but if a mortgage has been given for the husband's debts which covers both community property and separate property of the wife, she may have the community property exhausted first.<sup>4</sup> Judgment creditors cannot have a part of the community property set aside by metes and bounds to satisfy their debts.<sup>5</sup> In a foreclosure suit against the community the wife should be made a party.<sup>6</sup>

**COMMUTATION.**—The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides.<sup>7</sup>

**COMPACT.**—An agreement; a contract; generally applied as between States or governments.<sup>8</sup>

of law, has acquired an apparent lien upon land which has been purchased in whole or in part with the separate means of the wife, does not occupy such position as will preclude the wife from proving her separate interest, and thereby having it protected. Such protection is accorded under like circumstances to a third party, and there is nothing in the marital relation that should prevent it from being extended to the wife. *Parker v. Coop*, 60 Tex. 111.

1. *Thezan v. Thezan*, 28 La. Ann. 442.

2. *Jones v. Jones*, 15 Tex. 143; *Tompkins v. Tompkins*, 12 Cal. 114; *Good v. Combs*, 28 Tex. 34; *Baird v. Lemee*, 23 La. Ann. 424; *Sadler v. Kimbrough*, 24 La. Ann. 534; *Hawley v. Crescent City Bank*, 26 La. Ann. 230; *Durham v. Williams*, 32 La. Ann. 162; *Dickson v. Dickson*, 33 La. Ann. 1370.

3. *Ludeling v. Felton*, 29 La. Ann. 719; *Reihl v. Martin*, 29 La. Ann. 15. *Compare Cocco's Succession*, 32 La. Ann. 325.

4. Where a judgment is recovered against husband and wife jointly without any specific directions in the decree as to the estate out of which it is to be satisfied, it would seem that, as a general rule, it may be levied upon and be satisfied out of the property of either the husband or wife, or of the community. *Howard v. North*, 5 Tex. 290; s. c., 51 Am. Dec. 769. See also *Abut v. Atkinson*, 21 La. Ann. 239.

If by the terms of a trust deed the separate property of a wife be liable, all community property which is subject to the same lien must be exhausted before the separate property of the wife can be taken. *James v. Jacques*, 26 Tex. 321.

5. *Good v. Combs*, 28 Tex. 34.

6. *Burton v. Lies*, 21 Cal. 87.

7. *Bouvier's Law Dict.*

**Commutation of Imprisonment** allows a prisoner to acquire, by good behavior, a right to take a shorter term of imprisonment than that imposed by his original sentence. *Abbott's Law Dict.*

"A commutation," says Beatty, J., in *Ex parte Janes*, 1 Nevada, 321, "is the change of one punishment known to the law for another and different punishment also known to the law." It is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit. In the *Matter of Sarah M. Victor*, 31 Ohio St. 206. See also *Lee v. Murphy*, 22 Gratt. (W. Va.) 789.

**Commutation of Fares** consists in selling a ticket for a term at a less price than the aggregate of daily fares for the term. *Abbott's Law Dict.*

8. Compact and contract are convertible terms. *Canal Co. v. Railroad Co.*, 4 Gill & J. (Md.) 129.

As used in the prohibition upon the States to "enter into any agreement or compact with another State or with a

**COMPANY.**—An association of a number of individuals for the purpose of carrying on some business or undertaking. The term is not synonymous with partnership, though an unincorporated company is generally a partnership; but is usually applied to those associations whose members are more numerous, their capital larger, and their enterprises greater. When these companies are authorized by the government they are called incorporated companies or corporations.<sup>1</sup>

foreign power," in *Const. U. S., I. X. 2*, something more is meant by "compact" than by the word "treaty" in the preceding clause. The prohibition is designed to be more comprehensive, and forbid every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties. *Holmes v. Jennison*, 14 Pet. (U. S.) 572.

1. Bouv. Law Dict.

"The proper signification of the word 'company,' when applied to persons engaged in trade, denotes those united for the same purpose or in a joint concern. It is so commonly used in this sense, or as indicating a partnership, that few persons accustomed to purchase goods at shops where they are sold by retail would misapprehend that such was its meaning." *Palmer v. Pinkham*, 33 Me. 52.

An unincorporated company is "an association of individuals not forming a corporation, but carrying on business under a corporate name, and having certain qualities resembling those of incorporated companies." *Rap. & Lawr. Law Dict.*

A club is not a company within winding-up acts. *In re St. James's Club*, 16 Jur. 1075.

**Incorporated Company** in an embezzlement act was held to mean one composed of individuals associated together for private purposes. *Coats v. People*, 22 N. Y. 245.

**Joint-stock Company** and "corporation organized under general laws" are convertible terms in Massachusetts legislation. *Atty.-Gen. v. Merc. Ins. Co.*, 121 Mass. 524.

**Manufacturing Company**—One which makes goods and wares from raw materials. A company which makes castings and machinery from melted pig and old iron is not an "iron-manufacturing company." The iron is manufactured before the castings are made. *People v. Holdridge*, 4 Lans. (N. Y.) 511.

An aqueduct company whose business it is to distribute water is not a manufacturing company. *Dudley v. Aqueduct Corp.*, 100 Mass. 185.

**Persons Composing the Company**, in an act making such liable to the extent of their respective shares of stock for the debts of the company, are all persons who own stock. *Rosevelt v. Brown*, N. Y. 148.

**Said Company**.—A bond of indemnity given to the trustees of an incorporation insurance company, conditioned for the good conduct of a clerk while in the service of the said company, remains in force as long as the clerk serves the company, although there are changes among the individuals composing the company. It is otherwise in an ordinary partnership. *Metcalf v. Bruin*, 2 Camp. 422.

In an act incorporating a dock company the phrase "the dock or wharf owned by the said company" must be construed to mean by the individuals composing the said company. *Steamship Co. v. Transportation Co.*, 3 C. E. (N. J.) 13. 511.

**Ship's Company** or crew does not include a mere passenger. *U. S. v. Little*, 1 W. & M. (C. C.) 221.

**The Company**—Where a person delivered a message to a telegraph company to be sent to a point beyond its terminus and the company sent the message to its terminus, where it was delivered by transmission to another company, upon the blank upon which the message was written there was a stipulation that "this company" would not be responsible for error or delay of any other company, and limiting the liability of "this company," held, in a suit against a second company, that "the company" meant the first company, and the limitation did not extend to the second. *Squibb v. W. U. Tel. Co.*, 98 Mass. 232.

**Trading or Other Public Company** does not include a private partnership. *Griffith*, 12 Ch. Div. 655.

**Transportation Company**.—A company engaged in the removal of petroleum from place to place by means of pipes is a transportation company within a tax law. *Columbia Conduit Co. v. Com.*, 90 Pa. 307.

**Turnpike Company** in a tax law includes a plank-road company. *State v. Hain*

the state of being a companion ; fellowship ; society.<sup>1</sup>

**COMPARATIVE NEGLIGENCE.** (See also CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; MUNICIPAL CORPORATIONS; NEGLIGENCE; RAILROAD COMPANIES.)

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**Definition.**—Comparative negligence is that doctrine in the law of negligence by which the negligence of the parties is compared in the degrees of "slight," "ordinary," and "gross" negligence, and a recovery permitted, notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury, or when the negligence of the defendant is not gross, but only ordinary or slight when compared under the circumstances of the case, with the contributory negligence of the plaintiff.<sup>2</sup>

J. L. 443; *Haight v. State*, 32 N. J.

Where in a deed granting an annuity there was a provision that it should be annulled if the annuitant "should associate, or be obliged to keep company with, or co-operate or criminally correspond with J. L. 443; *Dormer v. Knight*, 1 Taunt.

Rockford, etc., R. Co. v. Delaney, 198; s. c., 25 Am. Rep. 308; *Winters v. Case*, 5 Bradw. (Ill.) 486; C., B. & Q. R. Co. v. Johnson, 103 Ill. 512; 8 Am. & Eng. R. R. Cas. 25; C., B. & Q. R. Co. v. Harwood, 90 Ill. 427; 10 Ill. 88; *Wabash, etc., R. Co. v. State*, 110 Ill. 114; s. c., 19 Am. & Eng. R. R. Cas. 359; *Chicago & Alton R. Co. v. Johnson*, 116 Ill. 206; *City of Chicago v. Stearns*, 105 Ill. 557; s. c., 2 Am. & Eng. Corp. Cas. 594; *Chicago, etc.,*

R. Co. v. Goebel, 7 West. Rep. (Ill.) 689, 692; *Chicago & Alton R. Co. v. Dillon*, 17 Bradw. (Ill.) 355; C., B. & Q. R. Co. v. Rogers, 17 Bradw. (Ill.) 638; *Chicago & N. W. R. Co. v. Thorson*, 11 Bradw. (Ill.) 631, 634; *Garfield Mfg. Co. v. McLean*, 18 Bradw. (Ill.) 447, 449; *Gardner v. C. R. & P. R. Co.*, 17 Bradw. (Ill.) 262, 265; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Chicago, etc., R. Co. v. Dimick*, 96 Ill. 42; *Moody v. Peterson*, 11 Bradw. (Ill.) 185.

These cases when classified support all parts of the statement of the rule in the text, and in the two late cases, *supra*, of C., B. & Q. R. Co. v. Johnson, 103 Ill. 512; s. c., 8 Am. & Eng. R. R. Cas. 25, and *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358. The cases in *Illinois* now deemed authoritative on this subject are collected, and many of them discussed. See also *Beach on Contribu-*

**2. Degrees of Negligence.**—The comparison of the negligence of plaintiff and defendant must be made by determining whether, under the circumstances, the negligence of each is slight, ordinary or gross in the technical and legal sense of these terms, and comparing the degree in which the one has been negligent with the degree of negligence on the part of the other.<sup>1</sup> In making this comparison the circumstances of the case must be considered, and the comparison made in the light of the circumstances.<sup>2</sup> But

tory Neg., pp. 82 and 83, note 4, and 55 Am. Dec., note p. 671, for reference to other cases.

1. In the case of *C., B. & Q. R. Co. v. Johnson*, 103 Ill. 512; s. c., 8 Am. & Eng. R. R. Cas. 225, 232, the supreme court of Illinois clearly and unequivocally state this doctrine, and define the legal meaning of the terms slight, ordinary, and gross negligence, saying: "In holding the plaintiff may recover in an action for negligence, notwithstanding he has been guilty of contributive negligence, where his negligence is but slight, and that of the defendant gross in comparison with each other, it must, of course, be understood that the terms 'slight negligence' and 'gross negligence' are used in their legal sense, as defined by common-law judges and text writers, for otherwise the terms would convey no idea of a definite legal rule. As defined by those judges and writers, these terms express the extremes of negligence. Beyond gross, or less than slight, there is no degree of negligence. 'Gross gross,' 'grosser gross,' and 'grossest gross,' and 'slight slight,' 'slighter slight,' and 'slightest slight,' are absurd and, in a legal sense, impossible terms. What is less than slight negligence the law takes no cognizance of as a ground of action; and beyond gross negligence the law, while recognizing that there may be liability for a trespass because of a particular intention to do wrong, or of a degree of wilful and wanton recklessness which authorizes the presumption of a general intention to do wrong, recognizes no degree of negligence. The definition of gross negligence itself proves that it is not intended to be the subject of comparison. It is 'the want of slight diligence.' Slight negligence is 'the want of great diligence,' and intermediate there is ordinary negligence, which is defined to be 'the want of ordinary diligence.'" The court then cites *Story on Bailments*, § 17; *Shearman & Redfield on Neg.* (2d Ed.) §§ 16, 17; *Cooley on Torts*, 631; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541; and a little further on

say: "The word 'diligence,' as used in the definitions of the degrees of negligence to which we have referred, is synonymous with 'care.' This is shown by the text in *Story* immediately following the definitions quoted. It is then said: 'For he who is only less diligent than very careful men cannot be said to be more than slightly inattentive; he who omits ordinary care is a little more negligent than men ordinarily are; and he who omits even slight diligence fails in the lowest degree of prudence, and is deemed grossly negligent.'" By many Illinois lawyers the doctrines of the *Johnson* case were looked upon as revolutionary, if not abandoning, the rule of comparative negligence as previously understood and declared by the supreme court. *Gilbert, Railroads and the Courts*, 127-138. And Mr. Justice Dickey, while concurring in the result arrived at in the *Johnson* case, dissented from the reasoning of the court, and insisted that the terms "slight," "ordinary," and "gross negligence" should have their popular meaning, and that they had been so used in the *Jacobs* case (20 Ill. 478), in which the rule of comparative negligence was first enunciated. 8 Am. & Eng. R. R. Cas. 235; s. c., 103 Ill. 512. But notwithstanding the criticisms to which it has been subjected, the *Johnson* case has been several times approved and followed in subsequent cases, and the rules laid down therein seem in harmony with the better considered cases in Illinois. *Rockford, R. I. & P. R. Co. v. Delaney*, 8 Ill. 196; s. c., 25 Am. Rep. 308; *City of Chicago v. Stearns*, 105 Ill. 557; s. c., 8 Am. & Eng. Corp. Cas. 594; *C. B. & Q. R. Co. v. Harwood*, 90 Ill. 427; *I. C. R. Co. v. Hammer*, 72 Ill. 351; *E. St. L. F. & P. Co. v. Hightower*, 92 Ill. 141.

2. "The terms 'slight' and 'gross negligence,' when used in an instruction do not sufficiently institute the comparison required to be made. The decision in the *Johnson* case, 103 Ill. 512, was not intended to eliminate from the doctrine of comparative negligence the very element that makes it available to the plaintiff, where both parties have been

When both parties have been negligent as to a particular act or omission, the relative degrees of their negligence cannot be changed by comparison.<sup>1</sup>

**When Plaintiff Can Recover.**—When, upon such a comparison of the negligence of the plaintiff and the defendant it appears that the contributory negligence of the plaintiff is "slight" and the negligence of the defendant "gross," as above defined,—that is, where a degree of negligence intervenes between the contributory negligence of the plaintiff and the "gross" negligence of the defendant,—the plaintiff is entitled to recover.<sup>2</sup> This doctrine was

of negligence contributing to injury,—the relative degree of guilt of the respective parties,—as it has in subsequent cases been recognized, defined and upheld as still existing under the same limitations as before the *Johnson* case was decided." *City of Chicago v. Earns*, 105 Ill. 554; s. c., 2 Am. & Corp. Cas. 594.

An instruction which requires the jury to determine whether the negligence of the plaintiff was slight and that of the defendant gross, but does not require the jury to compare the negligence of the parties, or to determine from such comparison whether the one is slight and the other is gross, is erroneous. *Chicago & Alton R. Co. v. Dillon*, 17 Bradw. (Ill.) 355.

The jury must be told that to authorize recovery it must appear from the evidence that the negligence of the plaintiff is 'slight,' and that of the defendant is 'gross,' in comparison with each other." *Harwood v. Q. R. Co.*, 80 Ill. 427. And there are many other cases enunciating the same rule, among which are: *St. L. & T. Co. v. Manly*, 58 Ill. 306; *I. C. R. Co. v. Goddard*, 72 Ill. 568; *R. R. I. Co. v. Delaney*, 82 Ill. 198; *55 Am. Rep. 308*; *C., B. & Q. R. Co. v. Van Patten*, 64 Ill. 510; *T., W. & A. Co. v. Spencer*, 66 Ill. 528; *I. C. R. Co. v. Hall*, 72 Ill. 225; *C. & N. W. Co. v. Dimick*, 96 Ill. 42. Perhaps the clearest statement of this qualification is in the *Johnson* case (8 Am. & R. R. Cas. 233), where it is said: "Applying the measure of slight and gross negligence to the acts of the respective parties charged to have been negligent is of course always to be held in remembrance that the term 'negligence' is relative, 'and its application depends on the situation of the parties, the degree of care and vigilance required by the circumstances reasonably imposable." *Cooley on Torts*, 630. The rule is therefore, in the present instance, related to the measure of care,

under the circumstances shown by the evidence to have existed, imposed upon the respective parties. It was to that measure of care that these instructions related, and if they had related to any other, they would, for that cause alone, have been erroneous."

1. "Surely it needs no demonstration that if, as to a particular act, the negligence of the plaintiff was ordinary, and that of the defendant gross, their relation is not changed by comparing them with each other. The same evidence that determines the one is gross and the other ordinary, fixes their relative degrees with reference to each other." *C., B. & Q. R. Co. v. Johnson*, 103 Ill. 512; s. c., 8 Am. & Eng. R. R. Cas. 234.

2. Assuming the terms "slight" and "gross" negligence to have been used in the *Jacobs* case, 20 Ill. 478, in their legal sense, that case, which was the first declaration of the law of comparative negligence, was also the first case to lay down the limitations governing the plaintiff's right of recovery where the law of comparative negligence prevails. In that case it was said: "We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action." 20 Ill. 496, 497. But whatever may have been the meaning of "slight" and "gross" negligence in the *Jacobs* case, a long line of recent Illinois cases, including the latest, fully support the text. "Even though the plaintiff is guilty of only slight negligence, he cannot recover unless defendant's negligence is gross, or the injury is wanton or wilful." *Winchester v. Case*, 5 Bradw. (Ill.) 486. And he cannot recover when his negligence is ordinary, and that of the defendant only gross, and not wilful. *Illinois, etc., R. Co. v. Hetherington*, 85 Ill. 510; *Earlville v. Carter*, 6 Bradw. (Ill.) 421.



intended to soften the rule of contributory negligence, which, the Illinois courts thought, denied the right of recovery when plaintiff's negligence contributed proximately to his injury in any degree, however slight;<sup>1</sup> and it does not prevent the plaintiff from recovering when his negligence, no matter what its degree, was not a proximate cause of his injury.<sup>2</sup> That is, where the negligence of the plaintiff does not proximately contribute to his injury the rule of comparative negligence has no application, and the ordinary rules of proximate and remote negligence are applied.<sup>3</sup>

**4. When Plaintiff Cannot Recover.**—In cases to which the doctrine of comparative negligence is applicable the plaintiff cannot recover

"The rule, as has often been announced, is that although the plaintiff may have been guilty of some negligence, still, if it is slight as compared with that of the defendant, which is gross, a recovery may be had." *Chicago & N. W. R. v. Dimick*, 96 Ill. 47; s. c., 2 Am. & Eng. R. R. Cas. 201, 205; *T. & W. R. Co. v. Grabbie*, 88 Ill. 443.

"In a number of his (plaintiff's) instructions the jury are told that he may recover if his negligence was slight as compared with that of appellant. As we have seen, they should have required the jury to find, when compared, that appellee's was slight and appellant's gross. Both of these conditions must exist when the plaintiff is guilty of negligence before he can recover. His may have been slight as compared with that of appellant, and its not gross." *I. C. R. Co. v. Hammer*, 72 Ill. 351; *E. St. L., P. & P. Co. v. Hightower*, 92 Ill. 141; *C., B. & Q. R. Co. v. Harwood*, 90 Ill. 427; *I. C. R. Co. v. Goddard*, 72 Ill. 568; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 197; s. c., 25 Am. Rep. 308.

1. "It was formerly held that the plaintiff could not recover in any case where his own negligence had materially contributed in any degree to the injury. In the courts of this State the severity of that rule was relaxed many years ago." *I. & St. L. R. Co. v. Evans*, 88 Ill. 65; *I. C. R. Co. v. Baches*, 55 Ill. 389; *St. L., A. & T. H. R. Co. v. Manly*, 58 Ill. 306; *C. & A. R. Co. v. Gretzner*, 46 Ill. 83; *C., B. & Q. R. Co. v. Lee*, 68 Ill. 580; *I. C. R. Co. v. Hammer*, 72 Ill. 351; *I. & St. L. R. Co. v. Stables*, 62 Ill. 319; *C., B. & Q. R. Co. v. Harwood*, 90 Ill. 427.

2. *Earlville v. Carter*, 2 Bradw. (Ill.) 34; *C., B. & Q. R. Co. v. Dougherty*, 12 Bradw. (Ill.) 199; *I. C. R. Co. v. Middleworth*, 46 Ill. 497; *Chicago & Alton R. Co. v. Becker*, 76 Ill. 25; *Tuff v. Warman*, 5 C. B. N. S. 573; *Greenland v. Chaplin*, 5 Exch. 248; *Trow v. Vt. Cent.*

*R. Co.*, 24 Vt. 487; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Murphy Deane*, 101 Mass. 455; s. c., 3 Am. Rep. 390; *Chicago & Alton R. Co. v. Pondrom*, 51 Ill. 333; s. c., 2 Am. Rep. 305; 55 Am. Dec., note p. 668; *Isbell v. Y. & N. H. R. Co.*, 27 Conn. 393; s. c., 71 Am. Dec. 28; *Deering on Negligence* § 17; *Shearman & Redfield on Neg.* (2d Ed.) § 25; *Pierce on Railroads*, 326, 327; 2 *Thompson on Neg.* 1151; *Wharton on Neg.* (2d Ed.) §§ 323-329.

3. This doctrine has not been in terms stated by the Illinois courts, but it follows as a necessary sequence of the cases of *C., B. & Q. R. Co. v. Johnson*, 111 Ill. 512; s. c., 8 Am. & Eng. R. R. Cas. 225; *City of Chicago v. Stearns*, 105 Ill. 554; s. c., 2 Am. & Eng. Corp. Cas. 55; and *Calumet Iron, etc., Co. v. Martin*, 111 Ill. 358, unless it was intended by those cases, and especially the first cited, to make the rule of comparative negligence the sole and only test, and that a more stringent and harsh one than the ordinary rule of contributory negligence. But that such was not the intention of the court is apparent from the *Stearns* and *Martin* cases. Prior to the three cases referred to, the whole doctrine of comparative negligence was in an uncertain state, and in many cases "slight" and "remote" negligence were confused, and the rule of comparative negligence indiscriminately applied. *Beach on Contributory Negligence*, § 88. But the cases referred to so enunciate the law that there can be little doubt that in future cases the doctrine of comparative negligence will only be applied when the plaintiff's negligence has proximately contributed to his injury. Indeed, the converse of this proposition, namely, that when the plaintiff has been guilty of a want of ordinary care contributing to his injury the doctrine of comparative negligence has no application, has been many times stated, and is emphasized in both the *Johnson* and *Martin* cases.

negligence of the defendant was "slight" or "ordinary," and not "gross," although plaintiff's negligence contributing to the injury have been only slight when compared with the negligence of defendant under the circumstances of the case.<sup>1</sup>

**Failure to Use Ordinary Care.**—Nor can the plaintiff recover for injury, the result of mere negligence upon the part of the defendant, when his own failure to exercise ordinary care under the circumstances contributed to the injury.<sup>2</sup> When plaintiff fails to use

*Winchester v. Case*, 5 Bradw. (Ill.) 111; *Boody v. Peterson*, 11 Bradw. (Ill.) 111; *C. R. Co. v. Hammer*, 72 Ill. St. L. P. & P. Co. v. Hightower, 141; *Rockford, etc., R. Co. v. ...*, 82 Ill. 108; s.c., 25 Am. Rep. 308; *Chicago & N. W. R. Co. v. Goebel*, West. Rep. 689, 692; *Calumet Steel Co. v. Martin*, 115 Ill. B. & Q. R. Co. v. Johnson, 103 s.c., 8 Am. & Eng. R. R. Cas. B. & Q. R. Co. v. Rogers, 17 (Ill.) 638; *Gardner v. C., R. 1 & Co.*, 17 Bradw. (Ill.) 262, 265; *... etc., R. Co. v. Wallace*, 110 s.c., 19 Am. & Eng. R. R. Cas. It is not needful to cite all the cases of this rule, as they are fully collected in the *Martin* case, *supra*.

This doctrine has been thought to overrule of comparative negligence, *Johnson* case, *supra*, has been held as precluding a plaintiff who exercised ordinary but not extraordinary care from recovering in cases where, under the doctrine of contributory negligence in its most absolute form, a recovery would have been had. *Gilbert, Railroad Courts*, 119, 120. But these courts have misapprehended the effect of the decision. In the *Johnson* case the following statement in plaintiff's instructions was held erroneous: "But if, from the evidence in this cause, it appears that the plaintiff's intestate, Johnson, was not exercising ordinary care, the plaintiff may recover, provided the jury believe that Johnson's negligence was slight and the negligence of the defendant gross in comparison with each other, then the verdict must be for the plaintiff." 8 Am. & Eng. R. R. Cas. The fallacy of this instruction, if once apparent, may be seen by the assumption that where a plaintiff failed to exercise ordinary care—he is guilty of ordinary negligence—his negligence may be slight when compared with that of the defendant. The negligence of both parties concurring in the same time and relating to the same omission must be judged by the same standard,—that, is the standard of

care under the circumstances,—and it follows that the negligence of the plaintiff cannot be ordinary considered by itself and slight in comparison. "It cannot, then, legally be true that where the plaintiff fails to exercise ordinary care and the defendant is guilty of negligence only, the plaintiff's negligence is slight, and that of the defendant gross, in comparison with each other." *C., B. & Q. Ry. Co. v. Johnson*, 103 Ill. 512; s.c., 8 Am. & Eng. R. R. Cas. 225, 233, 234. But it must be noted that the instruction held erroneous related only to the statement of the rule of comparative negligence. The supreme court in passing upon it expressly stated that "No question arises under these instructions with regard to the measure of care it would have been the duty of defendant to have observed if it had been within the power of the defendant to have avoided the consequences of the negligence of plaintiff's intestate." 8 Am. & Eng. R. R. Cas. 231.

And this case and the doctrine stated in it are in perfect harmony with the rule that if the plaintiff exercised ordinary care, but was slightly negligent,—i.e., did not exercise extraordinary care,—he may recover if the defendant failed to exercise even slight care—i.e., was guilty of gross negligence. "Within the contemplation of that rule, where one has observed ordinary care with reference to the particular circumstances involved for his personal safety, he has, even if slightly negligent, observed all the care the law requires of him; and where, having observed this care, he is injured by the negligence of another, that other has been guilty of the degree of negligence for which the law charges responsibility. The injured person could do no more to entitle himself to redress, and no higher degree of culpability is essential to the liability of the person causing the injury; and so the two degrees of negligence, if the person exercising ordinary care has been at all negligent, when compared with each other, fall within the opposite extremes of negligence, legally considered." *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358.

ordinary care the rule of comparative negligence has no application.<sup>1</sup>

**6. Preponderance of Negligence Insufficient.**—It follows from these doctrines, and has been expressly held, that a mere preponderance of negligence upon the part of the defendant will not entitle the plaintiff to recover.<sup>2</sup>

**7. Wilful Injury.**—But even though the plaintiff may have been negligent in the highest degree he will not be precluded from recovering if the defendant wilfully injured him.<sup>3</sup> In such cases contributory negligence is not a defence.<sup>4</sup> And the terms "gross negligence" and "wilful negligence" should not be applied to wilful misconduct of the defendant, evincing that something more than mere negligence which implies a willingness or a purpose to injure.<sup>5</sup> Wilfulness and negligence are the opposites of each other. "Gross" negligence is not wilfulness.<sup>6</sup>

**8. Proximate Cause.**—When the rule of comparative negligence is applicable to a case plaintiff is not prevented from recovering because his "slight" negligence proximately contributed to his injury.<sup>7</sup> This is only true where a full degree of negligence inter-

1. "The exercise of ordinary care is an indispensable prerequisite to a right of recovery in any case upon the ground of mere negligence, and the doctrine of comparative negligence has no application except in cases where such care was exercised." *Garfield Mfg. Co. v. McLean*, 18 Bradw. (Ill.) 447, 449; *Chicago & N. W. R. Co. v. Thorson*, 11 Bradw. (Ill.) 631, 634, 635; *C. B. & Q. R. Co. v. Rogers*, 17 Bradw. (Ill.) 638; *Abend v. T. H. & I. R. Co.*, 111 Ill. 203; s. c., 53 Am. Rep. 616; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510.

2. *Chicago, etc., R. Co. v. Dimick*, 96 Ill. 42; *I. C. R. Co. v. Goddard*, 72 Ill. 568; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 198; s. c., 25 Am. Rep. 308; *Indianapolis, etc., R. Co. v. Evans*, 88 Ill. 63; *Chicago, etc., R. Co. v. Dunn*, 61 Ill. 385; *Illinois, etc., R. Co. v. Moffit*, 67 Ill. 431; *Joliet v. Seward*, 86 Ill. 402; *T. W. & W. R. Co. v. Grabble*, 88 Ill. 443; *C. & N. W. R. Co. v. Clark*, 70 Ill. 278; *I. C. R. Co. v. Hammer*, 72 Ill. 351; *Chicago R. Co. v. Mock*, 72 Ill. 141. These cases, and others to the same effect, seem in harmony with the *Jacobs* case (20 Ill. 478), but modify, and in some instances overrule, intervening cases which seem to have recognized the doctrine that a mere preponderance of negligence upon the part of defendant would render him liable. Compare *Peoria Bridge Association v. Loomis*, 20 Ill. 251; s. c., 71 Am. Dec. 263; *C. B. & Q. R. Co. v. Payne*, 49 Ill. 503.

3. *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Earlville v. Carter*, 6 Bradw.

(Ill.) 421; *Winchester v. Case*, 5 Bradw. (Ill.) 486; *St. L., A. & T. H. R. Co. v. Todd*, 36 Ill. 414; *C. B. & Q. R. Co. v. Johnson*, 103 Ill. 512; *Carter v. L., N. A. & C. R. Co.*, 98 Ind. 552; s. c., 8 Am. & Eng. R. R. Cas. 347, and 22 Am. & Eng. R. R. Cas. 360; *Ivens v. Cincinnati, etc., R. Co.*, 103 Ind. 30; *Indianapolis, etc., R. Co. v. Galbraith*, 63 Ill. 436.

4. *Carter v. L., N. A. & C. R. Co.*, 98 Ind. 552, 554, 555; s. c., 8 and 22 Am. & Eng. R. R. Cas. 347 and 360; *Beach, Contributory Neg.*, § 17, p. 53 *et seq.*

5. "The words 'reckless' and 'wanton' do not mean 'wilful,' and express nothing more than mere negligence." *T. H. & I. R. Co. v. Graham*, 95 Ind. 286, 298.

"To say that an injury resulted from the negligent and wilful conduct of another, is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design." *L., N. A. & C. R. v. Bryan*, 107 Ind. 51, 54.

"To constitute wilful negligence the act done or omitted to be done must be intended. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; s. c., 71 Am. Dec. 263 265.

"The term 'wilful negligence,' if these words are to be interpreted with scientific accuracy, is a misnomer." *Beach on Con. Neg.*, p. 67.

6. *Pittsburg, etc., R. Co. v. McGrath*, 115 Ill. 172.

7. *I. & St. L. R. Co. v. Evans*, 88 Ill.

venes between the negligence of the plaintiff and that of the defendant.<sup>1</sup> And in all cases where the negligence of the parties is less than a full degree apart the ordinary rules of proximate cause and contributory negligence govern.<sup>2</sup>

**9. When Not Applicable to Children.**—The rule of comparative negligence is not applicable in the case of injuries to children so young as to be incapable of exercising ordinary care for personal security.<sup>3</sup> And where the child is manifestly so young as to be incapable of caring for its own safety, it will be held as a matter of law that it is not *sui juris*, and cannot be guilty of contributory negligence.<sup>4</sup> But where the child is old enough to be capable of exercising some degree of care, the question of negligence, whether comparative or contributory, is for the jury.<sup>5</sup> Ordinary care must be exercised by children who are of sufficient discretion to be deemed capable of negligence, but the care required is not that of an adult, but that of a careful child of similar age and capacity.<sup>6</sup>

**10. Special Rules.**—Evidence of a custom prevailing where plaintiff was employed is admissible to enable a jury to determine the degree of care exercised by the plaintiff in comparison with that of the defendant.<sup>7</sup> Where the rule of comparative negligence pre-

65; C., B. & Q. R. Co. v. Harwood, 90 Ill. 427; Galena, etc., R. Co. v. Jacobs, 20 Ill. 478.

1. Beach on Contributory Neg., pp. 77, 78; Rockford, etc., R. Co. v. Delaney, 82 Ill. 196; s. c., 25 Am. Rep. 308.

2. Aurora Branch R. Co. v. Grimes, 13 Ill. 585; Chicago & M. R. Co. v. Patchin, 16 Ill. 198; Dyer v. Talcott, 16 Ill. 300; Galena, etc., R. v. Yarwood, 17 Ill. 509; Galena, etc., R. v. Jacobs, 20 Ill. 478, 488, 491, 493, 496, 497; Galena, etc., R. Co. v. Fay, 16 Ill. 558; s. c., 63 Am. Dec. 323; C., B. & Q. R. Co. v. Dewey, 26 Ill. 255; s. c., 79 Am. Dec. 374; Garfield Mfg. Co. v. McLean, 18 Bradw. (Ill.) 447, 449; Abend v. T. H. & I. R. Co., 111 Ill. 203; s. c., 17 Am. & Eng. R. R. Cas. 614; s. c., 53 Am. Rep. 616; Myers v. Ind., etc., R. Co., 113 Ill. 386; s. c., 1 N. E. Rep. 899; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358; C., B. & Q. R. v. Rogers, 17 Bradw. (Ill.) 638; C., B. & Q. R. Co. v. Johnson, 8 Am. & Eng. R. R. Cas. 225; s. c., 103 Ill. 512. Compare Beach on Con. Neg. 85-87.

3. Chicago, etc., R. Co. v. Welsh (Ill.), 6 West. Rep. 540; s. c., 9 N. E. Rep. 197.

4. Mangam v. Brooklyn, etc., R. Co., 38 N. Y. 455; Ihl v. Railway Co., 47 N. Y. 317; Chicago, etc., R. Co. v. Gregory, 58 Ill. 226; Kay v. Pennsylvania R. Co., 65 Pa. St. 269; Pennsylvania Co. v. James, 81 Pa. St. 194; Walters v. Chicago, etc., R. Co., 41 Iowa, 71; Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. (Va.)

455; Hayes v. Michigan Cent. R. Co., 111 U. S. 228; s. c., 15 Am. & Eng. R. R. Cas. 394.

5. Chicago & Alton R. Co. v. Becker, 76 Ill. 32; Rockford, etc., R. Co. v. Delaney, 82 Ill. 198; s. c., 25 Am. Rep. 310; Indianapolis, etc., R. Co. v. Pitzer (Ind.) 109 Ind. 179; s. c., 25 Am. & Eng. R. R. Cas. 313; Pittsburgh, etc., R. Co. v. Vining's Adm'r, 27 Ind. 513; Railroad Co. v. Gladman, 15 Wall. (U. S.) 401; Railroad Co. v. Stout, 17 Wall. (U. S.) 657; St. Paul v. Kuby, 8 Minn. 154; Evansich v. Galveston, etc., R. Co., 57 Tex. 126; s. c., 44 Am. Rep. 586.

6. Railroad Co. v. Gladman, 15 Wall. (U. S.) 401; Railroad Co. v. Stout, 17 Wall. (U. S.) 657; Bransom's Adm'r v. Labrot, 81 Ky. 638; s. c., 50 Am. Rep. 193; I., P. & C. R. Co. v. Pitzer (Ind.), 109 Ind. 179; s. c., 25 Am. & Eng. R. R. Cas. 313; Birge v. Gardner, 19 Conn. 507; s. c., 50 Am. Dec. 261; Kerr v. Furgoe, 54 Ill. 482; s. c., 5 Am. Rep. 146; Chicago, etc., R. Co. v. Murray, 71 Ill. 601; Hund v. Geier, 72 Ill. 393; Glover v. Gray, 9 Bradw. (Ill.) 329. And see note, 55 Am. Dec. 676; Dowling v. N. Y. Cent. R. Co., 90 N. Y. 670; s. c., 12 Am. & Eng. R. R. Cas. 73; Barry v. N. Y. Cent. R. Co. 92 N. Y. 289; s. c., 13 Am. & Eng. R. R. Cas. 615; O'Connor v. B. & L. R. Co., 135 Mass. 352; s. c., 15 Am. & Eng. R. R. Cas. 362; Hynes v. San Francisco, etc., R. Co. (Cal.), 20 Am. & Eng. R. R. Cas. 486.

7. Pennsylvania Co. v. Stoelke, 104 Ill. 201.

vails, it is not error for the court to fail to instruct as to that doctrine, where such instructions are not requested.<sup>1</sup> The question of comparative negligence is for the jury.<sup>2</sup> But in Illinois the intermediate appellate courts are authorized to review the facts as well as the law, while the supreme court reviews only questions of law. But where there is no evidence of "gross" negligence on plaintiff's part, or where the evidence establishes that plaintiff did not use "ordinary" care, the supreme court will deny a recovery as a matter of law.<sup>4</sup>

**11. Comparative Negligence—How it Arose.**—The doctrine of comparative negligence was first developed as a common-law doctrine by the courts of Illinois.<sup>5</sup> A somewhat similar rule had long prevailed in courts of admiralty.<sup>6</sup> And the distinctions between "slight," "ordinary," and "gross" negligence were familiar in the law of bailments.<sup>7</sup> But the scientific accuracy and practical

1. Chicago, etc., R. Co. v. O'Connor, 9 N. E. Rep. (Ill.) 263, 266.

2. Ill. Cent. R. Co. v. Haskins (Ill.), 22 Am. & Eng. R. R. Cas. 343, 345; Pennsylvania Co. v. Frana, 112 Ill. 398; Pennsylvania Co. v. Conlan, 101 Ill. 94; s. c., 6 Am. & Eng. R. R. Cas. 243; Chicago & Alton R. Co. v. Bonifield, 104 Ill. 224; s. c., 8 Am. & Eng. R. R. Cas. 493; Indianapolis, etc., R. Co. v. Morgenstern, 106 Ill. 220; s. c., 12 Am. & Eng. R. R. Cas. 228.

3. Ill. Cent. R. Co. v. Haskins (Ill.), 22 Am. & Eng. R. R. Cas. 345; Chicago & Alton R. Co. v. Bonifield, 104 Ill. 224; s. c., 8 Am. & Eng. R. R. Cas. 495; Indianapolis, etc., R. Co. v. Morgenstern, 106 Ill. 220; s. c., 12 Am. & Eng. R. R. Cas. 229; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358; s. c., 3 N. E. Rep. 458.

4. C., R. I. & P. R. Co. v. Clark, 108 Ill. 114; s. c., 15 Am. & Eng. R. R. Cas. 261; C., B. & Q. R. Co. v. Rogers, 17 Bradw. (Ill.) 638; C., B. & Q. R. Co. v. Johnson (Dickey, J.), 8 Am. & Eng. R. R. Cas. 235; s. c., 103 Ill. 512; C. & N. W. R. Co. v. Seates, 90 Ill. 592; Pennsylvania Co. v. Rudel, 100 Ill. 603; Paleman v. Johnson, 84 Ill. 270; Simmons v. Chicago, etc., R. Co., 110 Ill. 340.

5. Galena, etc., R. Co. v. Jacobs, 20 Ill. 478 was the first case in which the rule was formulated. Although the decision in that case seems to have arisen, so far as this doctrine is concerned, from a misconception of the law relating to contributory negligence, and the application of the maxim *causa proxima et non remota spectatur*,—Beach on Con. Neg. 79.—yet it has never since been departed from in Illinois, and has recently been clearly and accurately formulated and reaffirmed. C., B. & Q. R. Co. v. Johnson,

103 Ill. 512; s. c., 8 Am. & Eng. R. R. Cas. 225; City of Chicago v. Stearns, 105 Ill. 554; s. c., 2 Am. & Eng. R. R. Cas. 594; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358; Abend v. T. H. I. R. Co., 111 Ill. 203; s. c., 53 Am. R. 616; s. c., 20 Am. & Eng. R. R. Cas. 616; Hayward v. Miller, 94 Ill. 349; s. c., Am. Rep. 229.

But it may be doubted whether the and other recent cases, heretofore cited, have not placed the doctrine on such a basis that it becomes only another way of stating the common-law rule. Wharton on Neg. (2d Ed.) § 334 et seq.; Shearman & Redfield on Neg. (2d Ed.) §§ 25, 36, 37; Butterfield v. Forester, East, 60; s. c., 2 Thompson on Neg. 1104; Priest v. Nichols, 116 Mass. 4; Railroad Co. v. Jones, 95 U. S. 4; Kennard v. Burton, 25 Me. 39; s. c., Am. Dec. 249; Hughes v. Muscatine, Iowa, 672; Houston, etc., R. Co. v. G. bett, 49 Tex. 573; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172; Baltimore, etc., R. Co. v. Fitzpatrick, 35 Md. 32; Strong v. Sacramento, etc., R. Co., 61 Cal. 326; Griffin v. Willow, 43 W. 509; Creamer v. Portland, 36 Wis. 4; Otis v. Janesville, 47 Wis. 422; Hammond v. Mukna, 40 Wis. 35; Bridge Grand Junction R. Co., 3 Mee. & W. 244; Davies v. Mann, 10 Mee. & W. 5; s. c., 2 Thompson on Neg. 1105.

6. The Nautilus, 1 Ware, 529; T. David Dows, 16 Fed. Rep. 154; T. Sapphire, 18 Wall. (U. S.) 51; The Pennsylvania, 12 Fed. Rep. 914; The Atlas Ben. C. C. 27; s. c., 93 U. S. 302; 22 Cent. Law Journal, 166; The Explorer, 20 Fed. Rep. 135; The Wanderer, 20 Fed. Rep. 140; McCord v. The Tiber, 6 Biss. (S. C. C.) 409.

7. Coggs v. Bernard, 2 Lord Raymon



peculiar modification of the doctrine of contributory negligence exists, but it is not comparative negligence.<sup>1</sup> The courts of most States deny the doctrine of comparative negligence;<sup>2</sup> and the supreme court of the United States adheres to the rule of contributory negligence.<sup>3</sup>

**COMPARISON OF HANDWRITING** is a comparison by the juxtaposition of two writings, in order, by such comparison, to ascertain whether both were written by the same person.<sup>4</sup>

R. Co. v. Fitzsimmons, 18 Kan. 34; s. c., 22 Kan. 686; s. c., 31 Am. Rep. 203; Central, etc., R. Co. v. Henigh, 23 Kan. 347; Mason v. R. Co., 27 Kan. 83; s. c., 41 Am. Rep. 405; s. c., 6 Am. & Eng. R. R. Cas. 1; Begnette v. People's Transp. Co., 2 Or. 200; Halstin v. Oregon, etc., R. Co., 9 Or. 163.

Late cases say the doctrine of comparative negligence is not in force in either State, thus: "Besides, I do not concede that a party can recover in such a case when chargeable with any degree of negligence upon his part. If it directly contributes to the injury. A person may be negligent in any affair and still recover on account of the negligence of another party, but not when his negligence is the proximate cause of the injury. The law does not enforce contribution between joint tort feors. However slight the negligence upon the part of a plaintiff may be, if it be such that but for that negligence the misfortune could not have happened, he cannot recover; but if the injury would have happened if his want of care had not contributed thereto, there may be a liability." Hurst v. Burnside, 8 Pac. Rep. (Or.) 888, 891; Cassida v. Oregon, etc., R. & Nav. Co. (Ore.), 13 Pac. Rep. 438, 441.

"This court has not adopted what is generally called the rule of comparative negligence." Kansas Pac. R. Co. v. Peavy, 29 Kan. 169; s. c., 11 Am. & Eng. R. R. Cas. 260, 268; Atchison, etc., R. Co. v. Morgan, 31 Kan. 77; s. c., 13 Am. & Eng. R. R. Cas. 499, 501.

1. Beach on Contributory Neg. 97; Whirley v. Whiteman, 1 Head (Tenn.), 610; Nashville, etc., R. Co. v. Carroll, 6 Heisk. (Tenn.) 347, 367. The rule in Tennessee is, that negligence on the part of the plaintiff contributing to his injury as a proximate cause thereof will bar a recovery, but that although guilty of some negligence, yet if he could not by the exercise of ordinary care have avoided the consequences of defendant's negligence, he may recover, but his negligence will be taken into consideration in mitigation of damages.

and this rule does not permit a recovery in any case where the parties are equally blamable. East Tenn., etc., R. Co. v. Fain, 12 Lea (Tenn.), 35; s. c., 19 Am. & Eng. R. R. Cas. 102, 105; L. & N. E. Co. v. Fleming, 14 Lea (Tenn.), 128; s. c., 18 Am. & Eng. R. R. Cas. 347; East Tenn., etc., R. Co. v. Humphrey, Adm'r, 12 Lea (Tenn.), 200; s. c., 19 Am. & Eng. R. R. Cas. 472; Jackson v. Nashville, etc., R. Co., 13 Lea (Tenn.) 491; s. c., 49 Am. Rep. 663; East Tenn., etc., R. Co. v. Stewart, 13 Lea (Tenn.) 431; s. c., 21 Am. & Eng. R. R. Cas. 614, 617. And the Tennessee statutory provision regarding the lookout required to be kept on railroad trains should not be overlooked in this connection. Code of Tenn., § 4643; 15 Am. & Eng. R. R. Cas. 477, note; Louisville, etc., R. Co. v. Burke, 6 Coldw. (Tenn.) 45; Smith v. Nashville, etc., R. Co., 6 Coldw. (Tenn.) 58; s. c., 6 Heisk. (Tenn.) 174; Railroad Co. v. Walker, 11 Heisk. (Tenn.) 383; Hill v. Louisville, etc., R. Co., 9 Heisk. (Tenn.) 823. These and all similar cases must be considered in the light of the statute.

2. O'Keefe v. Chicago, etc., R. Co., 32 Iowa, 467; Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274, 278; T. H. & I. Co. v. Graham, 95 Ind. 286, 293, 294; L. N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 434; L. S. N. R. Co. v. Norton, 1 Pa. St. 465; s. c., 64 Am. Dec. 67; Potter v. Warner, 91 Pa. St. 367; Wilcox v. Hudson River R. Co., 24 N. Y. 43; Pennsylvania Co. v. Richter, 42 N. J. 180; Gothard v. Alabama, etc., R. Co., 67 Ala. 114; Potter v. Chicago, etc., R. Co., 21 Wis. 377; s. c., 22 Wis. 61; Houston, etc., R. Co. v. Gorbett, Texas, 573; Marble v. Ross, 124 Mass. 44; Digby v. Kenton Iron Works, Bush (Ky.), 166.

3. Railroad Co. v. Stout, 17 Wall. (U. S.) 660; Railroad Co. v. Lockwood, Wall. (U. S.) 357.

4. Stark. Ev., part iv. p. 654.

Duncan, J., said, in Com. v. Smith, Serg. & R. (Pa.) 568 (1819): "Comparison of handwriting is where other witnesses prove a paper to be the hand-

**COMPELLED.**—Forced; constrained; obliged; necessitated irregularly.<sup>1</sup>

of a party, and the witness is de-  
to take the two papers in his hand,  
re them, and say whether they are  
not the same handwriting. The  
s collects all his knowledge from  
rison only; he knows nothing  
self; he has not seen the party  
nor held any correspondence with

istinguished from Quasi Comparisons.  
Edward, J., said, in *Travis v. Brown*  
St. 12): "Now this is as distinct  
parate a thing from that compari-  
hich a witness called to testify to  
riting makes between the writing  
tion and the exemplar in his mind,  
external, visible, and tangible ob-  
distinct from a mental impres-  
memory. It is the distinction  
n what is objective and what is  
ive."

and.—The English law was against  
g proof by comparison as a gen-  
e, though it was otherwise in the  
istical courts. See *Bouvier's Dic-*  
"Comparison of Handwriting,"  
thorities there cited. Exception  
however, where other writings  
ed to be genuine were already in the  
Another "exception" likewise ex-  
here the writings sought to be  
were so old that living wit-  
could not be procured, but were  
d enough to prove themselves.  
to Clark & Fin., *Fitzwater Peer-*  
se, it was said that this com-  
could not be made by persons  
ompared the other ancient docu-  
or the mere purpose of testifying,  
tain other cases, holding or in-  
g the contrary, were disapproved,  
however, at the present day. in  
ses, 17 & 18 Vict. c. 125, s. 27; in  
d cases, 28 & 29 Vict. c. 18, s. 8.  
e handwriting in dispute may be  
ed with any writing, proved to the  
tion of the judge to be genuine, by  
tresses, and their evidence sub-  
to the jury on the question of the  
riting in dispute.

ies.—In this country there is no  
nity. Many States follow the old  
law, and prohibit comparison  
ritings not relevant to the issue;  
permit it. Some which did prohibi-  
allow it under legislation.

ness.—Recourse may be had as  
rt testimony to *Lawson on Expert*  
inion Evidence. As to other mat-  
e 1 *Greenl. Ev.*, § 576 *et seq.*; 2  
on *Ev.*, ch. vii.

**Printed Matter.**—In an early Pennsyl-  
vania case—*McCorkle v. Burns*, 5 *Binney*,  
340—the jury were allowed to infer from  
a comparison of the types and devices of  
two newspapers that they were printed  
by the same person. *McCorkle v. Burns*,  
6 *Am. Dec.* 420.

1. *Web. Dict.*

**In Statute.**—"It is a maxim of the  
law, that what one may be compelled to  
do by suit, he may do without suit. No  
good purpose would have been subserved  
by withholding payment until suit and  
judgment; but payment without suit  
saved useless litigation and unnecessary  
costs. We are of opinion that where the  
officer is liable to the judgment creditor,  
and the latter claims payment of him,  
which is accordingly made, the payment  
is compulsory within the spirit and in-  
tent of the statute. All the analogies of  
the law, it seems to us, favor this con-  
struction. The case is totally unlike  
those that have been cited by counsel  
for the appellants, in which it has been  
held that a party who voluntarily pays  
an illegal claim against him cannot re-  
cover back of the party to whom it is  
paid, and that such a payment will be  
regarded as voluntary, unless made to  
release the person or property from pro-  
cess, a threatened action being insuffi-  
cient to render the payment compulsory.  
*The Town of Ligonier v. Ackerman*, 46  
*Ind.* 552, and cases there cited. An im-  
portant difference between those cases  
and that in judgment is found in the  
difference between an illegal and a legal  
claim. The law does not compel the  
payment of the former while it does of  
the latter." *Burbank et al. v. Slinkard*  
*et al.*, 53 *Ind.* 495.

Sec. 8, R. C. 1855, p. 1456, *Missouri*.  
"No such security shall be compelled in  
any action to pay more than his due  
proportion of the original demand, etc."  
*Vaughan v. Haden et al.*, 37 *Mo.* 179.

**In Contract.**—By contract made in this  
State, A engaged "to repay to B, of New  
Hampshire, any moneys, not exceeding  
1500 dollars, which B should legally be  
compelled to pay to C on account of  
money received of C on account of and  
in part pay for money due on D's bond  
to B." C recovered of B, in an action  
brought in New Hampshire, a larger  
sum than 1500 dollars. *Held*, that the  
words "legally compelled" meant com-  
pulsion by legal process, without reference  
to the laws of any particular State; that  
as the particular ground of the recovery



**COMPENSATION.** (See also ELECTION; RAILROADS; REWARD.)—A recompense or reward for some loss, injury, or service, especially when it is given by statute.<sup>1</sup> Amends for a loss or privation. As compared with consideration and damages, compensation, in its most careful use, seems to be between them. Consideration amends for something given by consent, or by the owner's choice. Damages are amends exacted from a wrongdoer for a tort. Compensation is amends for something which was taken without the owner's choice, yet without commission of a tort.<sup>2</sup>

In *C's* action did not, and was not required to appear by the record of the judgment, it might be shown by parol evidence, etc. *Parker, Admr., etc. v. Thompson*, 3 Pick. (Mass.) 429.

1. *Rapalje & Lawrence Law Dict.*, 2 Dall (U. S.) 304, 315; *Searcy v. Grow*, 15 Cal. 117.

2. Thus one should say, consideration for land sold; compensation for land taken for a railway; damages for a trespass. But such distinctions are not uniform. Land damages is a common expression for compensation for lands taken for public use. *Abbott's Law Dict.* See *Lloyd or Ingram on Compensation*.

Compensation consists in remuneration for loss of time, necessary expenditures, and for permanent disability. *Parker v. Jenkins*, 3 Bush (Ky.) 591.

Compensation is a mode of extinguishing a debt, and takes place, by mere operation of law, where debts equally liquidated and demandable are reciprocally due. *Dorvin v. Wiltz*, 11 La. Ann. 520.

Compensation is that return which is given for something else. *Searcy v. Grow*, 15 Cal. 117, 123; 8 Stockt. (N. J.) 106; 9 Vr. (N. J.) 155.

Compensation is of three kinds: legal, or by operation of law; compensation by way of exception, and by reconvention. *Stewart v. Harper*, 16 La. Ann. 181.

The phrase "compensation" differs from salary. One who is county collector and treasurer is entitled to but one compensation. *Kilgore v. People*, 76 Ill. 548.

**In Statute.**—As used in Ohio State constitution, compensation defines the money that must be paid to satisfy a wrong or injury inflicted; and such money must cover the extent of the injury, irrespective of the value of the property taken. *Symond v. Cincinnati*, 14 Ohio, 175.

Compensation, in a statute providing a mode of determining compensation for land taken for public use, means an equivalent for the value of the land.

Anything beyond that is more than compensation; anything short of it is less. *New Jersey R. & T. Co. v. Suydam*, 17 N. J. L. 25, 47. Compare *Van Schaick v. Delaware, etc., Canal Co.*, 20 N. J. L. 249, 252.

Compensation, as used in a constitutional provision that private property shall not be taken for public use unless just compensation be made therefor, means compensation must be in money. Any benefit to the remaining property of the owner, arising from public works for which a part has been taken, cannot be considered as compensation. *Alabama, etc., R. Co. v. Burkett*, Ala. 83.

**Just Compensation.**—The term "just compensation" for injury to property taken by a railroad excludes from consideration the general enhancement of the value of other property of the same owner. The cash value and the actual damage are the true standard by which to determine the compensation to which in such cases the party is entitled. *Brown v. Beatty*, 34 Miss. 227; *Isom v. Miss. Cent. R. Co.*, 36 Miss. 300. See 14 Ala. 192; 46 Ala. 579.

Benefit to the adjacent property of the owner whose land is taken for a public use, is, in so far, compensation for the taking, within the meaning of the constitution; and, if it equal the loss of damage from the taking, it is a just compensation. *Betts v. City of Williamburgh*, 15 Barb. (N. Y.) 255.

When the word "just" is used (as Nev. Const. art. 1, § 8) to intensify the word "compensation," something more than the mere market value should be deemed intended. *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165.

In an agreement to pay a solicitor just and reasonable compensation for services rendered by him as such, means neither more nor less than taxable costs. *Culley v. Hardenbergh*, 1 Den. (N. Y.) 508.

**Of Brokers.**—The compensation which a broker receives for his services is ordinarily a commission on the price

of the thing sold or exchanged. *Thomas v. Thomas*, 4 E. D. Sm. (N. Y.) 423; *Keys v. Johnson*, 68 Pa. St. 423; *Hill v. Hill*, 62 Ill. 216; *Morgan v. Morgan*, 4 E. D. Sm. (N. Y.) 636; *Child v. Butler*, 1 E. D. Sm. (N. Y.) 150; *W. v. Silliman*, 53 N. Y. (8 Sick.) 615.

**Executor, etc.**—In England, an executor or administrator can recover no compensation for his personal services in discharge of his duties, even if he has benefited the estate to the neglect of his own affairs. *Brocksopp v. Barnes*, 10 Q. B. 90; *Barrett v. Hartley*, L. R. 2 Q. B. 89.

The rule is, that no compensation can be charged against the trust estate beyond the amount of actual disbursements. *Collins v. Carey*, 2 Beav. 128.

An attorney or solicitor, who is an executor and renders professional services to the estate, cannot recover compensation. *Moore v. Frowd*, 3 My. & K. 373; *Burge v. Britton*, 2 Hare, 373.

In this country executors and administrators have never been required to perform their duties gratuitously, and compensation should be refused only in case of wilful default, or gross negligence causing loss to the estate. *Smith v. Ward*, 38 Ala. 695; *Barney v. Barney*, 16 How. (U. S.) 542; *Adams v. Westbrook*, 41 Miss. 385; *Frey v. Frey*, 17 N. J. Eq. 71; *Morris v. Morris*, 11 Va. 293; *Estate of Isaac*, 30 Ala. 505; *Sullivan v. Herrera*, 7 Hun 309; *Estate of Nicholson*, 1 Nev. 309.

Even unfaithful administration does not deprive an executor of a right to compensation for his services so far as they have been beneficial to the estate. *Jennison v. Hapgood*, 10 Pick. 77; *Tiner v. Christian*, 27 Ark. 37; *Finch v. Ragland*, 2 Dev. (N. C.) 37; *Gould v. Hayes*, 19 Ala. 438.

Compensation for services as executor, and as trustee in regard to the money, will not be allowed to the person. *Valentine v. Valentine*, 10 Ch. (N. Y.) 430; *Holley v. S. G.*, 10 Ch. 284. An executor who is tenant for life of the estate of the testator is, however, entitled to commissions. *Blount v. Hawkins*, 4 Jones (N. C.) 161. See *Ex parte Wither*, 3 Rich. Eq. (S. Car.) 13.

**Guardians**—A guardian should be allowed no compensation where he has neglected his duties and done his ward wrong. *McCahan's Appeal*, 7 Ark. 56; *Reed v. Ryburn*, 23 Ark. 47. He will be allowed compensation for taking care of the trust fund while

he himself is the borrower of it. *Farwell v. Steen*, 46 Vt. 678.

**Of Officers.**—Office has been defined to mean "public employment," and its legal meaning to be, an employment on behalf of the government in any station of public trust, not merely transient, occasional, or incidental, usually for a certain compensation. *Smith v. Mayor*, etc., of N. Y., 37 N. Y. 518. The legislature may increase the duties without enhancing the compensation or may diminish the compensation without lessening the duties. *Conner v. Mayor*, 5 N. Y. 285; *State v. Davis*, 44 Mo. 129; *Hyde v. State*, 52 Miss. 665; *Wilcox v. Rodman*, 46 Mo. 322; *Sharpe v. Robertson*, 5 Gratt. (Va.) 518.

If extra services be performed by direction of the proper authority having no connection with the duties of the office, the officer may be allowed compensation therefor. *United States v. Austin*, 2 Cliff. 325; *United States v. Chassell*, 6 Blatchf. 421.

Compensation as a clerk. *Tenney v. State*, 27 Wis. 387.

**Of Receivers (q.v.).**—Where his compensation is not prescribed by statute, it is, in general, governed by the same rule that is applied to other persons who hold a fiduciary position. *Daniell v. Ch. Pr.* 1581; *Day v. Croft*, 2 Beav. 49; *Neave v. Douglass*, 36 L. J. Ch. 756; *Grant v. Bryant*, 101 Mass. 569; *Jones v. Keen*, 115 Mass. 179; *Magee v. Cowperthwait*, 10 Ala. 966.

**Of Servants.**—Where a person is hired for a compensation fixed by agreement of the parties for a specified time, and he continues to serve in the same capacity after the expiration of the term, the law will presume, in the absence of other proof, that he is to receive compensation at the same rate. *Grover & Baker S. M. Co. v. Bulkley*, 48 Ill. 189; *Vail v. J. L. F. Mfg. Co.*, 32 Barb. (N. Y.) 564; *Smith v. Velie*, 60 N. Y. 106. In an action to recover compensation for services rendered, the employer is entitled to show, by way of recoupment of damages, loss sustained by him through the negligence of the employee. *Stull v. Hall*, 20 Wend. 51; *Stoddard v. Treadwell*, 26 Cal. 291; *Wilson v. Wall*, 34 Ala. 301.

**In Contract.**—The right of compensation may be excluded by express contract. *Cordingly v. Cheeseborough*, 3 Giff. 496. But a condition excluding compensation for errors is sometimes construed so as to extend to small unintentional errors only. *Whittemore v. Whittemore*, L. R. 8 Eq. 503. May

## COMPENSATION—COMPETENCY—COMPETENT.

**In Civil Law.**—A reciprocal liberation between two persons who are both creditors and debtors of each other.<sup>1</sup>

**COMPETENCY.**—The fact of being competent.

**COMPETENT.**—Able; fit; qualified; authorized or capable to act.<sup>2</sup> (See also EVIDENCE; WITNESS.)

be excluded by a revision of contract. *Duddell v. Simpson*, L. R. 2 Ch. App. 102; *Mauser v. Fletcher*, L. R. 10 Eq. 213; L. R. 6 Ch. App. 91.

**Compensation for Delay**, in performance of contract. *DeVisme v. DeVisme*, 1 Mac. & G. 346; *Enraght v. Fitzgerald*, 2 Ir. Eq. 87. See 2 Dru. & W. 43; *Mayo v. Purcell*, 3 Manuf. (Va.) 243; *Brown v. Wallace*, 2 Bland. (Md.) 585; 2 Lead Cas. Eq. (4th Ed.) 1057.

**Distinction between Compensation and Profits.**—Where there was a right to a share of the proceeds of a whaling voyage, a compensation merely for services rendered in the adventure did not constitute a partnership in the profits of the voyage. *Coffin v. Jenkins*, 3 Story (C. C.), 108. See *Moon v. Smith*, 19 Ala. 774; *Randle v. State*, 49 Ala. 14; *Stoullings v. Baker*, 15 Mo. 481; *Loomis v. Marshall*, 12 Conn. 69; *Dwinel v. Stone*, 30 Me. 384; *Lewis v. Greider*, 51 N. Y. 231; *Wiggins v. Graham*, 51 Mo. 17; *Campbell v. Dent*, 54 Mo. 325; *Bendel v. Hettrick*, 3 Jones & Sp. (N. Y.) 405.

The general rule is that compensation for service, in the form of commission or percentage of the profits, or a share of the product of a business, does not constitute the party entitled thereto a partner. *Brockway v. Burnap*, 16 Barb. (N. Y.) 309; *Good v. McCartney*, 10 Tex. 193; *Ambler v. Bradley*, 6 Vt. 119; *Miller v. Bartlett*, 15 S. & R. (Pa.) 137; *Edwards v. Macy*, 62 Pa. St. 374; *Lewis v. Greider*, 51 N. Y. 231.

1. It resembles in many respects the common-law set-off. The principal difference is that common-law set-off must be pleaded to be effectual, whereas compensation is effectual without any such plea. 2 *Bouvier Inst.* n. 1407. It may be *legal*, by way of *exception*, or by *reconvention*. 8 La. 158.

It takes place by mere operation of law, and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the *cause* of the debts, except in

case, *first*, of a demand of restitution of a thing of which the owners have been unjustly deprived; *second*, of a demand of restitution of a deposit and a loan for use; *third*, of a debt which has for its cause aliments declared not liable to seizure. La. Civ. Code, 2203, 2208. *Dorvin v. Wiltz*, 11 La. Ann. 520.

As to the doctrine of compensation with reference to questions of equitable election, see ELECTION.

2. Abb. L. Dict.

**Competent Authorities**, in the ratification of a treaty referring to grants made by the king or his "competent authorities," were held equivalent to the words "lawful authorities" in the treaty itself, and to mean "those persons who exercised the granting power by the authority of the crown." *U. S. v. Clarke*, 8 Pet. (U. S.) 449; *Mitchel v. U. S.*, 9 Pet. (U. S.) 735.

**Competent Clerk.**—Where a committee was authorized to employ a "competent clerk," and it was contended that this language authorized the employment of something more than a mere clerk, viz., of a "person learned in the law and fully competent to grapple with and solve all intricate and perplexing questions of law which might arise in the performance of those duties," it was held that this inference was unwarranted, and that "the use of the adjective in that connection does not change the character of the employment." *Tenney v. State*, 27 Wis. 392, 393.

**Competent Court**, in an act allowing any court to commit to prison one who makes default in payment of a debt due "in pursuance of any order or judgment of that or any other competent court," means "a court acting within the local limits of its existing jurisdiction, and with reference to persons within those limits, against whom, therefore, a warrant of the court for committal could be enforced." *Washer v. Elliott*, 1 C. P. D. 176.

**Competent Evidence** means that which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry. *Chapman v. McAdams*, 1 Lea (Tenn.), 504.

**Competent Jurisdiction**, in a statute

## COMPLAIN—COMPLAINANT—COMPLAINT.

**COMPLAIN.**—To make a formal assertion of injuries; to bring accusation; to make a charge.<sup>1</sup>

**COMPLAINANT.**—One who makes a complaint.<sup>2</sup> The plain- in a chancery proceeding.<sup>3</sup>

**COMPLAINT.**—In criminal law the allegation made to a per officer that some person, whether known or unknown, has n guilty of a designated offence, with an offer to prove the fact a request that the offender may be punished.<sup>4</sup>

iding that the validity of a sale shall be avoided on account of irregularity e proceedings if it were authorized "court of competent jurisdiction," not mean jurisdiction of the subject- er and not of the parties. "The s 'competent jurisdiction,' in their l signification, embrace the person ell as the cause." *Conwell v. Smith*, d. 359.

**Competent Party.** in a special act, de- . *Bowes v. Haywood*, 35 Mich.

**Competent Persons.**—One person named mutual consent was held not to be ppetent persons respectively ap- ed by the parties" within the mean- of an agreement. *Harvey v. Grab-* 5 Ad. & El. 75.

**Competent to Dispose by Will.**—Where ct imposed a duty in the case of a on "competent to dispose by will of ntinuing interest," it was held that e words had reference to the interest e property, and not to the personal ity. "The word 'competent' has eanings, and as in my judgment it ean one thing or the other, and ot mean both, we must ascertain in b of the two senses the legislature used it. Now the very language of 1st section imports that the compe- y relates to the property and not the of the party, because he must be etent to dispose of a continuing est; that is, possessing such an est in the estate as to have the power sposing by will of a continuing in- t." *Atty -Gen. v. Hallett*, 2 H. & 74; *Wilberf. Stat. L.* 140.

**With or other Competent Proof** in a stat- y direction is satisfied by swearing e facts on information and belief. e *v. Halliday*, 1 Coms. (N. Y.) 330. **Competent,** as used in a probate ith reference to an administrator eld to mean not addicted to drunk- ss, not imprudent, or wanting in rity or understanding. *In re Estate abecco*, 23 Cal. 476.

One who is a drinking man "and of no account," who has been arrested for vagrancy and punished for disorderly conduct, is not "competent" within the meaning of that term in a policy of insurance providing for reference in case of dispute to "two disinterested and competent men." *Etna Ins. Co. v. Stevens*, 48 Ill. 33.

1. Webster.

2. Webster.

3. Bouvier.

4. Webster.

**Act Complained of.**—In an action- against a justice of the peace for an act done by him in execution of his office (false imprisonment) the commitment is the act complained of, not the quashing of the conviction on the application of the party imprisoned. *Haylocke v. Sparke*, 1 Ell. & B 484.

**Neglect to make Complaint.**—Where a statute provides that "any grand juror who, after he is sworn, shall neglect to make seasonable complaint of any crime committed within the town where he lives, which shall come to his knowledge, shall forfeit two dollars," a breach of the peace had been reported to a grand juror who, acting in good faith, and in the belief that the offence was too trivial for a criminal prosecution, declined to make complaint. *Held*, that he was not liable to the penalty. *Watson v. Hall*, 46 Conn. 204.

**Complaints.**—The term "complaints" is a technical one, descriptive of proceedings before magistrates. A complaint may be made before one magistrate and the warrant therein returned to another for hearing. *Commonwealth v. Davis*, 11 Pick. (Mass.) 436.

Where criminal prosecutions originate under a statute on complaint, one under oath or affirmation is implied, as a part of the technical meaning of the terms. *Campbell v. Thompson*, 16 Maine, 117.

But the requirements of the complaint under the statutes of the several States and at common law differ. *Bishop Stat.*

**COMPLETE—COMPLETING—COMPLETION.**—To bring to a state in which there is no deficiency; entire; perfect; fulfilment; accomplishment.<sup>1</sup>

Crimes, § 242, and §§ 403, 407; Bish. Crim. Proc. I §§ 152, 230-232.

In order that the defendant may be apprised of the supposed offence he is to answer, and the magistrate what facts he is to try and adjudicate, and that the conviction or acquittal may be deducible in evidence to prevent a subsequent proceeding for the same offence, the complaint should be a formal charge. 2 Chit. Gen. Prac. 155.

**Complaint must be in Writing.**—A complaint, if oral, must be reduced to writing and spread upon the records as the foundation of the action of a board of tax assessors, and a mere recital that oral complaint was made to such board, without setting out the complaint, is not sufficient. *State v. Dodge County*, 20 Neb. 595. In this case the court say: "Webster defines the word 'complaint' to mean in law a 'form of legal process which consists of a formal allegation or charge against a party, made or presented to the appropriate court or officer, as for a wrong done or a crime committed; in the latter case generally under oath.' Now, supposing the alleged oral complaint to have been made to a proper party, the substance of it must be reduced to writing as a basis for the action of defendants. In the record presented to us there is no complaint, formal or informal, and the record of the defendants fails to show the existence of such an instrument. We have their naked assertion that such oral complaint was made. This, however, falls far short of showing the existence of a complaint."

**When Complaint Includes Indictment.**—Where a statute provided that a penalty might be incurred on complaint before any court of competent jurisdiction, the defendant contended that the word "complaint" was technical, and the language of the statute exclusive, and that it did not authorize an indictment. The court held that the import of the term "may" as used in the statute was permissive. The method of prosecution in the superior court is by indictment, but in the police court it is by complaint the words "may be" covered on complaint before any court of competent jurisdiction, and one half of the amount of fine imposed shall go to the complainant or informer, are used in reference to the appropriation of the fine in cases where there is a complainant,

and not for the purpose of excluding the jurisdiction of the superior court in cases where no person desires to obtain a part of the fine. *Comm. v. Haynes*, 107 Mass. 197.

**Where Complaints of Suffering Admissible.**—Where the nature and extent of the injury inflicted by the act of the accused are a subject of inquiry, the injured person's complaints of suffering and of the *res gesta* are admissible. Bishop Crim. Proc. I.; *Livingston v. Comm.*, 14 Grat. 592; *Reg. v. Johnson*, 2 Car. & K. 304; *Stein v. State*, 37 Ala. 123; *Kearney v. Farrell*, 28 Conn. 317; *Illinois, etc., R. v. Sutton*, 42 Ill. 438; *Howe v. Plainfield*, 41 N. H. 135.

Thus in rape anything which the woman said or did of the *res gesta* of her ravishment will be admissible in evidence. It is competent to show that she complained of it to suitable persons. It is of special practical importance that the complaint was recent, and explanations of any delay are competent. Bishop Crim. Proc. II. § 963.

The fact that a wife testified before the grand jury in obedience to a subpoena upon the question of her husband's adultery does not show a complaint made by the wife under a statute providing that "no prosecution for adultery shall be commenced but on the complaint of the husband or wife." *State v. Stout*, 32 N. W. Rep. 372; Bishop Stat. Crimes, § 688.

"Such complaint" in statute construed. *Sweetman v. Guest*, L. R. 3 Q. B. 262.

1. Webster.

**In Statute—Act of Congress.**—The clause of the judiciary act of 1789, ch. 20, § 16, which declares "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law," is merely affirmative of the general doctrine of courts of equity, and in no sense intended to narrow the jurisdiction of such courts. *Rean v. Smith*, 2 Mason. 270.

**Completely Issued and Negotiated—In a Plea.**—Where in an action on a note the plea alleged that after the note "was completely issued and negotiated" by one B. and defendant, plaintiff altered it in a material part, the court, after a verdict for defendant, without deciding whether the note was in point of law issued, supposing the plaintiffs and B.

Not suppose it complete, though defendant did, granted a new trial, with leave to amend the plea. *Gardner v. H.*, 5 Ell. & Bl. 84.

**Complete Purchaser.**—A complete purchaser is one who has paid the purchase-money, and who, although he has not obtained a conveyance of the legal title, is entitled to call for it. *Preston v. Preston*, 75 Va. 949.

Where land is sold, part of the purchase-money paid in cash, and notes for the balance, if these notes be transferred without indorsement or guarantee the purchaser's equity becomes complete against his vendor, the land is subject to levy and sale at the instance of any creditor other than the vendor, and the purchaser of the notes who takes them by mere delivery is nothing more than an ordinary creditor, and is not entitled to be first paid from the proceeds of the land under the code of Georgia. *Part v. Reviere*, 1 S. E. Rep. 222.

*Mallock v. Kinglake* it was contended that the words "completion of purchase" meant where the land was conveyed, but the court said they "only mean payment of the rest of the purchase-money," and it was therefore held that the purchase-money and interest might be sued for without previously tendering a conveyance. 10 Ad. & El. 50, 56.

**Complete Cargo**—By a charter-party a cargo was described to be of the burden of 100 tons, and the freighter covenanted to load a full and complete cargo. *Held*, that the loading of the goods equal in number of tons to the tonnage described in the charter-party was not a performance of this covenant, but that the charter was bound to put on board as much goods as the ship was capable of receiving with safety. *Hunter v. Fry*, 2 L. & Ald. 421.

The charter party provided that the ship should proceed to the port of loading and load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons.

*Held*, that the words "say about 1100 tons" were not mere words of estimation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity; that 3 per cent was a fair amount in excess over 1100 tons to allow in estimating what was a full and complete cargo of about 1100 tons, and consequently the cargo actually provided fell short of the charterer's obligation by 53 tons. *Morris v. Levison*, 2 C. P. Div.

By a charter-party defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses, and other produce." *Held*, that evidence was admissible of a custom at Trinidad to load sugar in hogsheads and molasses in puncheons; and therefore that a full and complete cargo of sugar and molasses so packed was a compliance of the contract. *Cuthbert v. Cumming*, 10 Exch. 809, 11 Exch. 405.

**Complete Inventory.**—An inventory attached to a general assignment for the benefit of creditors in these terms: "The entire stock of goods, wares, and merchandise in the show-houses, . . . consisting of dry-goods, shoes, hats, boots, caps, . . . (enumerating articles at length) in all to the value of \$7600, and choses in action," is full and complete within the meaning of the code of Tennessee, requiring the inventory to be full and complete. *Rosenbaum v. Moller*, 4 S. W. Rep. 10.

**Machinery to be Furnished Complete—In Contracts.**—The phrase in an agreement, "in consideration of machinery to be furnished, complete, in the mill," includes not only the cost of the machinery, but the labor and material necessary to place it in proper position for use. *Grove v. Miles*, 58 Ill. 338.

A, after inspection of the separate parts, bought of B soap frames, which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect." In an action for breach of warranty, the declaration alleged that the defendant warranted the frames to be fit for the purpose of making soap; and at the trial it was proved and found by the jury that though new, and having the proper number of bolts and nuts, the frames were not reasonably fit for the purpose of making soap. *Held*, that the evidence sustained the declaration. *Mallan v. Rudloff*, 17 C. B. (N. S.) 588.

**When House is Completed—In Contract.**—A written order for the delivery of lumber to be used in building the house of the drawee, and which he promises to pay for "when the house is completed," becomes due when the house is substantially finished by any one, although the drawee knew that the person to whom the order requested him to deliver the lumber was building the house under a contract, and it is not completed according to the terms of the contract. *Russell v. Barry*, 115 Mass. 300.

**Contract.**—Land upon which a block of houses was in process of building was

conveyed in mortgage, and a third person agreed in writing with the mortgagee to cause the houses to be fully completed without unnecessary delay, guaranteeing that they and all things appurtenant thereto should be fully completed to the acceptance of the mortgagee. At the time of this agreement the houses, which were built upon marsh land upon piles of the usual length for that territory, were all finished except the papering, painting, and the like. They had then settled somewhat to the knowledge of both parties, but no objection to the foundation was known by either party to exist. After they had been finished they settled further, and it became necessary for the mortgagee to protect himself to raise them and substitute new and longer piles. *Held*, that the third person was not liable on the guaranty for the insufficiency of the foundations. *Hyannis Savings Bank v. Moors*, 120 Mass. 459.

**Street Completed.**—A street was laid out in 1804 with an agreement by the owners of land taken therefor not to claim compensation, and that the street need not be "completed" until it was deemed expedient to do so. In 1831 the proper authorities voted that the order of 1804, laying out said street, "be carried into execution, so far as the same remains unfinished," and some work was done under that vote. *Held*, that the street was thereby "completed" within the meaning of the original laying out, and was from that time so far an existing way that damages could be recovered under the statute for lowering the grade thereof in 1850, notwithstanding the agreement of 1804 not to claim compensation for the land. *Fernald v. Boston*, 12 Cush. (Mass.) 574.

By a statute in 1803, annexing to Boston that part of Dorchester now known as South Boston, the selectmen of Boston were authorized to lay out such streets in South Boston as in their judgment would be for the common benefit of the proprietors of the land and of the town of Boston, provided that no compensation should be allowed the proprietors for such streets as should be laid out within twelve months from the passage of the act; and provided, also, that the town of Boston should not be obliged to complete the streets so laid out sooner than they might deem expedient. In pursuance of this authority the selectmen within twelve months laid out various streets over the entire territory of South Boston, and among others a very long street denominated Second Street, which subsequently became dis-

tinguished into two parts, namely, Second Street east and Second Street west of Dorchester Street. The mayor and aldermen in 1831 adopted an order that Second Street west of Dorchester Street should be made passable, and subsequently passed orders in 1834 and 1836, appointing committees to "cause Second Street at South Boston to be repaired and put in good order," "to be properly graded . . .," in pursuance of which that part of Second Street known as Second Street west had been completed and used as a highway; no part of Second Street east, though occasionally used as a highway, had not been ordered to be completed and made passable, unless included in the above orders. In an action against the city of Boston to recover damages for an injury occasioned by a defect in Second Street east, it was held that in order to render the defendant liable it must appear only that the way had been laid out, but that the mayor and aldermen by an official act had determined upon its completion; that is, when the same should be graded, fitted for travel, and opened for use. *Benman v. Boston*, 5 C. (Mass.) 1.

**When Railroad Completed.**—A condition precedent in a bond that the road is to be completed to a certain village was substantially complied with when it was made to the suburbs of that village in such a manner as to bear daily traffic on it, carrying all the freight and travelers that offer, although some portions of the work is intended to be replaced by other and better materials. *O'Neil v. Ring*, 3 Jones L. (N. C.) 517. The court says in this case: What did the parties mean when they used the word "completed" in the bond? Did it mean that in every particular, for ever minute, the road should be perfect before the defendant's liability to pay should arise? Did they use the word in its full critical sense that no piece of rot or unsound sill should be found in the whole line of road? Or did they use it in its plain common sense meaning? *Que hæret in litera hæret in costice* is an ancient maxim of the common law, whence the rule that the law in such a case is satisfied with a substantial performance of the condition. Wherefore, it is said in the contract that the road shall be completed to Green Court-house, and it is shown that the whole village is called by that name, that the road is brought to the suburbs of the village, that part of the condition is complied with; and where it is sh-



## COMPLETE—COMPOSITION WITH CREDITORS.

**COMPOSITION WITH CREDITORS** (See also ACCORD AND SATISFACTION; ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKRUPTCY; DEBTOR AND CREDITOR.)

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1. **Definition.**—A composition is an agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due him in satisfaction of the whole.<sup>1</sup>

that the whole of the road is finished so as to authorize the company to carry freight and passengers, and to demand and receive pay therefor, we hold that the condition of the bond is complied with, and that in the language used the road is completed to Greenville Courthouse.

**In Contract in Aid of a Railroad.**—The word "completed," when used in a contract in aid of a railroad, may have a different meaning from what it would have in a contract for the construction of a road. In a contract for construction it would mean a completion in accordance with specifications; but in a contract like the one in suit (*ut supra*) it is not likely the parties have any such completion in mind, and a less perfect construction may satisfy its intent, provided the road is in condition to be opened for regular passenger and freight traffic, and is actually in use. The purpose of such a contract . . . is accomplished when the road is thus put in condition for regular business." *Tower v. Detroit, L. & L. M. R. Co.*, 34 Mich. 338.

In *De Graff v. St. Paul & Pac. R. Co.* the court says. "The word 'completing' has substantially the same signification as the word 'constructing.' A railroad is completed or constructed when that is done which is necessary to make it a railroad—when it is fitted for use as a railroad. That is to say, where it is made ready and put in proper condition for the placing and running of regular trains upon it, or for operation, as it is usually termed. In this its natural and ordinary sense the word 'completing' does not include the equipment of the road with rolling-stock or putting it in operation." 23 Minn. 146.

Where an act provides that a railway shall be completed in five years, but the context shows the words are not compulsory, and no duty is imposed upon the company to make the line, the case is not affected by the fact that the company has completed a part of the line. *York & Midland R. Co. v. Queen*, 1 El. & Bl. 863; *McCandless's App.*, 70 Pa. St. Rep. 210.

**Canals Completed—In Statute.**—In *Newell v. People*, 7 N. Y. 130, in construing a statute providing that "the remainder of the revenue of the State canals after . . . shall be applied in each fiscal year to the completion . . ." of certain canals "until the said enlargement and the said canals shall be completed," it was contended that by the expression "until the said canals shall be completed" was to be understood the time when the canals are constructed and ready for use. The court said. "I incline to think this interpretation is too limited and contracted. The verb to complete, like many others, is used with some indefiniteness of signification, and the idea conveyed by it frequently depends upon the connection in which it is to be found, or the object to which it refers. The connection here is where provision is made for the disposition of the remainders, and the direction given for their application; and it is declared that they shall be applied as long as the application shall be necessary to such completion, or until the application is complete. This, in my judgment, was the sense in which the words in question were intended to be used."

1. *Bouv. Law Dict.*



**2. Generally.**—The rule that an agreement to accept, in satisfaction and discharge of a liquidated debt, a sum less than the amount due, is not valid, has no application when such an agreement forms part of a composition in which several creditors mutually stipulating to withdraw or withhold suits, and that they will release to their common debtor a part of their claims upon payment of a certain other part. Such an agreement is binding between each creditor and the debtor, the undertaking of the other creditors to give up a part of their claim being a good consideration for each creditor.<sup>1</sup>

1. *Perkins v. Lockwood*, 100 Mass. 249; *Eaton v. Lincoln*, 13 Mass. 424; *Farrington v. Hodgdon*, 119 Mass. 453; *Sage v. Valentine*, 23 Minn. 102; *Williams v. Carrington*, 1 Hilt. (N. Y.) 514; *Blair v. Wait*, 69 N. Y. 113; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Paddleford v. Thatcher*, 48 Vt. 574; *Pierce v. Jones*, 8 S. Car. 273; *Good v. Cheeseman*, 2 B. & Ad. 328; *Steinman v. Magnus*, 11 East, 390; *Pfleger v. Browne*, 28 Beav. 391; *Gillfillan v. Farrington*, 12 Ill. App. 101; *Way v. Langley*, 15 Ohio St. 392.

In the latter case the court say: "The binding force and validity of a composition agreement made in good faith between an embarrassed debtor and his creditors, and fully carried into execution, cannot at this late day be questioned. Notes to *Cumber v. Wane*, 1 Smith's L. C. 443-4." Compare *Murray v. Snow*, 37 Iowa, 410.

But the composition will not be effective to discharge the debtor unless the amount agreed upon is actually paid. *Re Hurst*, 13 Bankr. Reg. 455.

The reason for upholding such an agreement is that the rights and interests of other parties become involved in the arrangement, and this affords a new and legal consideration for the promise. It would be contrary to good faith for a creditor who has secured the advantage of such an arrangement to disregard its obligations by proceeding to enforce the balance of his demand, and the debtor is entitled to avail himself of this consideration in defence. *Perkins v. Lockwood*, 100 Mass. 249.

A covenant in a composition deed whereby the creditors, "severally and each for himself, agree" to release and discharge the debtor, is valid; such an agreement is mutual, and mutually binding on all who sign it. It is not necessary that the agreement should express the mutuality when it may be implied from the nature of the agreement. *Horstman v. Miller*, 3 J. & S. (N. Y. Sup. Ct.) 29.

The execution of a composition is to be deemed contemporaneous and of one general influence and one general consideration, so it cannot be said as to the last creditor who signs it is no mutuality. *Hall v. Merrill*, 9 Pr (N. Y.) 116.

Where the creditors of a failing debtor contract with a third person to sell and assign to him their claims at a certain percentage, in the absence of proof that such third person was acting merely as agent of the debtor, the transaction will be considered as a purchase and sale, a compromise; and a creditor who has assigned his claim, cannot enforce the balance of the indebtedness. It is sufficient proof simply that some of the creditors received more than the stipulated percentage for their claims. *Goldenberg v. Hoffman*, 69 N. Y. 322.

Nor does the acceptance of a payment for which a receipt is furnished, given, with an agreement to give a further payment for an additional amount, at a future time, operate as a composition, unless other creditors are thereby induced to enter into compromises, without their engagement. *Williams v. Carrington*, 1 Hilt. (N. Y.) 515.

So a written agreement between a debtor and a part of his creditors, without consideration, and not under seal, wherein they agreed to give him a respite for one year, during which they would not sue him, obtain judgment against him, or molest him by legal proceedings, or issue execution against his property, is merely an agreement for forbearance, and not binding. *Hart v. Patterson*, 57 Pa. St. 346.

And a mere agreement of a creditor with his debtor to accept a certain percentage of the debt in full satisfaction thereof, "provided that no other creditor shall receive more than the same percentage of his claim," is void for want of consideration. *Perkins v. Lockwood*, 100 Mass. 249.

the fact that a debtor has made an assignment of all his property for the benefit of all his creditors does not preclude him from dealing in good faith with certain creditors by paying a certain part of their claims, with the assistance of a third party.<sup>1</sup>

**How Effected.**—It is not essential that the compromise agreement should be in writing; each creditor may make a separate parol agreement for the purpose of carrying the compromise into effect, after the agreement is once made no creditor can withdraw without the consent of the debtor,<sup>2</sup> and although the debts are by specialty the composition does not require a seal.<sup>3</sup>

**Authority of Partner.**—If one of several partners assent to a deed executed by a debtor of the firm in favor of his creditors, the firm is bound by the deed; and the doctrine that one partner has no implied authority to bind his copartners by an instrument under which he has no application to such a case.<sup>4</sup>

**Agreement of Creditors to Join in Deed.**—A creditor who agrees to take a composition from his debtor, on the faith of which the debtor executes a deed of assignment of all his property to a trustee for the benefit of his creditors, will be held to his agreement, and will not be allowed by refusing to execute such deed to sue the debtor for the whole of his demand.<sup>5</sup> He can recover of

*Osdyke v. Nixon*, 8 N. E. Rep. 11.

*Chemical National Bank v. Kohner*, 17 N. Y. 189; *Fellows v. Stevens*, 24 (N. Y.) 294.

*van Bokkelen v. Taylor*, 62 N. Y. 574. See also *Paddleford v. Thatcher*, 574. Compare *Fellows v. Stevens*, 24 (N. Y.) 294.

*Well's Lindley on Partnership*, 277; *v. Marquand*, 17 Johns. (N. Y.) 17; *Each v. Ollendorf*, 1 Hilt. (N. Y.) 17; *Ellis v. Evans*, 20 Wend. (N. Y.) 17; *Malley v. Whitney*, 4 Mason (U. S.), 17.

*Cutler v. Rhodes*, 1 Esp. 236; *Heath v. Crookshanks*, 2 T. R. 24; *Brady v. Camp*, 147; *Bradley v. Greg-Camp*, 383; *Anstey v. Marden*, 1 Pull. 124; *Norman v. Thompson*, 55; *Woods v. Roberts*, 2 Starkie, 55; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Therasson v. Peterson*, 4 Abb. 396; *Chemical Bank v. Brown*, 85 N. Y. 189; *Brown v. Stack-N. H.* 478. See *Cutler v. Reynolds*, 8 B. Mon. (Ky.) 598.

It is not, in equity, necessary that a partner should execute a creditor's deed; if he does some act which amounts to an assent, he is entitled to the benefit of it, though it is not sufficient in him merely to assent and take no part in the matter. *Wells v. Mount*, 24 Beav. 642.

A partner, being insolvent, by agreement stipulated to assign his property immediately,

the creditors consenting that the business should be carried on for their benefit until the next Michaelmas, and that then the property should be divided among them; the insolvent assigned his effects; at the next Michaelmas several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time. *Held*, that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. *Cork v. Saunders*, 1 B. & A. 46.

The agreement may sometimes be inferred from the fact that the creditor receives the composition paid under the deed. A debtor, who was indebted to the plaintiff as well as other creditors, executed a deed of composition securing to all his creditors 10s. in the pound. The plaintiff withheld their consent to the deed. The composition under the deed was paid to the plaintiffs, who kept the money without stating on what account it was received, or without giving an acknowledgment for it. They afterwards claimed to have received it on account of their original debt. The deed was bad. *Held*, that the plaintiffs were precluded from saying that they had received the money on account of the original debt, and that it must be taken to have been paid as composition under the deed. *Kitchin v. Hawkins*, 12 Jur. N. S. 928.

the debtor only that proportion of the debt fixed in the agreement.<sup>1</sup>

But a mere assurance on the part of a creditor that he will unite in any arrangement which the other creditors might make, looking to a future period for the making of such an agreement, and reserving a *locus penitentiæ*, is not evidence of an accord of creditors which supplies the valuable consideration upon which alone rests the validity of a composition.<sup>2</sup> And where the debtor gives his consent to the withdrawal of a creditor who has signified his assent to a composition, the agreement is not a bar to an action for the recovery of the original indebtedness.<sup>3</sup>

But where, by the terms of a composition agreement, the creditors agree to accept notes indorsed by a particular person, and that person dies, they are not bound to accept any other indorser. Where, in such a case, the debtor wrote to his creditors notifying them of the death of the proposed indorser, and suggesting B. as a substitute, and closed his letter as follows: "Should you deem his indorsement sufficient, please advise me promptly." *Held*, that a creditor who did not signify his intention until notes indorsed by B. had been accepted by the other creditors was not bound to accept such notes, and, having refused to do so, is at liberty to sue on his original cause of action. *Danzig v. Gumersell*, 27 Fed. Rep. 185.

And a composition agreement by a bankrupt, whereby he gave his creditors his notes secured by a policy on his life, with a provision that the agreement should be forfeited if he failed to pay the insurance premiums, as he did fail, is no bar to an action on the original indebtedness by a creditor who had refused to accept the note which had been deposited in court for him. *Pupke v. Churchill*, 16 Mo. App. 334.

1. *Mellen v. Goldsmith*, 47 Wis. 573; *Reay v. White*, 1 C. & M. 748.

But in *Loney v. Bailey*, 43 Md. 10, certain creditors were held entitled to recover the full amount of their claims, under the following facts: A bill was filed by one member of a firm against his co-partners, praying the appointment of a receiver, and for the adjustment of the partnership affairs. The creditors were not parties. A receiver was appointed, who took charge of all the partnership effects, and reported to the court a proposition of a party to purchase the entire stock of goods and debts due the firm for a certain price, and prayed the court to authorize the sale. With this report was filed an agreement between the partners and a large number of the creditors,

wherein the proposed sale was assented to and recommended; and by said agreement the creditors, executing the same under their hands and seals, covenanted and agreed with the partners that, in consideration that the latter would assent to the sale, and of the dividends to be received from the proceeds thereof, the former did and would forever acquit, charge, and release the firm, and the several members thereof individually, from any and all balance or balances which might remain due on their several claims. The partners all assented to the sale. It was authorized, and the receiver was directed to give the usual notice to the creditors of the firm to file their claims properly authenticated, on or before a certain day, preparatory to a proper distribution of the assets of the firm. Under this notice certain creditors, who had signed the agreement aforesaid, filed their claim and received a dividend thereon. Prior to receiving such dividend the same creditors instituted an action at law to recover the amount of their claims. *Held*, that the plaintiffs were entitled to recover the full amount of their claims, less the dividend received thereon; the filing of the claim under the circumstances, and the receipt of the dividend did not bind the plaintiffs to abide by and perform the agreement between the defendants and certain other of the creditors.

2. *Bishop on Insolvent Debtors*, 1 Hartell v. Morgan, 1 Pitts. (Pa.) 354.

A creditor cannot be said in any sense to have acceded to the provisions of a compromise deed unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed. *Forbes v. Limond*, 4 Deane, Mac. & G. 298.

3. *Fellows v. Stevens*, 24 Wend. (N. Y.) 294.

**Agreement Held Not a Bar.**—Where a plaintiff, the drawer of a bill accepted by the defendant, agreed with him and

An agreed composition cannot be set up in bar of the debt unless the debtor has performed or offered to perform his part of the agreement.<sup>1</sup>

**6. Composition with a Portion of the Creditors.**—An agreement entered into between a debtor and any number of his creditors less than the whole number to take a composition for their debts, is binding upon those who enter into the agreement;<sup>2</sup> but such an agreement entered into between a debtor and a single creditor is void for want of consideration.<sup>3</sup>

And in order, therefore, that the agreement should be inoperative unless all the creditors sign it, such a condition should be expressly

est of his creditors to take a composition of 8s. in the pound, to be secured by promissory notes to be given by the defendant, payable on days certain; and that he should assign to the creditors certain debts, upon which they should execute a general release; and the assignment was executed, and all the creditors except the plaintiff received their composition and executed the release, and the plaintiff might have received his notes if he had applied for them, but it did not appear that the defendant had ever tendered them to the plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the notes had expired, sued the defendant on the bill of exchange: *held*, that he was not precluded by the agreement from recovering. *Cranley v. Hilary*, 2 M. & S. 120.

So where the plaintiff attended a meeting of the defendant's creditors, and concurred in certain resolutions for the execution of a release to the defendants, their executing an assignment of all their effects to trustees for distribution amongst their creditors, and the defendants and trustees at first disputed the amount of the plaintiff's debt, but subsequently altogether refused to allow him to come in under the deed, *held*, that having signed the preliminary resolutions was, under the circumstances, no bar to his right to sue the defendants for his original debt. *Garrard v. Woolner*, 11 M. & Scott, 327.

The defendant being in difficulties, called a meeting of his creditors, one of whom was the plaintiff, and proposed a composition to them, which, however, was not arranged. A witness, who was clerk to an accountant employed by the defendant, proved that he afterwards showed to the plaintiff a composition paper, which had already been signed by one of the creditors, and asked him to sign it also. The paper purported to be a memorandum, by which each of the

undersigned creditors, in consideration of the agreement therein contained on the part of the others, agreed with the others, and also with the defendant, to accept a composition of 10s. in the pound. The plaintiff being informed that L., one of the creditors, had not signed, said that he would not sign until L. had done so. The witness left the plaintiff on the understanding that he was to get L., and then that he (the plaintiff) would sign. The witness did get L. to sign, but the plaintiff could not be induced to keep his promise, and never did sign. *Held*, in an action by the plaintiff to recover the amount of his debt, that these facts did not constitute any defence, as no such agreement can operate as a defence if made merely between the debtor and a single creditor; and also that there was no agreement with the plaintiff, as the composition paper was expressly confined to those who had signed it. *Boyd v. Hind*, 1 H. & N. 938; 26 L. J. Exch. 164.

1. *Flack v. Garland*, 8 Md. 188.

2. *Norman v. Thompson*, 4 Exch. 755; *Brown v. Dakeyne*, 11 Jur. 39; *Good v. Cheeseman*, 3 B. & Ad. 328; *Devon v. Ham*, 17 Ind. 472; *Renard v. Tuller*, 4 Bosw. (N. Y. Sup. Ct.) 107; *Eaton v. Lincoln*, 13 Mass. 424. See *Lanes v. Squires*, 45 Tex. 382.

3. *Pierson v. McCahill*, 21 Cal. 122; *Greenwood v. Liddbetter*, 12 Price, 183.

But where a judgment creditor agreed with his debtor that if the latter would, when his land was sold under the execution, make no attempt to have a home-stead exempted, or to open the judgment under the provisions of a relief law applicable to the case, the former would either rebate a portion of his judgment, or if he became the purchaser of the property, convey a portion of it to the debtor, *held*, that the agreement was neither fraudulent *per se*, nor in derogation of the rights of junior judgment creditors. *Parkerson v. Sessions*, 40 Ga. 171.

declared or be clearly deducible from unambiguous language;<sup>1</sup> and verbal declarations made by the parties at the time when the deed was executed to show that it was to be void unless signed by all are not admissible.<sup>2</sup>

**7. Effect of Failure to Obtain Assent of All or a Certain Portion of the Creditors.**—An agreement for a composition entered into by one creditor, in contemplation and consideration of a general composition being entered into by all the creditors, is not binding on him if the others refuse to come in.<sup>3</sup> But where a deed is entered

1. Bishop on Insolvent Debtors, 450; Renard v. Tuller, 4 Bosw. (N. Y. Sup. Ct.) 107.

A composition deed recited that, "Whereas, C. G. Harger and Son, bankers, are indebted to their several creditors in diverse amounts, but by reason of sundry losses and disappointments were unable to pay and satisfy our demands in full," *held*, that the words "their several creditors" were not synonymous with all their creditors, and did not imply that the compromise was not to become binding until all had signed, and that there was no ambiguity which rendered parol evidence admissible to show that the deed was intended to be inoperative unless signed by all the creditors. Strickland v. Harger, 16 Hun (N. Y.) 465.

2. Lewis v. Jones, 4 Barn. & Cress. 506; Acker v. Phoenix, 4 Paige (N. Y.), 305.

But where a release called by the parties a "conditional release" was executed in contemplation of a composition of creditors, it was held to be competent to show by parol a condition that all releases to be executed should be binding only in case all the creditors came into the arrangement. Tutt v. Price, 7 Mo. App. 194.

3. Reay v. Richardson, 2 C. M. & R. 422; Chase v. Bailey 49 Vt. 71; Cobleigh v. Pierce, 32 Vt. 788, Green v. Schriver, 53 Pa. St. 259, Shenandoah M. E. Church v. Robbins 81 Pa. St. 361; Laird v. Campbell, 100 Pa. St. 159; Turner v. Comer, 6 Gray (Mass.), 530; Walker v. Mayo, 1 Mass. 42; Kinsing v. Bartholomew, 1 Will. (U. S.) 155.

Where there was a proviso "that if any of the creditors should refuse to execute or otherwise consent to the deed within six months from the date thereof, it should be void;" and some of the creditors did not execute the deed, but there was no evidence of their refusing to do so,—such non-execution was held not to be a refusal within the meaning of the proviso, and did not make the deed void. Holmes v. Love, 5 D. & R. 56; 3 B. & C. 242.

A debtor agreed to assign all his property in trust for his creditors, upon the usual covenants, and to be void if not signed before a given day by all the creditors, and the trustees sold the property and paid sixteen shillings in the pound and a creditor had not executed within the given time mentioned, nor would the debtor execute. *Held*, that an action could not be maintained by a creditor who had executed until it was ascertained that the other creditor would not execute. Tatlock v. Smith, 6 Bing. 33.

But if creditors agree to accept a dividend by way of composition the debtor covenants to pay if all his creditors shall come into the arrangement, one who has accepted his dividend cannot bring suit against the debtor on the original demand by reason of another creditor not having signed the composition paper. Chittenden v. Woodburg, 52 Vt. 562.

So a creditor who signed a composition on the condition that all the creditors should sign, cannot avoid his agreement where all had signed, except one with a claim of \$2.50. Fahey v. Clarke, 80 Ky. 613.

**Liability of Sureties.**—Previously to the execution of a composition deed, it was agreed, in the presence of a surety for the payment of the composition, that it should be void unless all the creditors executed it. A creditor, at the same interview, but subsequently to such agreement, executed the deed in the ordinary way, and without saying anything at the time of the execution. The deed was then delivered to one of the creditors, who was to get it executed by the rest. *Held*, that the condition previously expressed, although not introduced into the act of delivery, was sufficient to make this a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound thereby. Johnson v. Baker, 4 B. & A. 440.

A composition between creditors and a debtor and his surety stipulated that the surety should indorse certain notes of the debtor, provided that all creditors to amounts exceeding \$200 should sign

into with a clause that if certain debtors do not sign, it shall be null and void, if such creditors accept the composition or the security for it, though they do not actually sign the deed, it is valid and good.<sup>1</sup> Where a release to an insolvent debtor provides that it shall stand null and void, if not agreed to by all his creditors, he must prove that all such creditors have assented to the composition,<sup>2</sup> and such an agreement applies to secured as well as unsecured creditors.<sup>3</sup>

**3. Debtor Must Act in Good Faith.**—A composition between a debtor and a creditor is sustained only where the most scrupulous good faith has been observed by the debtor in reference to the transaction; and where a debtor fraudulently procures a composition with his creditors by means of false representations as to the amount of his property in pretending to be insolvent, the contract is void and the creditor may recover the whole debt.<sup>4</sup> The cred-

itor, that this indorsement of the notes was a waiver of the condition as to a debtor who was ignorant of any failure in the fulfilment of the condition, or of the fact that the agreement had been procured through a fraudulent bonus, *Attmore v. O'bear*, 58 Mo. 280.

The court distinguished this case from *of Doughty v. Savage*, 28 Conn.

There the composition agreement, made by the plaintiffs and other creditors of G., contained a condition that it should be binding unless signed by all. Composition notes were delivered to the plaintiff under the agreement indorsed by the defendant as surety for G. The agreement was not signed by all the creditors, but the fact was not known to the defendant when he indorsed the notes. Held, that he could set up in his defence non-compliance with the condition. Suit brought upon the notes indorsed by him.

*Falconbury v. Kendall*, 76 Ind. 260, where the plaintiff entered into a written contract to execute his notes to the creditors of B to a certain amount of their claims, on the consideration, among others, that all the creditors should sign such contract, agreeing to release B from liability on his indebtedness. A executed notes to the creditors of B except one who did not sign the agreement, who instituted suit thereon to compel payment by A of the amount of his claim thereunder. Held, that until all the creditors had assented to the agreement no right of action accrued against A; and that an allegation, in a complaint on such a composition agreement, that the creditors had assented to all the conditions of the contract on their part, is not equivalent to an allegation that all the creditors had assented to the agreement.

1. *Jolly v. Wallis*, 3 Esp. 228.

2. *Lower v. Clement*, 25 Pa. St. 63; *Durgin v. Ireland*, 14 N. Y. 322; *Babcock v. Dill*, 43 Barb. (N. Y.) 577; *Cutter v. Reynolds*, 8 B. Mon. (Ky.) 596.

3. *Kinsing v. Bartholew*, 1 Dill. (U. S.) 155.

4. *Seving v. Gale*, 28 Ind. 486; *Jackson v. Hodges*, 24 Md. 468; *Hester v. Cahn*, 73 Ill. 296; *Monger v. Kett*, 111 Md. 558; *Irving v. Humphry*, 104 N. Y. 284; *Vine v. Mitchell*, 1 Moody & R. 337.

Plaintiff held a claim against a firm, in which B. was a partner, upon which this suit was pending, and also an individual claim against B. The latter having become insolvent, proposed to his creditors to transfer all his property to trustees, to be divided among his creditors, if those holding claims to the amount of three fourths of his indebtedness would assent and join in a release. Plaintiffs, on being applied to, to assent to the compromise and sign the composition deed, refused, on the ground that they would thereby release the firm. Upon being assured by B. that he was only a special partner, plaintiffs consented to transfer the individual claim to R., with the understanding that he should execute the deed and release as creditor, holding any dividends received in trust for them. B., by the partnership agreement, was a special partner, but, by reason of irregularity in the proceedings, he had incurred the liability of general partner, which fact he knew at the time, but did not disclose to plaintiffs. The proposed compromise agreement was carried out. Held, that the case did not fall within the rule prohibiting a creditor, who is a party to a composition deed, or who assents thereto, from reserving a portion of his

itors are not bound to look for information elsewhere, and any material misrepresentation on the part of the debtor will avoid the compromise.<sup>1</sup> If in consequence of a debtor representing to one of his creditors that if he will agree to accept a composition for his debt all the other creditors will do the same, such creditor does not agree, the agreement is not binding upon him if that representation is untrue.<sup>2</sup> Where, by means of false and fraudulent representations upon the part of the debtor the creditor is induced to compromise a debt, the debtor representing that another had agreed to accept such compromise, upon discovering the falsity of such representation, the creditor may maintain an action against the debtor to recover the damages thereby sustained.<sup>3</sup>

**9. What Debts are Included.**—Where a creditor signs a deed of composition, leaving the amount of his debt in blank, he binds himself to all existing debts;<sup>4</sup> and a creditor who signs a composition deed, and inserts in it an amount as due him, cannot maintain

claim from the operation of the compromise, or stipulating for a secret advantage over the other creditors; and that the compromise agreement was no defence, and did not discharge B. *Almon v. Hamilton*, 100 N. Y. 527.

1. *Irving v. Humphry*, Hopk. (N. Y.) 284. In this case the debtor overstated the amount of his confidential debts, which were to be allowed a preference under the compromise, and the agreement had been acted upon, and the creditors had received the benefit of it, the court refused to set aside releases given by the creditors, except so far as to give them the benefit of all the property of the debtor. But a compromise made by a debtor with his creditor may not be assailed on the ground that the debtor omitted to disclose his financial condition. Where he is not questioned in regard thereto, and does nothing to mislead, he is not bound to make any such disclosure. *Graham v. Meyer*, 99 N. Y. 611.

2. *Cooling v. Noyes*, 6 T. R. 263; *Reay v. Richardson*, 2 C. M. & R. 422; *Lewis v. Jones*, 4 B. & C. 506.

But where the composition is effected by a third person, who advances his money to accomplish it, it seems that fraudulent representations made by the debtor to induce creditors to become parties will not invalidate the compromise; at all events, if the creditor desires to rescind he must restore to the third party the amount he has received under the agreement. *Bishop on Insolvent Debtors*, 456; *Babcock v. Dill*, 43 Barb. (N. Y.) 577.

3. *Whiteside v. Hyman*, 10 Hun (N. Y.), 218.

4. *Harrhy v. Wall*, 1 B. & A. 101; *Margetson v. Aitkin*, 3 C. & P. 338. But not to any debts which may afterward accrue to the creditor. *Lipman v. Lowitz*, 78 Ill. 252.

A composition with creditors bars an action by one for breach of contract, for which he made no provision on signing, as he should have done so if he had wished damages therefor. *Textor v. Hutchings*, 62 Md. 150.

Proof of a parol agreement made at the execution of a composition deed, under which the holders of a note agreed to receive a certain percentage of a debt due from the makers, that it should not embrace the note, is inadmissible upon the ground that it contradicts the written instrument; and also that such an agreement would be a fraud upon the other creditors, and void. *Perry v. Armstrong*, 39 N. H. 583; *Meyer v. McKee*, 19 Ill. App. 109.

The creditors of A and B by a composition deed agreed to accept from A and B, "ten per cent of the amount due us and each of us from said A, and said A and B in full settlement and discharge of our debts against them, said ten per cent to be paid within thirty days." The plaintiff, one of A's creditors who joined in the deed, held a note and account against him, which were then due. He also held another note, which would not become due until after the expiration of the thirty days, on which A's name appeared as indorser. Held, that this last note was not included in the composition deed. *Hamblen v. Ratigan*, 119 Mass. 153.

If the creditor induces others to agree to the composition, on the faith of his



an action against the debtor for a demand that existed, but not taken into account at the time of the composition, though deed specifies that the property conveyed by the debtor is to be divided among the creditors in proportion to their several debts.<sup>1</sup>

representation that he is not the owner of other bills, or that the bills for which he accepts the composition are the bills of the debtor which he holds, cannot afterwards sue the debtor upon

*Blackstone v. Wilson*, 26 L. J. 229.

*Russell v. Rogers*, 10 Wend. (N. Y.)

In this case A. signed a composition deed, and released his debtor from all demands, and afterwards sued him for breach of covenant in discharging a judgment that he had, before the composition, rendered to A., and it appeared that the cause of action accrued previously to the release. The release was held to bar the action, though the sum set opposite to A. in the composition deed was wholly different demand.

arrangement with creditors for an extension of the time of payment of their debts was signed by B., "provided I have the same indorsers for \$3500." B. gave up notes to the amount of \$3500, and received new notes therefor, and brought suit on another note not included in the sum. *Held*, that the agreement did not apply to the note sued on. *Garrison v. Papin*, 30 Mo. 243.

Deed of composition with creditors contained a provision for the payment of borrowed money and accommodated notes, and then all notes which were actually given in course of business, and which had been extended by the holders thereof. On exceptions taken to the claim of a creditor allowed as if borrowed money, upon the ground that it was not borrowed money "within the terms of the deed," *held*, that the words of the deed, "borrowed money," included, in ordinary sense, all sums of money loaned by a creditor to a debtor, without regard to the mode, or the existence of any security, or evidence of indebtedness, and being nothing in the context to alter the meaning of the words, it was held that the deed was not exceptant to establish any satisfactory proof that the terms had acquired and were used in a special or peculiar sense. *Murray v. Murray*, 24 Md. 520.

Creditors signed an agreement "to accept twenty-five per cent of the amount of the indebtedness as set against our respective claims, said seventy-five per cent to be paid in two, four, and six months

from December 15," the contract to take effect "provided all merchandise indebtedness accept the same settlement." A., one of the creditors, held three notes of the debtor, two of which he had previously sold, taken back under false representations by the purchaser, and at the time he signed the above agreement was, with the knowledge of the debtor, endeavoring to force the purchaser to take the notes back, which was done before December 15. *Held*, in an action by A. upon the note not sold, that A., not being in possession or having control of the two notes sold, the debtor was not obliged as to them to tender the settlement notes; and as to the note in suit, the debtor was not obliged to tender a settlement note of seventy-five per cent on that note after the transfer of the other two notes, which the debtor had paid to the purchaser. *Farrington v. Hodgdon*, 119 Mass. 453.

C., an insolvent debtor, made a compromise with his debtors for twenty-five cents on the dollar. H., a creditor, signed the composition deed, putting down his claim at \$25,000, when it was in fact \$45,000. There was no evidence of an actual fraudulent intent on H.'s part; but there was a fraud on the part of C. upon all the creditors in making a false representation as to his liabilities and assets. In a suit by H. against C. to recover the balance of his whole claim above the twenty-five per cent received, *held*, (1) that C.'s fraud vitiated the release against all the creditors; (2) that, supposing H. to have had a fraudulent intent in representing his claim as less than it was, yet this was a fraud on the other creditors and not on the debtor; and while it would have destroyed H.'s right to avail himself of the benefit of the compromise agreement, yet it would not preclude him from setting up the debtor's fraud as vitiating the compromise so far as the debtor was seeking the benefit of it; (3) that in the absence of evidence of intent, the conduct of H. was not necessarily fraudulent. *Huntington v. Clark*, 39 Conn. 540.

And where a creditor of an insolvent debtor had with other creditors signed an agreement to accept twenty-five per cent of their claims, the amount of the creditor's claim being stated in connection with his signature, it was held that, in the absence



A creditor who unites with others in releasing their common debtor is bound to protect the latter against a prior assignee of his claim,<sup>1</sup> and where a debtor makes out lists of his indebtedness and proposes to pay, and his creditors accept a certain per cent thereof, and payments are made accordingly, he cannot recover from one of his creditors a part of the sum so paid him on the ground of an alleged mistake as to his liability, except on clear and satisfactory proof of the mistake.<sup>2</sup>

If, when the creditor accepts the composition, the debtor has a claim against him, the debt which is released is the balance after deducting the counter-claim.<sup>3</sup>

of any proof of fraud on the other creditors, a receipt afterwards given by the creditor for his percentage, and also parole evidence, were admissible to show that the amount for which the creditor signed the composition was that of his unsecured claims, and that the agreement was not intended to apply to another secured claim. *Hartford & N. Y. Transp. Co. v. Hartford Bank*, 46 Conn. 569.

E. executed a deed, by which he conveyed his stock in trade and other property to trustees, in trust to sell and dispose of the same, "and apply the proceeds to the payment of certain promissory notes, given to said creditors and indorsed by J., his wife," to the amount of thirty cents on each dollar owed by said E. to his several creditors; then, after the payment of said notes, to deliver up to E. all that may remain of said property, to his use, discharged of said trust, "said creditors hereby agreeing to grant said E. a full discharge from all indebtedness upon the payment of said notes as aforesaid." The several creditors of E. signed this deed, placing against their names respectively the amount of their debts on account of which they had received the notes of E. indorsed by his wife, to the amount of thirty per cent. P, a creditor, who held a promissory note made by E., dated before and payable after the date of the deed, signed the deed, and against his signature was a certain sum, which was the amount of a book account due him, not including the note. For the amount of such account he had received notes of E. indorsed by his wife, but he never received any such notes for thirty per cent of the note above named. *Held*, in an action on the note by P. against E. that it was not barred by the deed. *Preston v. Etter*, 140 Mass. 465. See also *Holmes v. Vinert*, 1 Esp. 131, *Britton v. Hughes*, 15 Com. L. R. 488.

1. *Harloe v. Foster*, 53 N. Y. 385.

The plaintiff was indebted to the de

fendant in £50 upon a bill of exchange drawn by the latter upon and accepted by the former. Before the bill arrived at maturity the plaintiff called a meeting of his creditors, which was attended by him on the part of the defendant. At the meeting it was agreed that the several creditors of the plaintiff should receive a composition of their debts; and accordingly a deed of composition and release was prepared and executed (among others) by B. on behalf of the defendant, and the amount of the composition was afterwards paid to the defendant. The holder of the plaintiff's acceptances afterwards sued the plaintiff thereon, and compelled him to pay the amount, with £6 13s. for interest, and £2 10s. for costs. *Held*, that the plaintiff was entitled to recover from the defendant the amount of the bill and interest. *Hawley v. Beveridge*, 6 Scott N. R. 837.

But where a creditor held several notes of his debtor, and indorsed one of them to a third party, and afterwards and while said indorsed note belonged to the indorsee, made a composition agreement with his debtor, whereby he released and discharged him from all debts and sums of money then due, and owing from said debtor to him, stating the aggregate amount of such indebtedness, *held*, that this agreement would not affect the right of the creditor to collect from the debtor whatever sum he might afterwards have to pay, as indorser of the note, so indorsed before the execution of the composition agreement. *Lipman v. Low*, 78 Ill. 252.

And if a creditor, who is also an indorser of the debtor's note, executes a composition deed, and afterwards takes up the note, his right to recover upon it is not affected by the composition. *Nichols v. Tracy*, 1 Sandf. (N. Y.) 278.

2. *Jones v. Wright*, 71 Ill. 61.

3. *Faza Kerly v. McKnight*, 6 El. Bl. 795.

**10. Retention of Sureties.**—If a deed of composition with the principal debtor be voluntarily executed by the creditor without reservation, the surety will be discharged.<sup>1</sup> But if the deed contain reservation of remedies against the surety he will still be held.<sup>2</sup>

A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon is proved.<sup>3</sup>

**11. Duty and Liability of the Debtor.**—The creditors are entitled to a strict construction of the composition instrument, and the terms and provisions of the deed must be strictly complied with by the debtor to be a bar to an action by the creditor for his whole debt. It is not enough that it be shown that the creditor may eventually receive from the debtor's property the full amount of his composition claim, if it is to be procured by a violation of the terms of the composition.<sup>4</sup> Unless, therefore, the debtor pay the amount provided for by the composition deed, on the day appointed, the original debt is revived.<sup>5</sup>

De Colyar on Guarantees, 362; Wil-  
son v. Lloyd, L. R. 16 Eq. 60; *Ex parte*  
Denning, Buck, 517; Boulton v.  
Boulton, 18 Ves. 20; Duffy v. Orr, 5 Bligh  
805; *Ex parte* Gifford, 6 Ves. 805;  
Carstairs v. Buck, 560; Davidson  
v. McGregor, 6 M. & W. 755; North v.  
Field, 13 Q. B. 536.

Under the Bankrupt Act of June 22,  
1843, a composition only exonerated the  
debtor, and did not discharge his sure-  
ties. *Mason & H. Organ Co. v. Ban-*  
*croft*, 4 Cent. L. J. 295; *Guild v. Butler*,  
Mass. 498.

In *Thomas v. Courtney*, 1 B. & A.  
the creditors of an insolvent agreed  
by instrument (not under seal) that  
they would accept in full satisfaction of  
their debts 12s. in the pound, payable  
in instalments, and would release him  
from all demands; one of the creditors,  
who signed for the whole amount of his  
debt, held at the time, as a security for  
it, a bill of exchange drawn by the  
debtor and accepted by a third person,  
the money due on this bill having been  
previously paid by the acceptor, it was  
held that the creditor might retain it, the  
instrument of composition not containing  
any stipulation for giving up securities,  
and the effect of it not being to extin-  
guish the original debt.

*Kearsley v. Cole*, 16 M. & W. 128;  
*North v. Wakefield*, 13 Q. B. 536; *Kirby*  
*Turner*, 6 Johns. Ch. (N. Y.) 242;  
*Hubbell v. Carpenter*, 5 N. Y. 171.

A creditor, holding a security for his  
debt, may stipulate to have the benefit of  
it in addition to the amount of the com-

position offered by a debtor to his credi-  
tors; but he must either hold himself  
entirely aloof from the other creditors,  
or distinctly communicate with them on  
the subject, if he at all acts in common  
with them. *Cullingworth v. Lloyd*, 2  
Beav. 385.

3. *Close v. Close*, 4 De G., Mac. & G.,  
176; *Hubbell v. Carpenter*, 5 N. Y. 171.

4. *Smythe v. Graydon*, 29 How. Pr.  
(N. Y.) 11; *Haggerty v. Simpson*, 1 E.  
D. Smith (N. Y.), 67; *Warbury v. Wil-*  
*cox*, 2 Hilt. (N. Y.) 118; *Hadley Falls*  
*Bank v. May*, 29 Hun (N. Y.), 404.

The debtor cannot set up the composi-  
tion deed as a defence against the claim of  
any one creditor, unless he shall aver and  
prove that he performed it as towards all  
the creditors who were parties to it, not  
only towards the one who afterwards  
brings suit. *Evans v. Gallantine*, 57 Ind.  
367.

5. *Penniman v. Elliott*, 27 Barb. (N.  
Y.) 315; *Mackenzie v. Mackenzie*, 16  
Ves. 372.

It is incumbent on the debtor to tender  
the notes agreed to be taken as a com-  
position in order to bar the original  
claims, unless the creditors, by their acts,  
dispense with such tender. *Stewart v.*  
*Tipton*, 56 Cal. 52.

Where, at a meeting of the creditors of  
A, it is agreed that a composition of 6s. in  
the pound should be accepted, and that  
promissory notes for the amount "shall  
be given within fourteen days, the credi-  
tors consenting thereto within that time,"  
and A is sued for a debt due to one of the  
parties to the agreement, unless A can

But the mere fact that the composition notes were not given for the exact time agreed upon,<sup>1</sup> or that they were not tendered by the debtor until some time after the date agreed to be given for the notes,<sup>2</sup> is an immaterial variation, and not such a breach of the composition deed as to exempt the creditor from its obligation.

And if the creditor receive the amount provided for by the deed, after the day appointed, knowing that it was offered as payment of the compromise, this is a waiver of the forfeiture.<sup>3</sup>

Although a debtor, compounding with his creditors, give them the security of a third person for payment of part of the stipulated dividend, he is not discharged upon payment of that part only, if the residue continues unpaid.<sup>4</sup>

**12. Secret Agreements with Creditors.**—A creditor who unites with others in a composition deed enters into an obligation thereby, not only with the debtor, but with the other creditors who are parties; and any separate agreement by which he secures to himself advantages not enjoyed by the others, is a fraud upon them and void.<sup>5</sup> Such an agreement is void, although the effect of it is

show a delivery or a tender of the notes he is liable for the whole debt. *Oughton v. Trotter*, 2 N. & M. 71.

So where a creditor has agreed to a composition, but failed to execute the release and apply for the composition notes, he is not precluded from recovering the amount of his original indebtedness, if it is shown that the debtor did not tender him the notes. *Cranley v. Hillary*, 2 M. & S. 120.

Where creditors, in consideration of a debtor assigning all his stock in trade and book debts to a trustee for the benefit of his creditors, agreed to execute releases as soon as the property should realize £238, *held*, that by this agreement the creditors had still a right of action, though they had taken a security from a purchaser of the stock to the amount of £223. *Wiglesworth v. White*, 1 Stark. 218.

But where a creditor, entitled to certain payments at stated periods, does not receive them accordingly, but is paid irregularly, and after calling attention to the irregularity receives further payments in the same way, but without objection, he has waived his right to insist that the terms should have been strictly complied with. *Browning v. Crouse*, 40 Mich. 339.

1. *Renard v. Tuller*, 4 Bosw. (N. Y.) 107.

2. *Hall v. Merrill*, 9 Abb. Pr. (N. Y.) 116.

Where it is provided that if any of the composition notes be not paid at maturity the original indebtedness shall

revive, a mere notice that the notes will not be paid will not excuse a due presentment for payment, the other creditors being parties to the contract. *Green v. McArthur*, 34 Barb. (N. Y.) 450.

3. *Penniman v. Elliott*, 27 Barb. (N. Y.) 315.

4. *Walker v. Seaborne*, 1 Taut. 326.

5. *Townsend v. Newell*, 22 How. Pr. (N. Y.) 164; *Patterson v. Boehm*, 4 P. St. 507; *Lee v. Sellers*, 81\* Pa. St. 47; *Lawrence v. Clark*, 36 N. Y. 128; *Prineo v. Higgins*, 12 Abb. Pr. (N. Y.) 33; *Wiggins v. Bush*, 12 Johns. (N. Y.) 30; *Hughes v. Alexander*, 5 Duer (N. Y.) 488; *Williams v. Carrington*, 1 Hilt. (N. Y.) 515; *Carroll v. Shields*, 4 E. 1; *Smith (N. Y.)*, 466; *Eldridge v. Stren*, 2 J. & S. (N. Y.) 491; *Bartleman Douglass*, 1 Cranch (U. S.), 450; *Fenn v. Dickey*, 1 Flip. (U. S.) 34; *Smith Owens*, 21 Cal. 11; *Bliss v. Mattison*, N. Y. 22; *Russell v. Rogers*, 10 Wen (N. Y.) 473; *Van Brunt v. Van Brunt*, Edw. Ch. (N. Y.) 14; *Moses v. Katzeberger*, 1 Handy (Ohio), 46; *Way Langley*, 15 Ohio St. 392; *Goodwin Blake*, 3 T. B. Mon. (Ky.) 107; *Trumb v. Tilton*, 21 N. H. 128; *Doughty Savage*, 28 Conn. 146; *Baldwin v. Roseman*, 49 Conn. 105; *Breck v. Cole*, Sandf. (N. Y.) 79; *Cockshott v. Benae*, 2 T. R. 763; *Howden v. Haigh*, 3 P. D. 661; *Leicester v. Rose*, 4 East. 37; *Jackson v. Lomas*, 4 T. R. 166; *Knig v. Hunt*, 5 Bing. 429; *Higgon v. Pitt*, Exch. 312; *Watts v. Hyde*, 10 Jur. 12; *Wood v. Barker*, 11 Jur. N. S. 9; *Geere v. Mare*, 2 H. & C. 339; *Smith*

to secure to the creditor the payment of more money than the other creditors were to receive, but only further security for the same sum.<sup>1</sup>

A creditor who is thus deceived has the right to consider the contract as rescinded, and sue on his original demand.<sup>2</sup> He may

*Mann*, 9 Ex. Ch. 535; *Danglish v. Bennett*, 8 B. & S. 1; *Hart v. Smith*, 38 Q. B. 25.

It is immaterial that all other creditors executed the deed before such creditor agreed to become a party on receiving security for the additional sum. *Patterson v. Boehm*, 4 Pa. St. 507.

Where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take the defendant's bills at long dates for their respective debts, stipulated without their knowledge for a bill of exchange, to be indorsed to him by the defendant for a larger sum, the whole agreement between the plaintiff and defendant is void, being fraudulent upon other creditors; the latter cannot recover upon the defendant's bills for the amount of the composition money, even although he received nothing on the bill indorsed to him by the defendant. *Howden v. Hogg*, 3 P. & D. 611.

And if, upon a composition between a debtor and his creditors, one accepts the composition, and, in addition, agrees that the debtor shall keep up a policy on his life for the ultimate payment of the remainder of the debt, such an agreement is void, unless every creditor assents, and the policy belongs to the representative of the debtor. *Pfleger v. Browne*, 12 Nev. 391.

But the mere fact that the debtor intends to pay some of his creditors unitarily in the composition deed in full, from his earnings, and that he therefore obtains no discharge from them, does not vitiate a discharge given by another creditor in consideration of payment of a fair percentage if there is no agreement made with creditors to be ultimately paid, tending to defraud the others, and the percentage paid to all is as much as the entire assets will justify. *Argall v. Clark*, 43 Conn. 160.

And where an insolvent has been legally released from his obligations by a composition with his creditors, the debt due of such creditors, who accepted the composition on the written condition that none of the other creditors should receive better terms, is not revived by the payment by the insolvent, after such release, of additional sums to other creditors. *Re Sturgis*, 16 Bankr. Reg. 304.

So where notes of the debtor, with the indorsement of a third person, were given for a portion of the debt, and accepted as satisfaction of the whole, and the creditor before accepting the same knew of an additional payment to another creditor, *Held*, that he could not thereafter claim the settlement was invalid. *Bower v. Metz*, 54 Iowa, 394.

1. *Leicester v. Rose*, 4 East, 372.

But in *Feise v. Randall*, 6 T. R. 146, it was agreed by a deed of composition between a trader and his creditors that the trader should give them his bills, accepted by a friend for ten shillings in the pound, payable in certain portions at fixed periods, and his own promissory notes for the remaining five shillings, and that the creditors should be at liberty to take his own notes only for their full demands, if they pleased. One of the creditors who signed the deed took bills from the debtor, accepted by his friend, for the whole fifteen shillings in the pound, payable at the same respective times as the bills agreed to be given by the deed of composition. The payment of these bills was resisted upon the ground that it was a security beyond that agreed for, and greater than the other creditors obtained; but the transaction was adjudged fair, the creditor not receiving by it more than the others.

2. *Kahn v. Gumbert*, 9 Ind. 430; *Smith v. Stone*, 4 Gill & J. (Md.) 310; *Clarke v. White*, 12 Pet. (U. S.) 178; *Case v. Gerrish*, 15 Pick. (Mass.) 50; *Partridge v. Messer*, 14 Gray (Mass.) 180; *Saul v. Buck*, 72 Ga. 254; *Townsend v. Newell*, 22 How. Pr. (N. Y.) 164; *Brownsville Mfg. Co. v. Lockwood*, 3 McCreary (U. S.), 608. Compare *Page v. Carter*, 16 N. H. 254.

A made a composition with his creditors, and received back from B, one of said creditors, his notes, the evidence of his indebtedness to B, and wrote across their face "paid." Under a secret agreement with certain of the creditors, A made to them payments in excess of the amounts named in the deed of composition. B brought suit upon the notes. *Held*, that he could maintain his action; that he was excused by the facts from making profert of the notes, and that A could not be heard to object that they were not filed with the petition. Com-

sue for and recover the full amount of his original indebtedness less the amount received under the composition agreement. It is not essential to the right of action that the creditor should first rescind the composition agreement, and return the money he has received under it.<sup>1</sup>

But if a stranger, without the knowledge of the debtor, give his note to a creditor for an additional sum to induce him to sign a composition deed, this will not invalidate it, although the debtor subsequently pay the note.<sup>2</sup>

**13. Securities for Preference Void.**—If one of the creditors, before executing a composition deed, obtain from the debtor security for the residue of his demand, that security is void, because it is a fraud on the rest of the creditors. The principle is that in such cases each creditor must act openly. As the other creditors may have been induced to come into terms upon a belief that all were to be on the same footing, any private agreement for greater benefit to one is a fraud upon the rest, and hence invalid.<sup>3</sup>

*Commerce Bank v. Haerber*, 8 Mo. App. 171.

An attorney of a debtor, employed to effect a composition with the latter's creditors, gave his personal promise in writing, and afterwards paid to one of the creditors a sum in excess of the amount agreed on and accepted by the other creditors. *Held*, (1) that the knowledge of the attorney in the matter of giving such preference was, in law, the knowledge of the principal, and (2) that the failure of the attorney to disclose to another creditor the fact of such preference was the concealment of a material fact, and invalidated the composition. *Bank of Commerce v. Haerber*, 88 Mo. 37.

But for one creditor to secure fifty per cent in cash at once instead of seventy per cent on time, will avoid the deed; so held where the taking of the cash payment so embarrassed the debtor as to make it impossible for him to meet his payments to the other creditors as they matured. *Bean v. Amsinck*, 10 Blatch. (U. S.) 361.

1. *Hefter v. Cahn*, 73, Ill. 296; *Enneking v. Stahl*, 9 Mo. App. 390; *Crandall v. Cochran*, 3 Thom. & C. (N. Y.) 203; *Beach v. Ollendorf*, 1 Hill. (N. Y.) 41; *Smith v. Solomon*, 7 Daly (N. Y.), 216.

Where at the time of payment under a composition deed, the plaintiffs, in pursuance of a previous arrangement, received a sum of money from the debtor without the knowledge of the other creditors, larger than the amount stipulated in the deed, *held*, that in an action by the plaintiffs against the debtor, upon the original obligation, on the ground that the deed was fraudulently procured by

the latter, the acceptance of the money was not a bar to the action. *Elfelt v. Snow*, 2 Saw. (U. S.) 94.

2. *Babcock v. Dill*, 43 Barb. (N. Y.) 577. Compare *Commerce Bank v. Haerber*, 11 Mo. App. 475.

But where a party refused to sign a composition agreement to accept of his debtor a composition of ten shillings in the pound, but the debtor's brother offering to supply him with coals to the amount of the other ten shillings, he signed the composition agreement, and the other creditors knew nothing of the coal transaction, *held*, that he could not recover upon his promissory note for the amount of the ten shillings' composition. *Knight v. Hunt*, 5 Bing. 429. See also *Solinger v. Earle*, 82 N. Y. 393.

3. *Bigelow on Fraud*, 342; *Fay v. Fay*, 121 Mass. 561; *Sternberg v. Bowma*, 103 Mass. 325; *Lawrence v. Clark*, 36 N. Y. 128; *Bliss v. Mattison*, 45 N. Y. 2; *Breck v. Cole*, 4 Sand. (N. Y.) 7; *Hughes v. Alexander*, 5 Duer (N. Y.) 48; *Eldridge v. Strenz*, 2 J. & Sp. (N. Y.) 49; *Case v. Geinsh*, 15 Pick. (Mass.) 49; *Priner v. Higgins*, 12 Abb. Pr. (N. Y.) 33; *Carroll v. Shields*, 4 E. D. Smith (N. Y.) 466; *Crandall v. Cochran*, 3 Th. & C. (N. Y.) 203; *Fenner v. Dickey*, 1 Fla. (U. S.) 34; *Jackson v. Davison*, 4 Bar. & Ald. 695; *Wells v. Girling*, 1 Brad. B. 452; *Steinman v. Magnus*, 11 East. 393; *Leicester v. Rose*, 4 East. 380; *Mason v. Stock*, 6 Ves. 300; *Ex parte Saller*, 15 Ves. 55; *Lewis v. Jones*, 4 B. C. 511; *Cockshott v. Bennett*, 2 T. 763; *Howden v. Haigh*, 3 P. & D. 66; *Wells v. Girling*, 4 Moore, 78; *Geere v. Mare*, 2 H. & C. 339.

## CREDITORS—COMPOUNDING OFFENCES.

Such an agreement is void, not only for the excess, but *in toto*, being in fraud of third persons.<sup>1</sup>

And so money paid by the debtor under such a fraudulent agreement may be recovered back from the creditor in an action for money had and received.<sup>2</sup>

**4. New Promise.**—A debt released upon an accord and satisfaction by a composition assented to by all the creditors is extinguished, and can neither sustain a suit nor form the consideration of a new promise.<sup>3</sup>

**COMPOUNDING OFFENCES.** (See also ACCESSORY; CONTRACTS.)—**1. Definition.**—*Compounding a Felony* is the act of a party immediately aggrieved who agrees with a thief or other person that he will not prosecute him on condition that he returns him the stolen goods, or who takes a reward not to prosecute.<sup>4</sup>

Held with reference to a mortgage. *Man v. Gamble*, 26 N. J. Ex. 494; *Rey v. Hunt*, 119 Mass. 279.

*Moses v. Katzenberger*, 1 Handy 46; *Howden v. Haigh*, 11 A. & 663.

*Bishop on Insolvent Debtors*, 465; *Th v. Cuff*, 6 M. & S. 160; *Horton v. Th*, 11 M. & W. 492; *Atkinson v. Th*, 6 H. & N. 778; *Gilmour v. Th*, 49 How. Pr. (N. Y.) 198; *Th v. Higgins*, 12 Abb. Pr. (N. Y.)

Defendants holding as security for a debt due to them from D. a policy of assurance effected by D., refused to join in a composition deed, by which D. was to be released from his debts on paying 8s. the pound, unless D. assigned the policy to them; D. assigned it, and the defendants then executed the composition deed. *Held*, that such assignment was a fraud, and D. having become bankrupt, that his assignees were entitled to recover from defendants the money they had received on the policy, notwithstanding the 8s. in the pound never paid. *Alsager v. Spalding*, 4 L. N. C. 407.

It is in *Solinger v. Earle*, 82 N. Y. 393, the doctrine that where a debtor himself or a near relative, out of compassion for him, pays money exacted by a creditor as a condition of his signing a composition, he may be regarded as having acted under duress, and is not equally bound with the creditor, so that he may recover it back, is doubted. The court held that it cannot, at least, be invoked in favor of one remotely related by marriage to the debtor. The facts were that the plaintiff, who was a brother-in-law of the firm of N. & Co., to induce

the defendants, who were creditors of that firm, to unite with the other creditors in a composition of its debts, secretly agreed to and did give them his promissory note for a portion of their debt beyond the amount to be paid by the composition agreement. Defendants transferred the note before due to a *bona fide* holder, and plaintiff was compelled to pay. *Held*, that the agreement was a fraud upon the other creditors; that it was not divested of its fraudulent character by the fact that it was made, not by the debtor, but by a third person, and that an action was not maintainable to recover back the amount so paid.

*8. Evans v. Bell*, 15 Lea (Tenn.), 569; *Stafford v. Bacon*, 1 Hill (N.Y.), 532.

*4. Bonvier's L. D.*, title Compounding a Felony; *State v. Duhammel*, 2 Harr. (Del.) 532; *Bothwell v. Brown*, 51 Ill. 234; *Chandler v. Johnson*, 39 Ga. 85.

Where a party is robbed and he knows the felon and takes his goods again or otherwise amends upon agreement not to prosecute, such compounding was anciently called "theft bated" and a party so compounding the felony was considered an accessory to the fact. *4 Black. Com.* 133.

The bare taking again of a man's own goods which have been stolen (without favor shown to the thief) is no offence. *Hawk. P. C.* b. 1, c. 59, s. 7; *Bothwell v. Brown*, 51 Ill. 234; *Taylor v. Cottrell*, 16 Ill. 93.

The holder in good faith of a forged note, received from the forger as collateral security, may lawfully deliver it to the forger upon payment being made by him; and although such delivery necessarily puts it in the power of the forger to destroy or suppress the paper, and to

**2. Compounding a Misdemeanor.**—The offence of compounding is not restricted to compounding felonies. Compounding a misdemeanor is also indictable.<sup>1</sup>

that extent to hinder and prevent his prosecution, and although such necessary consequence must be presumed to be intended by the holder of the paper when he so delivers it, yet such delivery is not the compounding of a felony. And in this case, where the alleged forger paid the notes by the sale and transfer to the holder thereof of certain personal property, *held*, that such sale could not be set aside by an attaching creditor of the alleged forger, on the ground that the consideration thereof was illegal, and that the transaction was therefore void, and vested in the transferee no title to the property. *Deere v. Wolff*, 65 Iowa, 32.

An attorney who had collected money for his client neglected to pay it over and was threatened with criminal proceedings, a warrant for his arrest being taken out. The attorney then gave his note with security for the amount. *Held*, that the note was not given to compound an offence, although a refusal to pay over by an attorney was made a misdemeanor by statute. The statute allows the injured party to receive his own from the wrongdoer. *Ford v. Cratty*, 52 Ill. 313.

A deed to P. was given after J.'s release from arrest made upon a charge of P. and his partner that J. while in their employ had committed embezzlement of their money. J. confessed having taken about \$1500 from them. *Held*, although the deed to B. may have been given in part in consideration of the withdrawal of the criminal complaint, there was another consideration, i.e., the moneys embezzled, which is enough. There was no proof of any unconscionable advantage taken; and, moreover, this suit is against innocent purchaser for value without notice. *Wilcox v. Daniels*, 3 Atl. Repr. (R. I.) 204.

But accepting a promissory note signed by a party guilty of larceny as a consideration for not prosecuting is sufficient to constitute a compounding of a felony, although the note is illegal and void, and may never be paid. *Com. v. Pease*, 16 Mass. 91.

It is not necessary that the benefit of the consideration should come to the one making the agreement not to prosecute. If the defendant corruptly exacted a consideration for an agreement not to prosecute a felony to which he was knowing, he is guilty although he took the consideration for another. *State v. Ruthven*, 58 Iowa, 121.

Neither a justice of the peace, prosecuting witness, nor prosecuting attorney has power to compromise a felony. *Ivinson v. Pease*, 1 Wy. Ter. 277.

By duress of imprisonment on a criminal charge, with threats of future prosecution if a certain sum of money be not paid him, and promise to dismiss the prosecution on such payment being made, A. induces B. to procure for him negotiable promissory notes for said sum from X., a friend of B., and then causes the prosecution to be dismissed, and B. is charged. B. thereupon gives X. his (B.'s) own notes secured by mortgage for the same amount, and X. pays his notes to A. when due. B. is not guilty of said offence; the complaint against him fails to charge him with any offence; the warrant on which he was arrested is void on its face; and both complaint and warrant are colorable only. *Held*, that the facts do not show any compounding of a felony. *Heckman v. Swartz*, 50 Wis. 26.

The mere fact that the defendant was an officer does not shield him from being indicted under a charge of compounding a felony. *State v. Ruthven*, 58 Iowa 121.

It is not compounding a felony for an official to account for moneys as received from his predecessor, and himself assure their payment upon the latter's assurance that he will make the amount good if the accounts are incorrect. *Van Ness Hadsell*, 54 Mich. 560.

A party indicted for compounding larceny and agreeing to withhold evidence cannot plead the acquittal of the person charged with the larceny in bar of his own conviction. But neither is the record of a conviction of the criminal conclusive proof against the compounder. Such evidence may be rebutted. *People v. Buckland*, 13 Wend. (N. Y.) 50; *Maybee v. Avery*, 18 Johns. (N. Y.) 35; *State v. Duhammel*, 2 Harr. (Del.) 53; *Biddulph v. Ather*, 2 Wils. 23.

1. *Russell on Crimes* (9th Am. Ed.), 21; *Jones v. Rice*, 18 Pick. (Mass.) 440; *Edcombe v. Rodd*, 5 East, 301; *McMahon v. Smith*, 27 Conn. 221; s. c., 36 Am. Rep. 67; *Pearce v. Wilson*, 111 Pa. St. 14; s. c., 56 Am. Rep. 243.

A judgment confessed by warrant attorney, in consideration of stifling prosecution for forgery, is void, and it was error for the court to refuse to open such judgment and permit the defendant to show the illegal consideration, although they were parties thereto. *Bredin's A.*



Pa. St. 241; s. c., 37 Am. Rep.

There can be no recovery by one for injury and services, the purpose and policy of whose employment was to obstruct the administration of justice, by inducing State witnesses, and by inducing the State's attorney to hold back in discharge of his official duty in prosecuting the defendant charged with adultery. *W. v. Tucker*, 53 Vt. 338; s. c., 38 Rep. 684.

The statutes, however, provide that a person is committed or indicted for assault and battery, or other misdemeanor, for which the party injured may obtain remedy by civil action, if the party appears before a magistrate or court and acknowledges satisfaction for the injury sustained, a stay of proceedings is ordered. *Partridge v. Hood*, 120 Mass. 403; s. c., 21 Am. Rep. 524; *Noble v. Bles*, 13 S. & R. (Pa.) 319, 322.

The law of Oregon allows misdemeanor to be compromised, but in compromise of prosecution for larceny it is unlawful. The person whose property has been stolen to exact or receive from the thief committing the larceny anything more than the property stolen or its value and the necessary expense of recovering it. *Saxon v. Conger*, 6 Oreg.

An acknowledgment of satisfaction does not entitle the defendant to be discharged, but leaves it to the discretion of the magistrate or court whether a stay of proceedings is consistent with the interests of public justice. *Partridge v. Hood*, 120 Mass. 403; s. c., 21 Am. Rep. 524; *W. v. Dowdican's Bail*, 115 Mass. 133; *W. v. Hunter*, 14 La. Ann. 71; *McDanate*, 27 Ga. 419; *Statham v. State*, 507, *Bone v. State*, 18 Ark. 109. An offence for an assault and battery or misdemeanor, except in certain cases, may be compromised either before indictment, but not after conviction. *People v. Bishop*, 5 Wend. (N.Y.) 578; *Price v. Summers*, 5 N. J. L. 578.

The right to stifle a prosecution does not depend on the question whether the offence is a felony or a misdemeanor. All authorities hold that an agreement to compound a felony will not be enforced, but any security based upon such a transaction is void. But as to misdemeanors a distinction has been made. Authorities hold that those misdemeanors which are personal in their nature, between the parties, such as based upon a common assault, unaccompanied with riot or intent to kill, may be compromised. *McMahon v. Smith*, 47

Conn. 221; s. c., 36 Am. Rep. 67; *Sharon v. Gager*, 46 Conn. 189; *Mathison v. Hanks*, 2 Hill (S. Car.), 625; *Maurer v. Mitchell*, 9 W. & S. (Pa.) 69; *Robinson v. Crenshaw*, 2 Stew. & P. (Ala.) 276; *Merrill v. Fleming*, 42 Ala. 234; *Moog v. Strang*, 69 Ala. 98; *Price v. Summers*, 2 South. (N. J.) 578; *Holcomb v. Simpson*, 8 Vt. 141. But where the offence is in whole or in part of a public nature, nearly all the authorities hold that no agreement to stifle a public prosecution for it can be valid. *Fay v. Outley*, 6 Wis. 42; *Prough v. Entriiken*, 11 Pa. St. 81; *Sharp v. Philadelphia Warehouse Co.*, 14 Phila. (Pa.) 513; *Jones v. Rice*, 18 Pick. (Mass.) 440; *Com. v. Johnson*, 3 Cush. (Mass.) 454; *Hinesborough v. Sumner*, 9 Vt. 23; *Bowen v. Buck*, 28 Vt. 308; *Shaw v. Reed*, 30 Me. 105; *Shaw v. Spooner*, 9 N. H. 197; *Clark v. Ricker*, 14 N. H. 44; *Kimbrough v. Lane*, 11 Bush (Ky.), 556; *Peed v. McKee*, 42 Iowa, 649; *Buck v. First Nat. Bank*, 27 Mich. 293; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90; *Kier v. Lehman*, 6 C. B. 308.

A promissory note given in consideration of an agreement not to prosecute under the bastardy act is valid. *Maxwell v. Campbell*, 8 Ohio St. 265; *Holcomb v. Simpson*, 8 Vt. 141; *Maurer v. Mitchell*, 9 W. & S. (Pa.) 69; *Wyant v. Leshner*, 23 Pa. St. 338; *Harter v. Johnson*, 16 Ind. 271; *Parker v. Way*, 15 N. H. 45; *Allyn v. Allyn*, 108 Ind. 327.

Plaintiff having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for \$1000, agreed to and did discontinue the action without costs. In an action upon the note, *held*, that it was given for a good consideration, and was valid; that the transaction could not be regarded as against public policy. *Adams v. Adams*, 91 N. Y. 381; s. c., 43 Am. Rep. 675.

The defendant kept a box of smoking tobacco on his counter for the gratuitous use of the public. The plaintiff was in the habit of filling his pipe therefrom, as was known to the defendant. The defendant by way of joke put gunpowder with that tobacco, and the plaintiff, filling his pipe therefrom, was injured by the explosion. The plaintiff made a claim against the defendant for damages, and the defendant executed to him the note in suit therefor. *Held* valid. *Parker v. Enslow*, 102 Ill. 272; s. c., 40 Am. Rep. 588.

A note given in settlement of damages claimed for criminal intimacy with the



**3. Compounding Information on Penal Statutes** is an offence of equivalent nature in criminal causes, and is besides an additional misdemeanor against public justice by contributing to make laws odious to the people.<sup>1</sup>

**4. Contracts made in Consideration of Compounding an Offence Enforceable.**—No contracts, as promissory notes, bonds, mortgages or other securities, of which the offence of compounding is the consideration either in whole or in part, can be enforced.

wife of the payee, on consideration that the payee should never after refer to or speak of such intimacy, was held valid. *Wells v. Sutton*, 85 Ind. 70.

Where the offence is in part of a public nature, as a crime, an agreement to forbear bringing a civil action for damages may be a good consideration for a note and mortgage if no promise or understanding is involved not to prosecute for or give evidence of the crime. *Breathwit v. Rogers*, 32 Ark. 758. But it is doubtful whether an agreement to satisfy the private damage inflicted by an assault will be valid if embracing a stipulation not to prosecute for the offence against the public peace. 1 *Smith L.C.* (8th Am. Ed.) 735, citing *Jones v. Rice*, 18 Pick. (Mass.) 440; *Corley v. Williams*, 1 Bailey (S. Car.) 588; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90; *Wells v. Thompson*, 50 Ala. 84; *Peeds v. McKee*, 42 Iowa, 689; *Haines v. Lewis*, 54 Iowa, 301; *Kimbrough v. Lane*, 11 Bush (Ky.) 556; *Morrill v. Goodenow*, 65 Me. 178; *Partridge v. Hood*, 120 Mass. 403; *Lyon v. Waldo*, 36 Mich. 345; *Lindsay v. Smith*, 78 N. Car. 328; *Bank v. Kirk*, 90 Pa. St. 49; *Bredin's Appeal*, 92 Pa. St. 241; *Cain v. Southern Expr. Co.*, 1 Baxt. (Tenn.) 315.

In *Vanover v. Thompson*, 4 Jones (N. Car.), 485, it was held that all contracts founded upon agreements to compound felonies, or to stifle prosecutions of "any kind," are void, and cannot be enforced. See *Lindsay v. Smith*, 78 N. Car. 328; s. c., 24 Am. Rep. 463; *Garner v. Qualls*, 4 Jones (N. Car.), 223.

In *Lindsay v. Smith*, 78 N. Car. 328; s. c., 24 Am. Rep. 463, the court said, "A party cannot take care of his private interest by depriving the State of a witness or an active prosecutor, which is the means relied on for the conviction of offenders; much less can he pollute the very fountains of criminal justice by suppressing an indictment already instituted against him." Citing *Thompson v. Whitman*, 4 Jones (N. Car.), 47; *Ingram v. Ingram*, 4 Jones (N. Car.), 188; *Blythe v. Lovinggood*, 2 Ired. (N. Car.) 20.

A contract will not be declared void and the cause be reversed on the ground

that the only consideration therefore is the compromise of a felony, where it does not clearly appear from the evidence whether the consideration for the contract was a forbearance to prosecute criminally or in a civil action for damages. *Malli v. Willett*, 57 Iowa, 306; *Wilkins v. Riley*, 47 Miss. 306.

Where an assignee of a bankrupt appropriated money received as assets, and gave a note to his co-assignee in consideration that the co-assignee should not press proceedings instituted against him for the protection of the creditors, such note was held to be valid. *Ash v. Fisher*, 124 Mass. 414.

A note given for the suppression of prosecution is not necessarily for an illegal reason without good consideration, unless it appears that the prosecution was for a criminal offence. *Soule v. Bonney*, 128 Me. 128.

The public always has an interest in the fair trial of causes, so that not only the furtherance of agreements to suppress testimony are void. *Fallows v. Taylor*, 7 T. R. 475; *Swan v. Chandler*, 8 B. Mon. (Ky.) 97; *Hoyt v. Macon*, 2 Col. 50.

1. 4 Blacks. Com. 136; 1 Russell's Crimes, 197; *Keir v. Leeman*, 9 Q. B. 392; *Hinesburgh v. Sumner*, 9 Vt. 2.

It is, however, in the discretion of the court to allow an informer or plaintiff to bring a popular action on a penal statute to compound upon such terms as they may think fit; and it is a general rule in the exercise of this discretion to require, as one of the terms of granting leave to compound, that a moiety of the penalty given to the informer be paid, unless under special circumstances, when leave to discontinue on payment of the costs only will be granted. *Bradway v. Le Worthy*, 9 Johns. (N. Y.) 251; *Minton v. Woodworth*, 11 Jo. (N. Y.) 474. See *Sneed v. Com.*, 61 Ky. 338.

2. *Com. v. Pease*, 16 Mass. 91; *Com. v. Johnson*, 3 Cush. (Mass.) 454; *Boyd v. Wood*, 1 Bay (S. Car.) 239; *Corley v. Williams*, 1 Bailey (S. Car.) 588; *Mason v. Hanks*, 2 Hill L. (S. Car.) 10; *Smith v. Pinney*, 32 Vt. 282; *Pierce v. Kibbee*, 51 Vt. 559; *Bowen v. Buck*

308; *Mattocks v. Owen*, 5 Vt. 42; *Sburgh v. Sumner*, 9 Vt. 23; s. c., 31 Dec. 599; *Bailey v. Buck*, 11 Vt. Plumer v. Smith, 5 N. H. 553; s. c., m. Dec. 478; *Shaw v. Spooner*, 9 s. c., 32 Am. Dec. 348; *Clark v. Coker*, 14 N. H. 44; *Coburn v. Odell*, H 553; *Ozanne v. Haber*, 30 La. Pl. 2, 1384; *Cameron v. McFar-* 2 Law Rep. (N. Car.) 415; s. c., 6 Dec. 566; *Lindsay v. Smith*, 78 N. 328; s. c., 24 Am. Rep. 463; *King v. nants*, 71 N. Car. 469; *Raguet v. Ohio*, 76; *Den v. Moore*, 5 N. J. 7; *Steuben County Bank v. Mathew-* 5 Hill (N. Y.), 249; *Pearce v. Wil-* 11 Pa. St. 14; s. c., 56 Am. Rep. Nat. Bank of Oxford v. Kirk, 90 St. 49; *Porter v. Jones*, 6 Coldw. 313; *Cain v. Southern Exp. Co.*, mn. 315. *Allison v. Hess*, 28 Iowa, 328; *Reed v. McKee*, 42 Iowa, 689; s. c., n Rep. 631; *Shaw v. Reed*, 30 Me. Soule v. Bonney, 37 Me. 128; *Foley v. eene*, 14 R. I. 618; s. c., 51 Am. 419; *Averbeck v. Hall*, 14 Bush 505; *Kimbrough v. Lane*, 11 Bush 556; *Gardner v. Maxey*, 9 B. (Ky.) 90; *Swan v. Chandler*, 8 B. (Ky.) 97; *Henderson v. Palmer*, 579; s. c., 22 Am. Rep. 117; *Sny-* Willey, 33 Mich. 495; *Wisner v. ell*, 38 Mich. 278; *Murphy v. Bot-* 40 Mo. 67; *Sumner v. Summers*, 340; *Baker v. Farris*, 61 Mo. 389; n v. Padgett, 36 Ga. 609; *Puckett v. nemore*, 55 Ga. 235; *Breathwit v. s*, 32 Ark. 758; *Collier v. Waugh*, d. 456; *Ricketts v. Harvey*, 78 Ind. s. c., 106 Ind. 564; *Crowder v. Reed*, d. 1; *Wynne v. Whisenant*, 37 Ala. ight v. Rindskopf, 43 Wis. 344; v. Leeman, 6 Q. B. 308; *Bayley v. Williams*, 4 Giff. 638; *Galton v. Tay-* T R. 475; *Kirk v. Strickwood*, 4 Ad. 421. Compare *Bibb v. Hitch-* 49 Ala. 468; s. c., 20 Am. Rep. 288. promissory note given for com- ing a public prosecution for a mis- nor is founded upon an illegal con- tion, and void. *Jones v. Rice*, 18 (Mass.) 440; s. c., 29 Am. Dec. 612; v. Pomeroy, 4 Allen (Mass.), 534; v. Richards, 29 Conn. 232; *Hinds v. amberlin*, 6 N. H. 225; *Porter v. s*, 37 Barb. (N. Y.) 343; *Oakford v. on*, 2 Miles (Pa.), 203; *Jackson v. k*, 2 Miles (Pa.), 362; *McGowen v. 17 Tex. 195.*

complaint to cancel a note alleged to been executed at the demand of and and received by the defendant "in satisfaction and compromise of the of larceny, robbery, and embezzle-

ment," with which said defendant charged the maker, etc., tenders an issue to which is applicable an instruction that if the defendant took the note under an agreement, express or implied, that he would not prosecute the maker for such crime, and without any other consideration, the jury should find for the plaintiff. *Stout v. Turner*, 102 Ind. 418; s. c., 3 West. Repr. 303.

It is not necessary that the fact that the note was given for compounding an offence be expressed on the face of the note to make it void. *Gardner v. Maxey*, 9 B. Monr. (Ky.) 90.

Though a bond be given to secure a valid debt, yet if obtained under an agreement to compound a felony, it is void. *Steuben County Bank v. Mathewson*, 5 Hill (N. Y.), 249.

A contract to pay one for the use of his influence in securing the consent of a prosecutor to dismiss certain prosecutions for felonies, is contrary to public policy; and a declaration which seeks to recover for services so rendered is demurrable. *Rhodes v. Neal*, 64 Ga. 704; s. c., 37 Am. Rep. 93.

A contract whereby an attorney-at-law undertakes, for a contingent fee, to procure a settlement of a criminal charge for fornication, is against the policy of the law, and cannot be enforced. *Ormerod v. Dearman*, 100 Pa. St. 561; s. c., 45 Am. Rep. 391.

Even a note partly given to secure the acquittal of one prosecuted for a felony cannot be enforced. *Ricketts v. Harvey*, 106 Ind. 564. Compare *Haynes v. Rudd*, 102 N. Y. 372.

The money for which the note was given may be actually due the payee, as in case of an embezzlement; but if the consideration for the note is even in part the abandonment or prevention of criminal proceedings, the instrument is illegal and void. *Godwin v. Crowell*, 56 Ga. 566; *Taylor v. Jaques*, 106 Mass. 291; *Buck v. First Nat'l Bk.*, 27 Mich. 293.

But if there is no agreement to cheat the criminal law, and the money is really due, the note is good. *Cohoes v. Cropsey*, 55 N. Y. 685; *Von Windisch v. Klaus*, 46 Conn. 433.

Money paid in consideration of compounding a felony cannot be recovered back. *Daimouth v. Bennett*, 15 Barb. (N. Y.) 541; *Collins v. Lane*, 80 N. Y. 627.

Where a person has voluntarily, i. e., without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a bona-fide holder for value before maturity,

he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. *Haynes v. Rudd*, 83 N. Y. 251. And see also same case, 102 N. Y. 372; s. c., 55 Am. Rep. 815.

Where a convict pays money to another to secure a pardon, he cannot, after the contract is executed, recover back the money paid. In such a case it is immaterial that the contract was made while the civil rights of the convict were suspended, or that the parties were not *in pari delicto*. *O'Reilly v. Cleary*, 8 Mo. App. 186.

If A deposits with B money to be paid to C when C shall have compounded a felony, C cannot maintain an action against B for the money. *English v. Rumsey*, 32 Hun (N. Y.), 486. But if B does not so pay it, but converts it to his own use, he cannot retain it as against A on the ground that the contract with C was illegal. *Kiewert v. Rindskopf*, 46 Wis. 481.

A receipt in full given in consideration of stifling a criminal prosecution is void. *Bailey v. Buck*, 11 Vt. 252.

Where two or more informations are pending against the same person for unlawful sales of intoxicating liquors, an agreement between the defendant and the prosecuting attorney that if the defendant will plead guilty to one of the informations the fine shall be only a certain amount, and the other information shall be dismissed, and the defendant's permit shall not be forfeited, is a corrupt agreement, and the defendant who is misled by thus corruptly purchasing his indulgence is not entitled to relief. *Golden v. State*, 49 Ind. 424.

An agreement with one of several jointly indicted that in case he will testify fully and candidly the facts will be presented to the court with a recommendation on the part of the prosecutor or prosecuting officer that a *nolle prosequi* be entered as to him, is not void as against public policy. *Nickelson v. Wilson*, 60 N. Y. 362.

An agreement by one under sentence for crime, to deliver notes and money to the prosecuting witness on condition of signing a petition for pardon and the granting of such petition, or a subsequent discharge on a new trial, is void. *Haines v. Lewis*, 54 Iowa, 301; s. c., 37 Am. Rep. 202. But an attorney may lawfully agree to do "what he can" to procure a pardon, and can recover for services rendered accordingly. It is to be presumed that proper acts only were contemplated. *Bremsen v. Engler*, 49 N. Y. Super. Ct. 41; *Meadow v. Bird*, 22 Ga. 246.

A promissory note, given to secure restoration of stolen property, is void; a part of its consideration is an agreement not to search the house of the thief for the property before the next pending negotiations for a settlement of the matter. *Merrill v. Carr*, 60 N. H. 1.

A promissory note and a mortgage were given in consideration that a prosecution for a felony should be discontinued. The mortgage was afterward foreclosed by a proceeding in which a waiver of consideration could not be pleaded as a defence, and the property was sold to an agent of the mortgagee. *Held*, that the consideration of the note and mortgage was illegal and void; and that the court of equity would cancel the note and mortgage, and set aside the foreclosure and the sale. *Henderson v. Palmer*, 111 Ill. 579; s. c., 22 Am. Rep. 117.

No action can be maintained upon a promissory note, given by a person who was under arrest on a complaint for larceny of property exceeding in value \$100, by the owner of the property alleged to have been stolen, under an agreement that a complaint shall be placed on file, the plaintiff having received the note with notice of the circumstances; and the question of the guilt or innocence of the accused person is not open in such action. *Gorham v. Keyes*, 137 Mass. 583.

If it be alleged that a bond was given in consideration of an agreement to suppress or in any way embarrass the course of a criminal prosecution then pending against the felon, the plea is sufficient though it do not aver that a felony in fact been committed; but where the pendency of criminal proceedings is stated, the plea must show the actual commission of the felony; a mere threat to commence a prosecution will not sustain the defence. *Steuben County B. v. Mathewson*, 5 Hill (N. Y.), 249; *Clinton v. Henton*, 9 Wis. 442, *Keith v. B. B.*, 16 Ill. App. 121; *State v. Ruthven*, 10 Iowa, 121; *Conderman v. Hicks*, 3 L. (N. Y.) 108; *Fribly v. State*, 42 Ohio 205; *Ford v. Cratty*, 52 Ill. 313; *Platt v. Gunn*, 2 Woods (U. S.), 372. See *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90.

One cannot be directly or collaterally adjudged guilty of compounding a felony unless it has been established that he or other party to the unlawful compact was guilty of the felony. It is not sufficient that he be charged or indicted merely. *Deere v. Wolff*, 65 Iowa, 32.

An answer, alleging that a promissory note was executed in consideration of an agreement to suppress a prosecution for a felony, is sufficient without averring

the accused had actually committed crime charged. *Crowder v. Reed*, 80 Mo. 1; *Baker v. Farris*, 61 Mo. 389.

Where one alleges that a contract could be avoided on the ground that it was made to compound a felony, it must be shown that there was an agreement to prosecute, and it must appear by a preponderance of evidence that a crime was actually committed. Threats of execution unless a certain security was given will not justify an inference that if security was given the agreement was that no prosecution would follow. *People v. Jefferson Fire Insurance Co.*, 124 N. Y. St. 251.

One may take a note from another for what he owes him, though for money embezzled; but, if he procure the note to be executed upon an agreement not to execute him for the embezzlement, the contract will be illegal and void. *Martin v. Tucker*, 25 Ark. 279.

A clerk in a post-office embezzled funds which the postmaster was liable to the government. To secure himself the postmaster induced the clerk to give him a note with surety, he agreeing not to execute criminally for the embezzlement. *Held*, that the note was valid and the surety liable. The consideration notwithstanding the agreement to refrain from the execution, but the debt owed for the amount of the embezzlement. *Bibb v. Brock*, 49 Ala. 468; s. c., 20 Am. Rep. 288.

One having robbed the plaintiff bank, a surety of B. was induced to execute to the plaintiff promissory notes in consideration of a promise by the plaintiff to petition the court to mitigate the punishment. *Held*, that the notes were against public policy, and not enforceable by the plaintiff. *Buck v. First Nat. Bank*, 27 N. J. 293; s. c., 15 Am. Rep. 189.

Where, without an agreement to prevent prosecution, a note given to procure discharge from arrest for theft is illegal and void. *McMahon v. Smith*, 47 Conn. 288. *Bowen v. Buck*, 28 Vt. 308; *Ozarne v. Barber*, 30 La. Ann. 384; *Couderman v. Hicks*, 3 Lans. (N. Y.) 108. Or one to prevent the prosecution for forgery of a note of the maker. *National Bank of Pa. v. Kirk*, 90 Pa. St. 49.

A mortgage executed upon consideration that the mortgagees should obtain from the governor, even by fair means, a *nolle prosequi* to be entered in a prosecution against a third party, and in the issuance of which the mortgagors are interested, is against public policy and void. *Key v. Collier*, 7 Md. 273; s. c., 61 Dec. 346.

A bond executed by the prosecutor to

pay the costs of a criminal action, the matter being then compromised by entering a *nolle prosequi*, and the accused paying the prosecutor a sum of money, is against public policy and void. *Guilford Co. Commrs. v. March*, 89 N. Car. 268.

A husband agreed, in consideration that his wife should prosecute to final judgment a suit for divorce, to make no defence thereto, and to convey certain land to her. *Held*, upon her suit in equity to have a mistake in the deed corrected, that the contract was against public policy, and that therefore the court would not interfere. *Phillips v. Thorp*, 10 Oreg. 494.

The owner of a distillery, indicted for defrauding the revenue, agreed to pay his bookkeeper, who knew all the transactions, his salary and travelling expenses as long as he kept out of the jurisdiction and avoided service of process. *Held*, that the agreement was unlawful, and that the bookkeeper could recover nothing thereon—not even his expenses. *Bierbauer v. Wirth*, 10 Biss. C. C. (U. S.) 60.

Where a mortgage is executed with an understanding by the parties that a part of the consideration thereof is that certain criminal proceedings shall be stopped, the agreement vitiates the mortgage, and this irrespective of the question whether the criminal proceedings are stopped or prosecuted to judgment; and where it is executed without any express agreement on the part of the mortgagee that in consideration thereof criminal proceedings shall not be instituted, and yet there are allegations and representations in relation to such criminal proceedings made by the mortgagee which are intended to and actually do deceive the mortgagor, and in consequence said mortgagor, relying on said mortgagee's statement that no criminal proceedings will be instituted, executes the mortgage, the subsequent institution of such proceedings will relieve the said mortgagor from liability. A was the president of an unincorporated savings-bank, whereof his son B was cashier. Both A and B were guilty of embezzlement of the bank's funds, whereupon on complaint of the directors an indictment was found against B, and criminal proceedings also threatened against A. At a meeting of the stockholders to raise a fund for the payment of depositors and creditors, C, another son of A, subscribed \$4000 himself, and \$2000 on behalf of his mother D, without the latter's authority. These subscriptions C made at the request of E, a director of the bank, who stated that he believed and

**6. A Misdemeanor.**—Compounding an offence, although formerly punished very severely, is now generally considered to be a misdemeanor, and punished with fine and imprisonment. The punishment for the offence is regulated by the statutes.<sup>1</sup>

**7. Taking Rewards for Helping to Recover Stolen Goods—Advertising Rewards, etc.**—Similar to the offence of compounding a felony is that of taking a reward for the return of stolen property, and advertising a reward for the same purpose.

was satisfied it would stop the prosecutions against A and B if C could get his mother, D, to pay the sums subscribed. C having subsequently notified D of his subscription on her behalf, D said she would agree to it if it would stop the prosecutions. E subsequently called upon D to induce her to execute a mortgage to him for \$6000. D stated that she would not sign the mortgage till the criminal matters were fixed up. E replied that if she signed it he firmly believed it would settle the whole criminal business, and if she did not it would be the worst thing she ever did. D then signed the mortgage with the understanding that the bank would not appear against her son B or prosecute her husband A. If she had not so understood she testified that she would not have executed the mortgage. Afterwards a *nolle prosequi* was entered in the prosecution against B, and on complaint of the bank an indictment was found against A and B for conspiracy, on which they were tried, convicted, and sentenced. The mortgage being subsequently assigned by E to the trustee of the bank, a *scire facias* was issued thereon against D. *Held*, that it was for the jury to say whether an agreement to desist from the criminal prosecutions did not constitute part of the consideration of the mortgage, in which event the mortgage would be vitiated because based on an illegal consideration. *Held*, further, even if this were not the case, that it was for the jury to say whether the plaintiff had not induced the defendant to execute the mortgage by representing that the criminal prosecutions would not be pushed, in which event the actual pushing of such prosecutions would relieve the defendant from liability. *Held*, further, that under the circumstances the assignee of the mortgage occupied no higher ground than the assignor. *Riddle v. Hall*, 99 Pa. St. 116.

Where the consideration for a contract is the compounding of a felony neither party can obtain relief in a court of equity. The parties will be left as found. *Allison v. Hess*, 28 Iowa, 388; *Wilcox v. Daniels*, 3 Atl. Repr. (R. I.) 204.

1. 1 Russell on Crimes (9th Ed.), 133; 4 Black. Com. 133; *Porter v. Jones*, Coldw. (Tenn.) 313; *State v. Dandy*, Brev. (S. Car.) 395; *Com v. Pease*, Mass. 91; *Jones v. Rice*, 18 Pick. (Mass.) 440; *Plumer v. Smith*, 5 N. H. 553; *Bowell v. Brown*, 51 Ill. 234.

To attempt to induce a witness on part of the State not to attend a public prosecution, even where such witness had not been served with a subpoena, was known to be a material witness and was relied on, was held to be an indictable offence. *State v. Keyes*, 8 Vt. 57.

By the New York Penal Code the punishment of the offence of compounding a felony or a misdemeanor is graded according to the magnitude of the offence compounded. By this code it is considered either a felony or a misdemeanor. N. Y. Penal Code, § 125; *Cushman v. Trenchard*, 58 Barb. (N. Y.) 168; *Daimouth v. Bennett*, 15 Barb. (N. Y.) 541.

8. Whosoever shall corruptly take money or reward, directly or indirectly under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, detained, extorted, embezzled, converted or disposed of as in this act before mentioned, shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony. Upon an indictment under this statute it is not necessary to show that the prisoner had any connection with the commission of the previous felony; it is sufficient if the evidence satisfies the jury that the prisoner had some corrupt and improper design when he received the money, and did not bona fide intend to use such means as he could for the detection and punishment of the offender. *R. v. King*, 1 Cox C. C. 36. Where A was charged with corruptly and feloniously receiving from B money under pretence of helping B to recover goods before then stolen from B, and with not causing the thieves to be apprehended, three questions were left for

## COMPULSION—COMPUTE—CONCEAL.

**COMPROMISE.** See ACCORD AND SATISFACTION; COMPOSITION WITH CREDITORS.

**COMPULSION.** See note 1.

**COMPUTE.** See note 2.

**CONCEAL.**—To hide; to withdraw from observation; to cover keep from sight.\*

1. Did A mean to screen the guilty thieves, or to share the money with them? 2. Did A know the thieves, and aid to assist them in getting rid of the property by promising B to buy it? 3. Did A know the thieves, and assist B, her agent, and at her request, in endeavoring to purchase the stolen property from them, not meaning to bring the thieves to justice? The jury answered the two first questions in the negative and the third in the affirmative. It was held that the receipt of the money under the above circumstances was a corrupt giving of the money by A within the meaning of the statute. *R. v. Pascoe*, 1 Den. C. C. R. 18 L. J. M. C. 186; *Roscoe's Cr. (10th Ed.)* 420.

In a certificate of acknowledgment by a married woman, the use of the words "without undue influence or compulsion of her husband" is a sufficient compliance with a statute which requires acknowledgment to be that the deed was executed "of her own free will," without undue influence or compulsion of her husband. *Tubbs v. Gatewood*, 128 Ark. 128.

An allegation, in a plea of justification in libel, that the plaintiff, the cashier of a bank, "unfairly and secretly debited" the amount of a certain note did not necessarily imply that he was guilty of "moral obliquity," of which he was accused in the language alleged to be defamatory. *Kerr v. Force*, 3 Cr. C. C.

**Webster.** Worcester's definition of conceal is "to hide; to keep secret; to secrete; to cover; to disguise." Both are quoted in *Driskill v. Parrish*, 3 McLean C. C.

In this case it was held that "to harbor or conceal" a fugitive from labor, under an act imposing a penalty for so doing, must be with a view to elude the law of the master. In this act "harbor" and "conceal" are not synonymous; there may be a harboring without concealment. "What amounts to concealment, also, may depend much on the circumstances. It does not necessarily follow that the subject of it be secreted in a garret or a cellar, a barn or a cov-

ered wagon. The highways of a remote and uncultivated country . . . may be better places of concealment than the byways of many other places." *Van Meter v. Mitchell*, 2 Wall. Jr (C. C.) 311.

A similar statute was interpreted in the same way in Alabama, where it was held that harboring and concealing were distinct offences, and that a person might be convicted of the former though there were no concealment. *McElhaney v. State*, 24 Ala. 71. The contrary was held in *Driskill v. Parrish*, 3 McLean C. C. 631, where it was said that the two constituted one and the same offence.

Where one is charged with "harboring, hiding, concealing and employing" a runaway slave, a verdict finding him guilty of "concealing and employing, etc.," finds him guilty of the offence charged. *Cook v. State*, 26 Ga. 593.

"The word 'conceal,' according to the best lexicographers, signifies to withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation." Hence the concealment of the fact of the falsification of certain facts which would constitute a cause of action is a concealment of a cause of action, within an exception to a statute of limitations. *Gerry v. Dunham*, 57 Me. 334.

Concealment of a cause of action must be something more than mere silence; it must be an arrangement or contrivance to prevent subsequent discovery, and must be of an affirmative character. *Boyd v. Boyd*, 27 Ind. 429.

"Concealed" is not synonymous with "lying in wait" in a statute defining murder; in order to constitute homicide murder, the concealment must be for the purpose of killing. A person concealed may kill another without being guilty of murder. *People v. Miles*, 55 Cal. 207.

The mere acts of resisting the officers of the customs, in the seizure of goods, and casting the packages of goods out of a window of a stable, whereby they were entirely removed from the possession of the officers, does not *per se* constitute a concealing of the goods, which under

## CONCEALED WEAPONS.

*Statutory Offence, 408.*

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**1. Statutory Offence.**—The statutes of some of the States have made it an offence to carry weapons concealed about the body, while others prohibit the simple carrying of weapons, whether they are concealed or not. Such statutes have been held not to conflict with the constitutional right of the people of the United States to keep and to bear arms.<sup>1</sup>

statute would work a forfeiture, although it may have led to a concealment. *U. S. v. Farnsworth, 1 Mason (C. C.), 1.*

"The term 'concealed' used in this section is one of plain interpretation, and obviously applies to articles intended to be secreted and withdrawn from public view on account of their being so subject to duties, or from some fraudulent motive." The fraudulent removal from the storehouses agreed upon by the collector and the importer, by some person other than the claimants, who were *bona fide* purchasers, and without their knowledge and consent, is not such a concealment. *U. S. v. 350 Chests of Tea, 12 Wheat. (U. S.) 486.*

"Concealed" in statutes making it a misdemeanor to carry concealed deadly weapons, means "wilfully or knowingly covered or kept from sight." *Owen v. State, 31 Ala. 387.* "So hidden from general view as to put others off their guard." *Carr v. State, 34 Ala. 448.* The weapon must consequently be entirely out of sight. *Stockdale v. State, 32 Ga. 225.*

A deed which has been recorded according to law cannot be said to be concealed. *Dick v. Balch, 8 Pet. (U. S.) 30.*

*1. State v. Speller, 86 N. Car. 697; State v. Jumel, 13 La. Ann. 399; State v. Smith, 11 La. Ann. 633; State v. Chandler, 5 La. Ann. 489; Wright v. Com., 77 Pa. St. 470; State v. Wilforth, 74 Mo. 528; State v. Hopper, 4 Western Repr. (Mo.) 276; State v. Mitchell, 3 Blackf. (Ind.) 229; Walls v. State, 7 Blackf. (Ind.) 572; State v. Reid, 1 Ala. 612; Owen v. State, 31 Ala. 387; Andrews v. State, 3 Heisk. (Tenn.) 165; s. c., 8 Am. Rep. 8; Aymette v. State, 2 Humph. (Tenn.) 154; State v. Wilburn, 7 Baxt. (Tenn.) 57; Haynes v. State, 5 Humph. (Tenn.) 120; State v. Buzzard, 4 Ark. 18; Fife v. State, 31 Ark. 455; s. c., 25 Am. Rep. 556; Haile v. State, 38 Ark. 564; Hill v. State, 53 Ga. 472; Stockdale v. State, 32 Ga. 225; Munn v. State, 1 Ga. 243; Killet v. State, 32 Ga. 292; Alford*

*v. State, 33 Ga. 303; Washington v. State, 36 Ga. 242; Cockrum v. State, 24 Tex. 394; Lewis v. State, 2 Tex. App. English v. State, 35 Tex. 493; s. c., Am. Rep. 374.*

The second article of the amendment to the constitution of the United States securing to the people the right to keep and bear arms, is a restriction upon powers of the national government only, and not upon State legislation. The statutes prohibiting the carrying of concealed, dangerous, and deadly weapons upon the person, and the exhibition of the same, and the carrying of deadly weapons when intoxicated, is a reasonable regulation to which the citizen must yield, and is a valid exercise of the legislative power. *State v. Shelby, 90 Mo. 302.*

The Texas statute relative to carrying deadly weapons does not operate as a prohibition of carrying weapons, but as a regulation of the manner of carrying them. The carrying a pistol is not necessarily an offence, though it becomes so when the weapon is carried under circumstances or in the manner prohibited. *Lewis v. State, 2 Tex. App.*

Some authorities, however, hold that acts prohibiting the carrying of concealed weapons are unconstitutional. *Bliss v. Com., 2 Litt. (Ky.) 90; Simpson v. State, 5 Yerg. (Tenn.) 356.*

So is a provision in a statute providing for the forfeiture of a weapon upon conviction of carrying the same in violation of the statute unconstitutional. *Linnens v. State, 5 Tex. App. 298; Leath v. State, 6 Tex. App. 244; Hubbard v. State, 38 Tex. 535.*

Although a statute prescribes a penalty for the offence of carrying concealed weapons, a municipal ordinance may provide a punishment for the same offence. *Linnens City v. Dusky, 1 Western Repr. (Mo.) 321.*

A municipal ordinance forbidding the carrying of concealed weapons is not in conflict with a general law which makes



**What Weapons Included.**—Most statutes specify the weapons included in the prohibition. Pistols, dirks, butcher or bowie knives, cut-throats, daggers, a sword or spear in a cane, brass or metal knuckles, razors, slungshots, are generally included.<sup>1</sup>

Exception for those whose lives are endangered. *Linnens v. Dusky*, 19 Mo. 20.

*State v. Duzan*, 6 Blackf. (Ind.) 31; *State v. State*, 35 Tex. 493; s. c., 14 Am. Rep. 374.

*Arkansas* it has been held that the legislature may to some extent regulate the mode and occasion of wearing war weapons, but to prohibit the citizen from carrying or carrying a "war arm," except on his own premises or when on a journey, or when acting as or in aid of an officer, is an unwarranted restriction on his constitutional right to keep and bear arms. *Wilson v. State*, 33 Ark. 557; *State v. State*, 31 Ark. 455; s. c., 25 Am. Rep. 556; *Holland v. State*, 33 Ark. 560. See *Aymette v. State*, 2 Humph. (Tenn.) 158; *Andrews v. State*, 3 Heisk. (Tenn.) 165; s. c., 8 Am. Rep. 8; *Page v. State*, 3 Heisk. (Tenn.) 198; *English v. State*, 35 Tex. 493; s. c., 14 Am. Rep.

*Andrews v. State*, 3 Heisk. (Tenn.) s. c., 8 Am. Rep. 8, it was held that a revolver belongs to the "arms of war," therefore a statute prohibiting the carrying of a revolver to be unconstitutional. See *Puryear v. State*, 44 Ga. 221. No doubt in time of peace persons may be prohibited from wearing war weapons to places of public worship, or elections, etc. *Andrews v. State*, 3 Heisk. (Tenn.) 182.

The provision of a statute which makes it an offence to carry concealed knives, in form, shape, or size resemble cut-throats, is not void on the ground that it is too indefinite to be safely executed. *Haynes v. State*, 5 Humph. (Tenn.) 120; *Sears v. State*, 33 Ala. 347. The words "deadly weapons," as used in the Kentucky statute, are not restricted to such weapons or instruments as are actually designed for offensive or defensive purposes, or for the destruction of property, or the infliction of injury, but they include any deadly weapon by which a person may be wounded by cutting or stabbing, as a chisel. *Com. v. Branham*, 100 Mass. (Ky.), 387.

At the trial of one for unlawfully carrying brass knuckles, it was proved that the knuckles were made of lead. *Held*, "brass knuckles" was used as the name of a weapon, and it made no differ-

ence of what metal it was made. *Patterson v. State*, 3 Lea (Tenn.), 575.

A statute making it indictable for one to carry concealed about his person any "pistol, bowie-knife, razor, or other deadly weapon of like kind," embraces a butcher's knife. The words "other deadly weapons of like kind" imply simply similarity in the deadly character of weapons, such as can be conveniently concealed about one's person, to be used as a weapon of offence and defence. *State v. Erwin*, 91 N. Car. 545. See *State v. Hall*, 3 West. Repr. (Mo.) 290, where a pair of "brass knucks" was considered to be a dangerous weapon.

It has been held that a pistol, to come under the prohibited weapons, need not be one in perfect order, and ready to be discharged or used as a weapon. A pistol, the tubes of which were battered and the lock so much out of order that it could not be discharged by the trigger, was held to come under the statute. *Atwood v. State*, 53 Ala. 508. And also a pistol of which the mainspring was broken, and which was so disabled that it could not be discharged in the usual way. *Williams v. State*, 61 Ga. 417. But compare *Evins v. State*, 46 Ala. 88, where it was held that the statute did not cover a pistol which had no mainspring or other necessary machinery of a lock, the hammer and cock of which were disconnected and loose, and the nipple or tube of which was not touched by the hammer when down, and which could not be discharged by a cap on the tube. The court said, "It is not enough that it has a stock and a barrel, and may be loaded and fired off by a match or in some other such way."

One who conceals on his person the various parts of a pistol, incapable of use while thus separate, but capable of being readily put together and becoming effective as a pistol, is guilty of carrying concealed weapons. *Hutchinson v. State*, 62 Ala. 3; s. c., 34 Am. Rep. 1. Compare *Cook v. State*, 11 Tex. App. 19, where it was held that all the essential parts must be in the possession of the party carrying the pistol, and that carrying a pistol without a cylinder is not unlawful.

A pistol need not be loaded to come within the statute. *State v. Duzan*, 6 Blackf. (Ind.) 31; *Ridenour v. State*, 65



**3. Carried About the Person.**—Where a statute makes it an offense to conceal a weapon "about the person," it will be sufficient if it is concealed near, in close proximity to the person, within convenient control and easy reach so that it can be promptly used.<sup>1</sup>

**4. What is Concealment.**—Where a statute prohibits only the carrying of "concealed" weapons the word "concealed" means wilfully and knowingly covered and kept from sight.

Ind. 411; *Gamblin v. State*, 45 Miss. 658; *State v. Wardlaw*, 43 Ark. 73. But see *Carr v. State*, 34 Ark. 448, where it was held that to constitute the offense of wearing concealed weapons, under the statute, the implement must be carried about the person, to be always accessible for use in fight, and so hidden from general view as to put others off their guard. If a pistol, not loaded, or unfit for use, this rebuts the presumption that it was carried as a weapon. If a pistol be worn concealed, the jury may presume that it was loaded and worn as a weapon. But this is a presumption of fact, and not of law, and may be rebutted by proof.

1. So held where a pistol was concealed in a basket on the defendant's lap. *State v. McManus*, 89 N. Car. 555.

A person who being in the room of another in which there are several persons has a pistol in his vest-pocket, and wilfully or knowingly covers or keeps it from sight, violates the statute. *Owen v. State*, 31 Ala. 387.

A charge that a person carried a pistol about his person is supported by proof that he carried it in his hand. *Woodward v. State*, 5 Tex. App. 296.

2. *Owen v. State*, 31 Ala. 387.

It is sufficient if it is so covered that it is hidden from ordinary observation, although it may have been discovered by close inspection. *Jones v. State*, 51 Ala. 16; *State v. Johnson*, 16 S. Car. 187; *Sutton v. State*, 12 Fla. 135.

To constitute the offense of carrying a concealed weapon, it must be worn or carried so that persons near enough to see it, if it was not concealed, cannot see it with ordinary observation. *Street v. State*, 67 Ala. 87.

But a pistol carried in the belt with the greatest part exposed is carried openly under such statute. *Stockdale v. State*, 32 Ga. 225; *Killelt v. State*, 32 Ga. 292. Compare *Sutton v. State*, 12 Fla. 135.

A pistol partly stuck in a pocket and partly exposed is a "concealed" weapon within the meaning of the statute. *State v. Biaz*, 37 La. Ann. 259.

The possession of a weapon is *prima facie* evidence of its concealment, but such evidence may be rebutted by proof. The burden of proof is, however, upon

the defendant. *State v. Roten*, 86 N. Car. 701; *State v. Gilbert*, 87 N. Car. 527; *State v. McManus*, 89 N. Car. 555.

On trial of an indictment for carrying a weapon concealed, it was shown the defendant had two pistols buckled around him without scabbards and naked on his belt, on the outside of his clothing. *Held*, that the presumption of concealment raised by the statute was rebutted, and the defendant not guilty. *State v. Roten*, 86 N. Car. 701.

A charge which assumes, as a fact, that "there is no proof as to whether the witness looked to see whether the defendant had a pistol or not," when the witness had testified that he passed within a few feet of the defendant, while lying on the ground drunk, "but did not examine him," is properly refused; nor can it be affirmed, as matter of law, that unless the witness, while passing, "looked to see whether the defendant had a pistol or not, there could be no inference that the pistol was then concealed," which another witness saw in his hand a short time previously. *Farley v. State*, 72 Ala. 170.

In a prosecution for carrying concealed weapons, the evidence showed that the defendant was watching a watermelon patch, which had been previously depredated, until her father and brother should return from a school meeting to which they had gone; that she took a revolver from the house with her, carrying it in her hand, in the box in which it had been purchased; that, while at the melon patch she heard her father and brother coming home and some men following them, threatening to beat her brother; that she took the revolver from the ground where it had been lying, and, carrying it in her hand, went to her brother's rescue and succeeded in getting him away from the men; that the revolver was at no time concealed, unless it was when the defendant folded her arms at the scene of disturbance. *Held*, that the evidence did not make a case against the defendant for carrying concealed weapons. *Smith v. State*, 69 Ind. 140.

One accused of carrying concealed weapons cannot show that he was in the habit of carrying the weapon openly, and

**5. Statutory Exemptions.**—The statutes generally exempt some specially designated persons,<sup>1</sup> as travellers,<sup>2</sup> officers of the

and it concealed only at the time charged. *Washington v. State*, 36 Ga. 242.

Where on the trial of one indicted for carrying concealed weapons evidence was given of his having been seen once before wearing such weapon under circumstances which implied that such was a general practice, he was convicted, and the judgment affirmed. *Hicks v. Commonwealth*, 7 Gratt. (Va.) 597.

Where the carrying of arms in an open manner is not prohibited, and such privilege is abused, the party abusing it will be liable to an action at common law. *De v. Roten*, 86 N. Car. 701.

The offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at common law, and is indictable. A man may carry a gun for any lawful purpose, business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people. It is the wicked purpose and the mischievous result which essentially constitute the crime. *State v. Huntley*, 3 Ired. L. (N. Car.) 8.

On the trial of a defendant charged with carrying a concealed deadly weapon the concealment alleged is a material fact, and unless proved a conviction cannot be sustained. *Ridenour v. State*, 65 Ind. 411; *Smith v. State*, 69 Ind. 140; *Burst v. State*, 89 Ind. 133, 134; *State v. Johnson*, 16 S. Car. 187.

Where there is any evidence tending to show that the weapon was not concealed, it is error to refuse to charge the jury on request that they must acquit the defendant unless they are convinced from all the evidence that he did carry it concealed about his person. *Jones v. State*, 51 Ala. 16.

To justify a conviction on the charge of carrying concealed weapons there should be certainty in proof, such as would amount to that which is morally certain. A conviction upon the following evidence was held to be void: "I saw a belt around the waist of defendant. I saw, underneath the coat of defendant, what I took to be the handle of a pistol. It did not look like the handle of a knife, but like the handle of a pistol. Would you swear that what I saw was a pistol." *Smith v. State*, 10 Tex. App. 420.

Under an indictment charging that the defendant carried "concealed deadly

weapons, to wit, a bowie-knife and also a dirk or dagger," it is not necessary in order to conviction to prove that he carried both a bowie-knife and a dirk or dagger. Proof that he carried either is sufficient. *Com. v. Howard*, 3 Metc. (Ky.) 407.

On a trial upon an indictment for carrying a deadly weapon one witness swore that during a quarrel between him and the defendant he saw a pistol about the person of the latter. Another witness swore that he saw no pistol; that he looked sharp and must have seen one if the defendant had it about his person. *Held*, that both witnesses may have sworn truthfully, but that the preponderance of the evidence was in favor of the positive evidence of the prosecutor. *Fitzgerald v. State*, 12 Ga. 213; *Haskew v. State*, 7 Tex. App. 107.

Carrying a navy pistol in a scabbard on a saddle while riding along a public road is a violation of a statute prohibiting carrying an army pistol otherwise than openly in the hands. *Barton v. State*, 7 Baxt. (Tenn.) 105.

1. *Exp. Boland*, 11 Tex. App. 159; *Reynolds v. State*, 1 Tex. App. 617.

2. **Travellers.**—A traveller under the statute is one who goes a distance from home beyond the circle of his acquaintances. It must be without his ordinary habits, business, or duties. *Gholson v. State*, 53 Ala. 519; s. c., 25 Am. Rep. 652.

But the length of the distance travelled is immaterial. *Lockett v. State*, 47 Ala. 42. In this case a passenger on a railway train for the distance of 28 miles, seeking employment, was held to be travelling.

One making a two days' journey on a river raft is a traveller. *Baker v. State*, 49 Ala. 350.

One travelling in the neighborhood of his house, although in another county, is not a traveller under the statute. *Smith v. State*, 3 Heisk. (Tenn.) 511.

Nor a person daily returning to his home in the country from his business in the city. *Eslava v. State*, 49 Ala. 355.

One who is going from home by the highway to a definite point far enough distant to carry him beyond the circle of his neighbors, and to detain him throughout the day, and not within the routine of his daily business, is upon a journey within the meaning of the exception in the statute against carrying weapons. *Davis v. State*, 45 Ark. 359.

law,<sup>1</sup> persons who are threatened with bodily harm<sup>2</sup> or who are on their own premises,<sup>3</sup> from the operation of the statute.<sup>4</sup>

(~~See~~ Notes 2, 3, and 4 are on pages 413 and 414.)

The privilege given by a statute to carry a weapon concealed about the person when travelling begins when one is setting out on a journey, and continues until he reaches home. *Coker v. State*, 63 Ala. 95. In this case the accused was held to be improperly convicted for carrying a concealed weapon while returning, and near his own residence, from a collecting trip which had taken him some 40 miles from his home.

"Travelling" and "setting out on a journey" are used in the statute in the popular meaning of the terms, and it is impossible to lay down any unbending rule or determine the distances which will characterize the act as a journey or the actor as a traveller. Much must depend on the circumstances of each particular case. The fact of leaving the neighborhood of one's immediate acquaintances and friends, going among strangers, and, possibly, the purpose and object in view, are circumstances to be weighed by the jury in determining whether the defendant was travelling, or setting out on a journey, so as to excuse the carrying of weapons concealed about his person. There may be cases so plain that the presiding judge may, as matter of law, instruct the jury that the defendant was or was not travelling or setting out on a journey. But when the only evidence in the case was, that defendant was setting out by railroad to a place in another county, distant by railroad forty miles, and by dirt road twenty miles, and the court charged the jury this was not setting out on a journey, *held*, error. *Wilson v. State*, 68 Ala. 41.

Whether a traveller was "upon a journey" in the spirit of the law against wearing concealed weapons, while stopping at a town on his way, is a question for the jury, upon all the circumstances before them. His intent governs, and the question of fact is, was he really prosecuting his journey, only stopping for a temporary purpose, or had he stopped to stay awhile, mingling generally with the citizens, either for business or pleasure. *Carr v. State*, 34 Ark. 448.

One passing through a country at a rate of ten miles a day with cattle to market is a traveller. *Rice v. State*, 10 Tex. App. 288.

A Texas act prohibiting the carrying of deadly weapons was not intended to prevent persons travelling in buggies or carriages upon the public highway from placing arms in their vehicles for self-de-

fence, or even from carrying them from place to place for an innocent purpose. *Maxwell v. State*, 38 Tex. 112.

In a prosecution for carrying concealed weapons the evidence showed that at the time of the alleged offence, and before and since, the defendant resided in P. county, was extensively engaged in the stove business, having stove yards in various places in that and an adjoining county, that he travelled from his residence in a buggy to and from these several places in attending to his said business, and was so engaged three fourths of his time. On the day of the alleged offence, while travelling in his business, he stopped, 22 miles distant from his home, at a picnic in P. county, and while there made a harmless exhibition of a pistol to one person, and then replaced it in his pocket. *Held*, that the defendant was a traveller within the meaning of the statute, and the evidence insufficient to sustain a conviction. *Burst v. State*, 89 Ind. 133.

1. **Officers of the Law.**—*Irvine v. State*, 18 Tex. App. 51; *Summerlin v. State*, 3 Tex. App. 444; *Rainey v. State*, 8 Tex. App. 62; *Snell v. State*, 4 Tex. App. 171.

Though not technically a peace-officer or a policeman, a sergeant or under-officer in the penitentiary service is, while in charge of a convict camp and engaged in duties incidental thereto, a "civil officer engaged in the discharge of official duty," within the meaning of the Code, and as such is expressly exempt from amenability for carrying a pistol. *Carmichael v. State*, 11 Tex. App. 27.

To give an officer the benefit of the exemption of the statute against carrying a pistol, he must produce the process under which he claims to have acted, or a certified copy thereof, if in existence. *Beasley v. State*, 5 Lea (Tenn.), 705.

The exemption only applies in favor of an officer while actually engaged in executing process, or searching for and arresting criminals. *Miller v. State*, 6 Baxt. (Tenn.) 450; *Bremer v. State*, 6 Baxt. (Tenn.) 446; *State v. Hayne*, 88 N. Car. 625; *State v. Wisdom*, 84 Mo. 177.

The provisions of the act of 1879, making it lawful for officers and policemen, under proper circumstances, to go armed, does not extend to a private detective, appointed by a mayor, under a city ordinance clothing him with power to ferret out felonies and make arrests, if he had no warrant or *capias* at the

time he carried the pistol. *Horn v. State*, 6 Lea (Tenn.), 335.

A person summoned by an officer to attend him as one of the posse to assist in the execution of a search warrant cannot be convicted for carrying deadly weapons while thus employed, though he may in company with the officer and while under his orders have gone in a direction which he was not required to go in executing the process. *O'Conner v. State*, 40 Tex. 27.

But a tax collector, while engaged in distraining property from taxes, can be indicted for carrying a pistol. *Gayle v. State*, 4 Lea (Tenn.), 466.

**2. Threatened with Bodily Harm.**—Carrying a pistol concealed in violation of a statute, even for self-protection, is not excused by a communication of threats of violence made against the defendant. *State v. Speller*, 86 N. Car. 697. See *Carroll v. State*, 28 Ark. 99; s. c., 18 Am. Rep. 538; *Coffee v. State*, 4 Lea (Tenn.), 245.

Reasonable ground to apprehend an attack at a dangerous locality which defendant visited about daybreak will not be a sufficient excuse for carrying a concealed weapon procured for that visit late in the day at a locality not shown to be dangerous. *Chatteaux v. State*, 52 Ala. 388.

Evidence that defendant had been shot at by strangers more than two years ago, and that ever since he carried a pistol in self-defence, was held to be irrelevant. *Hopkins v. Com.*, 3 Bush (Ky.), 481.

In Kentucky it has been held that where a person has reasonable grounds to believe that his person or the person of some member of his family will be in immediate danger of violence or crime at the hands of another whenever that person is present, then he may lawfully carry concealed weapons whenever and wherever he has reasonable ground to apprehend that he will encounter such person and be exposed to the apprehended danger. *Bailey v. Com.*, 11 Bush (Ky.), 692. See *Polk v. State*, 62 Ala. 237.

In a trial on an indictment for carrying concealed weapons it was proved that the accused had previously been taken from his home at midnight by certain armed men, and that he received notice of threats made by them to do so again, and that they had no scruples about shooting him. *Held*, that evidence that these men were prowling through the country, armed and without any employment, sometimes for a while in Georgia, dodging in and out of the State of Ala-

bama, was admissible. *Hardin v. State*, 63 Ala. 38.

That defendant's life was in danger was held not to be a defence for carrying a weapon near an election poll. *Livingston v. State*, 3 Tex. App. 74.

In a prosecution for carrying a concealed pistol, the defence being that the defendant had been threatened with, and had good reason to apprehend, an attack, it is not permissible for him to show that a person to whom he had spoken of the threat advised him to arm himself. *Berney v. State*, 69 Ala. 233.

To make out a threatened or apprehended attack, as a defence to a prosecution for carrying concealed weapons, the defendant offered in evidence a letter written by the prosecutor to the chief of police, in which the writer stated "that he did not wish to violate the law, nor to be arrested for violating the law, but that he understood the defendant had made threats against him, and was therefore carrying a pistol concealed about his person." *Held*, that the contents of the letter could not be garbled by the defendant, but must be taken altogether as written; and that the court properly refused a charge, requested by him, to the effect "that what was said in the letter about any threats made by him could not be considered by the jury as evidence." To make out the defence of a threatened or apprehended attack, within the statutory exception, the motive (or purpose) of carrying the weapon must be defence against violence, threatened or apprehended. If offence instead of defence—a meditated attack on another, and not an apprehended attack by him—be the real motive, the party is guilty of violating the statute; and as bearing on this question, the conduct and declarations of the accused and the prosecutor, during an altercation and subsequent rencontre between them, out of which the prosecution arose, are relevant and competent evidence. To establish the defence of a threatened attack, the threat must be real, and not simply apparent or simulated; but, to make out an apprehended attack, it is sufficient to show facts which may convince the jury that he had good reason to apprehend an attack—as reports of threats, believed to be true, though not true in fact; hostile demonstrations; preparations for attack, real or apparent, and the entire conduct of the parties. *Shorter v. State*, 63 Ala. 129, citing *Baker v. State*, 49 Ala. 350; *Eslava v. State*, 49 Ala. 355; *Stroud's Case*, 55 Ala. 77; *McManus v. State*, 36 Ala. 285; *Mitchell v. State*, 60 Ala. 26.

**6. The Intent.**—The implement must be worn—that is, placed about the person, and carried around in some way, to be at all times accessible. If it is merely, and in good faith, being transported, to be repaired, or given to another, or for purposes of trade, or any other object, save to be used in fight, it cannot be said to be worn.<sup>5</sup>

Under a statute prohibiting the carrying of concealed weapons, the exception in favor of a person "being threatened with, or having good reason to apprehend an attack," was construed to justify the carrying of such weapons as a means of defence only against such threatened or apprehended attack, and not as a means of offence by a person who intended to provoke an attack, though he had been threatened; but, to make out this justification, it was sufficient for the defendant to show such threats or apprehended attack, and he was not required to negative an offensive purpose or intention on his part. *Collier v. State*, 68 Ala. 499.

**3. On Defendant's own Premises.**—Under a statute prohibiting the carrying of weapons "publicly or privately," it was held that it makes no difference whether the offender was at the time on his own farm or not. *Dycus v. State*, 6 Lea (Tenn.), 584. See *Carroll v. State*, 28 Ark. 99; s. c., 18 Am. Rep. 538. Or within the curtilage of his own abode. *Harmar v. State*, 69 Ala. 248.

Where the statute excepts the carrying of weapons "on his or her own premises or at his or her own place of business," this refers only to a particular locality, as the farm, store, shop, or dwelling-place, but does not authorize the carrying of concealed deadly weapons while hunting for stock in the woods. *Baird v. State*, 38 Tex. 599.

On trial of an indictment for carrying a concealed weapon off the defendant's own premises, the jury found specially that defendant, a minor, was seen with a pistol in a public road which ran over his father's land, and the judge ruled he was not guilty. *Held*, no error. In contemplation of law the son was not off his own premises. *State v. Hewell*, 90 N. Car. 705.

One indicted for carrying concealed weapons off his premises cannot defend himself by proving that he carried the weapon on his own property when in fact such property had been leased to another, and the lease gave him no authority to enter thereupon. *Zallner v. State*, 15 Tex. App. 23.

One who is in the occupation of land

as a tenant, even at will or by sufferance, or an agent or overseer, or any one else who is vested with the right of dominion, is the owner of land within the meaning of the statute against carrying concealed weapons. A mere servant or hireling who is found with a concealed weapon on the premises of his employer is not on his own premises, and is guilty under the act. *State v. Terry*, 93 N. Car. 585.

A mere contractor and supervisor of the erection of a building for another cannot carry weapons about the building as upon his own premises. The exception in the statute protects only such as have an interest or estate in the real property which constitutes the premises. *Kinthead v. State*, 45 Ark. 536.

**4. Burden of Proof.**—Whether the burden of proof that the accused comes under the exceptions under the statute is on the defendant, or whether the indictment must negative the exceptions, is a question on which the decisions are not unanimous. The following cases decide that the indictment must negative the exceptions: *State v. Clayton*, 43 Tex. 410; *State v. Duke*, 42 Tex. 455; *Smith v. State*, 42 Tex. 464; *Young v. State*, 42 Tex. 462; *Leatherwood v. State*, 6 Tex. App. 244; *Summerlin v. State*, 3 Tex. App. 444; *State v. Carter*, 36 Tex. 89; *Hill v. State*, 53 Ga. 472.

Others decide that the burden of proof is on the defendant. *State v. Maddox*, 74 Ind. 105; *Wiley v. State*, 52 Ind. 516; *State v. Williams*, 29 N. Western Repr. (Iowa) 801; *State v. Jackson*, 1 Lea (Tenn.), 680; *Beasley v. State*, 5 Lea (Tenn.), 705; *Territory v. Burns*, 9 Pac. Repr. (Mont.) 432; *Com. v. McClanahan*, 2 Metc. (Ky.) 8; *State v. Hedrick*, 2 Western Repr. (Mo.) 591; *State v. Hayne*, 88 N. Car. 625.

When there is an exception in the enacting clause of a statute, it must be negated in the indictment, but when a statute contains provisos and exceptions in distinct clauses it is not necessary to state that the defendant does not come within the exceptions, or to negative the proviso it contains. *Wilson v. State*, 33 Ark. 557.

**5. Carr v. State**, 34 Ark. 448; s. c., 36

Am. Rep. 15; Page v. State, 3 Heisk. (Tenn.) 198. But see Cutsinger v. Com., 7 Bush (Ky.), 392, where it was held that one who carried a pistol from the seller to the purchaser merely for the sake of accommodation was guilty. And see State v. Martin, 31 La. Ann. 849, and Walls v. State, 7 Blackf. (Ind.) 572, where it was held that the motive for carrying the pistol was immaterial. Morton v. State, 46 Ga. 292.

If one carry a pistol off his own premises, concealed about his person, for the purpose of hunting, he is guilty of a violation of the statute. State v. Woodfin, 87 N. Car. 526; Titus v. State, 42 Tex. 578.

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind, and a purpose to so carry it that it may not be seen. And to hold that a merchant, who, having just purchased a pistol with a view to his trade, and in carrying it from one store in a town to another for the purpose of having it packed with other goods, thoughtlessly puts it in his pocket, not caring and not thinking whether it could be seen or not, is guilty of a criminal violation of the laws of his country, is more, we think, than was ever contemplated by those who framed the law upon the subject, and very certainly seems far removed from the mischief that it was intended to remedy. State v. Gilbert, 87 N. Car. 527.

Where one bought a pair of pistols, and carried them from the store to another store to buy ammunition for them, and thence home, it was held not to be a violation of the statute for want of any criminal intent. Waddell v. State, 37 Tex. 355; Christian v. State, 37 Tex. 475. Compare Hilliard v. State, 37 Tex. 358.

A letter written by a third party to the chief of police, stating that the writer "understood that the defendant had made threats against him, and that he was consequently carrying concealed about his person a pistol," was held to be competent evidence to go to the jury to show the intentions of the defendant. Shorter v. State, 63 Ala. 129.

One who had to use a pistol in a part he had to play in a school exhibition concealed it about his person on a different day from that on which the exhibition was to take place, and used it in a personal difficulty. Held, that he was not entitled to an acquittal on the charge of carrying concealed weapons. Preston v. State, 63 Ala. 127.

When a person borrows a pistol for

the purpose of joining in a chase for a bear, returning the pistol soon after the return from the chase, he is not guilty of going armed in the sense of the law. Moorefield v. State, 5 Lea (Tenn.), 348.

Proof that defendant merely picked up a pistol, held it in his hands for a few minutes, and then replaced it, will be a good defence. Brooks v. State, 15 Tex. App. 88.

Where one finds a pistol on the road and carries it home, he does not infringe on the statute. Mangum v. State, 15 Tex. App. 362.

One is not guilty of a violation of the statute prohibiting the carrying of concealed weapons, where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. The facts here show that there was no criminal intent. State v. Brodnax, 91 N. Car. 543.

If a man carry a deadly weapon concealed about his person, off of his own premises, for the purpose of trading it off, and the jury believe that such is his purpose, he is entitled to an acquittal. State v. Harrison, 93 N. Car. 605.

Carrying a pistol to or from a repair shop for repairs is not "carrying concealed weapons," even though he fires it off. Pressler v. State, 19 Tex. App. 52; s. c., 53 Am. Rep. 383.

The statements of a defendant of his intended use of a pistol at the time he borrowed it of the witness, and a like statement when he exhibited it to another witness, were admissible in evidence as part of the *res gesta*. Wilson v. State, 33 Ark. 557.

An indictment for being armed with a dangerous weapon when arrested by a police officer on a warrant must aver that the arrest was lawful or that the officer was authorized to make it. Com. v. Doherty, 103 Mass. 443.

In an indictment charging the carrying of concealed weapons the intent need not be expressed. State v. Judy, 60 Ind. 138; State v. Swope, 20 Ind. 106; Walls v. State, 7 Blackf. (Ind.) 572; State v. McManus, 89 N. Car. 555; Pickett v. State, 10 Tex. App. 290; State v. Williams, 29 N. Western Rep'r (Iowa), 801.

Carrying a weapon concealed about the person is necessarily an act continuous in its nature; and where it appears that the defendant, while visiting a neighboring plantation, and inviting the residents to a dance, exhibited a pistol at two houses some fifty or sixty yards apart, and has been tried and convicted (or acquitted) on the testimony of the persons at one of the houses, he cannot

**CONCEALMENT.** See ATTACHMENT; FRAUD; INSOLVENCY; INSURANCE; LIMITATION OF ACTIONS; MISREPRESENTATION.

**CONCEALMENT OF BIRTH.**—In England and the United States statutes have been enacted making it a criminal offence to conceal the birth of a child. These statutes vary in many essential particulars, and must be construed according to their own peculiar requirements. It seems, however, that their general intent is to make the concealment of the birth of a bastard child upon which the crime of murder could have been committed criminal.<sup>1</sup>

**What Constitutes the Offence.**—The offence being purely statutory, its requirements in the indictment must be strictly followed. The statutes make heavily punishable what of itself is nearly or quite innocent, simply because of its tendency toward an unproved wrong. Hence the interpretation is always specially strict.<sup>2</sup>

be again prosecuted on the testimony of the persons who saw him at the other house. *Smith v. State*, 79 Ala. 257.

A person who, in a state of intoxication, has about his person a deadly weapon, is guilty of but one offence, where the proof shows but one carrying at the same time and place, and he cannot be convicted of both carrying about his person a deadly weapon when under the influence of intoxicating drink, and for carrying concealed a deadly weapon. *State v. Shelby*, 90 Mo. 302.

1. *Desty Am. Crim. Law*, § 90 a. See the various statutes.

Some of the statutes make the offence consist in concealing the "death," others the "birth," of the child; the idea being that it is a badge of murder. *Bishop on Stat. Crimes* (2d Ed.), § 770.

The offence of concealing the birth of a child was first provided against by the 21 Jac. I., c. 27, which was repealed by the 43 Geo. III., c. 58. The latter statute was also repealed and the offence provided for by the 9 Geo. IV., c. 31, sec. 14. This is also repealed; and now by the 24 & 25 Vict. c. 100, sec. 60, "if any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child die before, at, or after its birth, endeavor to conceal the birth thereof, shall be guilty of a misdemeanor; provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavor to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had

been convicted upon an indictment for the concealment of the birth."

Upon a prosecution for this offence, the prosecutor, after establishing the birth of the child, must prove the secret burying or other disposal of a dead body, the identity of the body with that of the child so born, and the endeavor to conceal the birth. In general, the evidence to prove the first point will also tend to establish the last.

Where the bill for murder was not found by the grand jury, and the prisoner was tried for murder on the coroner's inquisition, it was held that she might be found guilty of the concealment. *R. v. Maynard*, Russ. & R. 240; *R. v. Cole*, 2 Leach, 1095; 3 Camp. 371.

Upon an indictment for the murder of a child, any person, on failure of the proof as to the murder, may be now convicted by the statute of endeavoring to conceal the birth. Formerly no person but the mother could be so convicted. *R. v. Wright*, 9 C. & P. 154.

The date of the parent statute of 21 Jac. I., c. 27, is 1623, sufficiently early to be common law in most of our States. The Pennsylvania judges do not include it in their list; but Kilty says it was received in Maryland, and under it there were in early times numerous convictions. *Bishop on Stat. Crimes* (2d Ed.), § 767.

2. *Bishop on Stat. Crimes* (2d Ed.), § 769.

Some statutes require that it must appear that the child was born alive, for where the child was stillborn there is no crime. *Desty Am. Crim. Law*, § 90 a, citing *State v. Kirby*, 57 Me. 30; *State v. Joiner*, 4 Hawks (N. Car.), 350; *State v. Love*, 1 Bay (S. Car.), 167; *Douglass v. Com.*, 8 Watts (Pa.), 538; *Boyles v. Com.*, 2 S. & R. (Pa.) 40; *Com. v. Clark*,

2 Ashm. (Pa.) 105; *Pennsylvania v. McKee*, Addis (Pa.), 33. See also *State v. Conover*, 4<sup>th</sup> Crim. L. Mag. 233.

Under a statute providing that "if a woman is willingly delivered in secret of the issue of her body, which would be a bastard if born alive, and conceals the death thereof, so that it is not known whether it was born dead or was born alive and was murdered, she shall be punished," held, that if the child is proved to have been born dead, although she concealed its birth she cannot be convicted. *State v. Kirby*, 57 Me. 30.

The secret burying or other secret disposal of the body of a dead child, born alive, is a misdemeanor; and the endeavor to conceal the birth of such child is also a misdemeanor. *State v. Stewart*, 93 N. Car. 539.

Other statutes do not require that the child should be born alive. *Bishop on Stat. Crimes* (2d Ed.), § 774; *R. v. Cornwall*, Russ. & Ry. 336; *R. v. Wright*, 9 Car. & P. 754; *R. v. Coxhead*, 1 C. & K. 623.

An indictment for concealing the death of a bastard child must expressly and distinctly allege the child to be dead; but it need not state whether the child died before, at, or after its birth, nor how the mother endeavored to conceal its death. *State v. Ellis*, 43 Ark. 93; *R. v. Coxhead*, 1 C. & K. 623.

An indictment against a woman for endeavoring to conceal the birth of a child, of which she has been delivered, by secretly burying the same, will be good if it follows the language of the statute. It need not allege any specific intent on her part; and it is immaterial whether the child was still-born or not. *State v. White*, 76 Mo. 96.

It seems that a foetus not bigger than a man's finger, but having the shape of a child, is a "child" within the statute. *R. v. Colmer*, 9 Cox C. C. 506. But in *R. v. Hewitt*, 4 F. & F. 1101, it was left to the jury to say whether what the prisoner had concealed was a child or was only a foetus.

It has, however, also been held that the foetus, to be a "child" under the statute, must so far be advanced that in the natural course of things it must have a chance to be born alive and to live after birth, and that the great probability is that under seven months this chance does not exist. *R. v. Berriman*, 6 Cox C. C. 388; *R. v. Sleep*, 9 Cox C. C. 559.

Where a woman went in great pains from the house to a thicket a few yards away and remained there for about an hour, and afterward a new-born child still

living was found in the thicket in a ditch with about six inches of water, the child being bruised about the head and other parts of its body, it was held sufficient evidence to convict the mother. *Peters v. State*, 67 Ga. 29.

An indictment against a mother for concealing the death of her child must allege that the child was a bastard. *Sullivan v. State*, 36 Ark. 64. See *Boyles v. Com.*, 2 S. & R. (Pa.) 43; *Douglass v. Com.*, 8 Watts (Pa.), 535; *State v. Love*, 1 Bay (S. Car.), 167; *State v. Joiner*, 4 Hawks (N. Car.), 350.

**Concealment.**—Where the evidence was, that the prisoner had been delivered of a child, and had placed it in a drawer, where it was found locked up, the drawer being opened by a key taken from the prisoner's pocket, the court directed an acquittal, being of opinion that the former statute by the words "buried or otherwise disposed of" contemplated a final disposing of the body. *R. v. Ash*, 2 Moo. & R. 293. So where the prisoner had placed the child in a box in her bedroom, held that the disposing of the body must be in some place intended for its final deposit. *R. v. Bell*, MS. 2 Moo. & R. 294. These authorities have since been overruled. *R. v. Goldthorpe*, 2 Moo. C. C. R. 244. There the prisoner had been suspected of being with child, but always denied it, and after her delivery persisted in denying that she had been delivered, but on being pressed by the surgeon who examined her, she confessed that the child was between the bed and the mattress, where it was discovered. The case having been reserved the conviction was affirmed. The point was again reserved in *R. v. Perry*, Dears. C. C. R. 473; 24 L. J. M. C. 137. There the prisoner placed the dead body of the child under the bolster, with the intention of endeavoring, as far as she could, to conceal the body from the surgeon, but with the intention of removing it elsewhere when an opportunity offered. This was held by the court to be disposing of a dead body within the statute. *R. v. Opie*, 8 Cox C. C. 332. Where the prisoner denied to her mistress that she was in the family way, but told the doctor she had been confined and the child was in a box in her bedroom, and the child was found in a box with the lid open in her bedroom, it was left to the jury to say if they thought this was a secret disposition of the body. In his opinion it was not. *R. v. Sleep*, 9 Cox C. C. 559. Where the prisoner put the dead body of her child over a wall into a field where there was no path, this was held to be a



secret disposition. *R. v. Brown*, L. R. 1 C. C. R. 244, 39 L. J. M. C. 94. Where the prisoner was stopped going across a yard, in the direction of a privy, with a bundle, which on examination was found to be a cloth sewed up, containing the body of a child, it was held that the prisoner could not be convicted, the offence not having been completed. *R. v. Snell*, 2 Moo. & R. 44. Evidence was given that the prisoner denied her pregnancy, and also, after the birth of the child, denied that also; but she afterwards confessed to a surgeon that she had borne a child. The body of the child was, on the same day, found among the soil in the privy. *Held* it to be essential to the commission of the offence, that the prisoner should have done some act of disposal of the body after the child was dead; therefore if she had gone to the privy for another purpose and the child came from her unawares, and fell into the soil, and was suffocated, she must be acquitted of the charge, notwithstanding her denial of the birth of the child. The prisoner was acquitted. *R. v. Turner*, 8 C. & P. 755. See also *R. v. Coxhead*, 1 C. & K. 623; *R. v. Cornwall*, Russ. & Ry. 336.

On an indictment against the mother for concealment of the birth of her illegitimate child, it appeared that the body of the child was found, three days after it was born, behind the door of the privy belonging to the house where she lived as a domestic servant, in a tub covered over with a small cloth. *Held*, that there was no conclusive evidence to warrant the jury in finding a verdict for concealment of the birth. *R. v. Opie*, 8 Cox C. C. 332.

On an indictment against the mother for the murder of her illegitimate child, it appeared that the body of the child was found, a few hours after its birth, on the floor of an attic in a house where she lived as domestic servant, the head severed from the body, and both lying in sheets which had been removed from the bedroom below, which was occupied by the prisoner and her mistress, and where there was evidence to show that the birth had taken place, but it was doubtful whether the severance of the head from the body was effected there or in the attic. *Held*, that there was no evidence to warrant the jury in finding a verdict for the statutory misdemeanor of endeavoring to conceal the birth. *R. v. Goode*, 6 Cox C. C. 318.

The act of throwing a bastard child down the privy, by its mother, was evidence of an endeavor to conceal the birth within 43 Geo. III. c. 58, s. 3; *R. v. Cornwall*, R. & R. C. C. 337.

D. and one H. were indicted for murder of a female child, of which were acquitted; whereupon the jury desired to inquire whether the female was guilty of endeavoring to conceal the birth. The prisoners had been living together for some time, and in the night, or about four in the morning, she was ordered of the child, in the presence of the male prisoner, who was the father. The male prisoner very soon afterwards put the child (which had not been rated from the after-birth) into a bag, and carried it downstairs into the cellar, and threw the whole into the privy, the male prisoner remaining in bed up. She was proved to have said she knew what was to be done. The fact of her having a child was, some time before her delivery, known by her mother, who lived at some distance, and was apparent to other women. No female was present at the delivery; one had been seen at the commencement of the labor, twelve at night, but was so ill that she could not attend. There were no preparations, or other provision made for the parties were in a state of the most abject poverty and destitution. The jury found her guilty of endeavoring to conceal the birth. *Held*, that the concealment made to other persons was not evidence, but no bar, and that the conviction was good. *R. v. Douglas*, 1 C. C. 480. So in *R. v. Skelton*, 3 C. K. 119, the court directed the jury that if a woman be delivered of a child which is dead, and a man take the child and secretly bury it, she was indicted for the concealment by secret burial under the statute, and he for aiding and abetting, if there was a common purpose in both in thus endeavoring to conceal the birth of the child; but that the jury must be satisfied, not only that she wished to conceal the birth, but that she was a party to the carrying that wish into effect by the secret burial by the hand of the man, in pursuance of a common purpose between them. *R. v. Bird*, 2 C. C. 817; *R. v. Bate*, 11 Cox C. C. 617; *R. v. Higley*, 4 Car. & P. 366.

Leaving the dead body of a child in a box, closed, but not locked or fastened, one being placed inside the other in the bedroom, but in such a position as to attract the attention of those who descended to the room, is not a secret position of the body within the statute. *R. v. George*, 11 Cox C. C. 41.

Where an indictment for concealment of the birth of a child alleged the concealment to have been in and among a heap of carrots, and the evidence was that the body was not laid u



**CONCEPTION.**—The act of conceiving; first stage of generation on the part of the female.<sup>1</sup>

**CONDEMNATION.**—The act of condemning; that is, pronouncing a judicial sentence against. Used of the sentence or judgment of any court of competent jurisdiction, but most commonly of the decree by which property is seized and made subject to forfeiture

ested or concerned in keeping or exhibiting a table for gaming.

**Concerned in the Loss.**—A fire policy on a saw-mill and machinery therein, required, in the event of a loss, a certificate containing certain information "under the hand of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise." *Held*, that the words "concerned in the loss" meant interested in the loss, and directly, not remotely, interested. *McRossie v. Provincial Ins. Co.*, 34 Upper Canada (Q. B.), 55.

**For Whom it may Concern.**—A policy in the name of a particular person, "for whom it may concern," will inure to the interest of the party for whom it was intended by the person who ordered it, provided he at the time of effecting the insurance had the requisite authority from such party, or the latter subsequently adopted it. *Hooper v. Robinson*, 98 U. S. 528; *Wise v. St. Louis Marine Ins. Co.*, 23 Mo. 80; *Walsh v. Washington Ins. Co.*, 32 N. Y. 427; *Newson v. Douglass*, 7 Har. & John. (Md.) 417; s. c., 16 Am. Dec. 317. See also *De Bollé v. Penna. Ins. Co.*, 4 Whart. (Pa.) 68; s. c., 33 Am. Dec. 38; *Sleeper v. Union Ins. Co.*, 65 Me. 385; *Barnes v. Union Ins. Co.*, 45 N. H. 21; *Buck v. Chesapeake Ins. Co.*, 1 Peters (U. S.), 151.

When the words "for whom it may concern" are used in a policy, evidence *dehors* the writing is admissible to apply the words and show to whom they referred. *Richardson v. Home Ins. Co.*, 15 Jones & Sp. (N. Y.) 138; *Lee v. Adsit*, 37 N. Y. 78; *Newson v. Douglass*, 7 H. & J. (Md.) 417.

1. Worcester's Dict.

**Effect of Evidence of Conception in Rape.**—It was formerly supposed that if a woman conceived, it was no rape, because that showed her consent. But such opinion is now admitted on all hands to have no sort of foundation either in reason or law. 1 East P.C. 445.

**Declarations in Travail.**—The declarations of a woman in travail, as to who was the father of the child, are not com-

petent evidence. *The State v. Hus*, 7 Iowa, 409.

**Cause of Conception.**—In an indictment for bastardy, the mother will not be permitted to decide which of the conditions about the same time was the operative cause of conception. *Com. v. Fritz*, 8 Penn. L. J. 43; *Com. v. Carty*, 4 Penn. L. J. 140; s. c., 2 C. (Pa.), 351; *Wharton on Ev.* § 1299. *Com. v. McCarty*, 4 Penn. L. J. Ellis, C. J., in charging the jury, "The organs of conception, like those of digestion, perform their appropriate offices without the volition of the female. She is not conscious, at the moment of the occurrence, of what has taken place. It is only by inference that she can determine the paternity of her offspring. If intercourse has been confined to one individual, there is no difficulty in drawing a correct conclusion from the premises. But if she exposed herself to the embraces of several, at or about the time she became pregnant, she has placed out of her power to draw any safe conclusions on the subject. Where several causes are shown to exist, either of which is adequate to produce the effect, and there are no circumstances to determine the mind in favor of either, the cause must necessarily remain uncertain, and in that case there is not sufficient evidence to justify a conviction."

**2. Condemnation of Lands.**—Where two suits were pending for the condemnation of certain lands for the use of two distilling water companies the lower court refused to appoint commissioners on the petition of one of the companies, on the ground that he could not determine to his satisfaction which of the two companies had the better right to condemn. This was held error, and a *mandamus* granted, the court, Shafter, J., saying: "Two suits for the same cause of action may be pending in the same court between the same parties, but the fact never attracts judicial attention until the pendency of the one suit has been pleaded in abatement of the other. Or there may be two actions pending in the same court at the same time at the suit of different plaintiffs and against a common defendant,

it would be contrary to established principle should the court in such cases refuse to proceed with either suit until it had decided and determined an issue between the plaintiffs in the respective proceedings, as to which had the better right to the land *inter sese*. The condemnation of the land is but a purchase of them *in invitum*, the title acquired is but a quitclaim. A corporation starts proceedings under a statute, to get a title of that quality, like proceedings have been commenced by another company, and there should be a condemnation and payment in both proceedings, both corporations should have good title as against the real owner or owners; but as between the companies, the lands would belong to the one over whose proceedings the title first acquired jurisdiction—a question to be litigated between the companies. It may be that either company might make the other party defendant to the condemnation, or, failing that, that one of the companies might intervene in the proceedings of the other.—*Contra* *U. S. v. R. Co. v. Moss*, 23 Cal. 323.—At the question of priority might be determined in advance of a purchase by one; but should the junior applicant, knowing all the facts, or having the means of knowing them, push its suit to a quitclaim and voluntarily pay the purchase-money, the responsibility would not be on the law." *Lake Merced Water Co. v. Lewis*, 31 Cal. 215.

**Condemnation Money.**—Where a Georgia Act (Act 16, Dec. 1811, § 3; Prim. Dig. 1811) declared that "No injunction shall be granted or granted by any judge of the superior courts of this State until the court requiring the same shall have previously given to the party against whom the injunction is to operate, by application to the clerk of the superior court at that purpose, a bond with good and sufficient security for the eventual condemnation-money, together with all further costs," the court held that "the eventual condemnation-money" secured by the injunction bond was the amount ultimately awarded and settled by the judgment of the court in the case; Warner, J., saying: "The term 'condemnation' as defined by Bouvier in his Law Dictionary, 395, to be 'a sentence or judgment which condemns some one to do something, or to pay something; or which declares that his claim or pretensions are unfounded.' 'Judgments are the sentences of the law, pronounced by the court in the matter contained in the record.' *Com. 395*. The 'eventual con-

demnation-money,' then, is that which the law sentences the party to pay; expressed by the judgment of the court, the legitimate organ of the law." *Lockwood v. Saffold*, 1 Ga. 72.

In a suit on an appeal bond against the executors of one of the sureties, where the appeal had been taken by a defendant from a judgment against him in ejectment, and the bond was conditioned for the prosecution of the appeal with effect, and the payment of the condemnation-money and costs should the judgment be against the appellant, it was held that the plaintiff could not recover, in this suit, the mesne profits, the court, Sullivan, J., saying: "By 'the condemnation-money' is meant the damages that should be awarded against the appellant, by the judgment of the court. It does not embrace damages not included in the judgment." *Doe v. Daniels*, 6 Blackf. (Ind.) 8.

**Condemnation and Confiscation Distinguished.**—In allowing the claim of an owner of cotton seized, and holding that he was entitled to judgment for the proceeds in the treasury, although placed there under a decree of a court of admiralty to be distributed in prize, on the ground that a court of admiralty is without jurisdiction to distribute in prize a moiety previously awarded to a naval officer as informer by a district in proceedings for the confiscation of enemy's property, the court of claims, by Davis, J., said: "A suit for confiscation is an action of an entirely different nature from a proceeding in prize. Confiscation is the act of the sovereign against a rebellious subject. Condemnation as prize is the act of a belligerent against another belligerent. Confiscation may be effected by such means, either summary or arbitrary, as the sovereign, expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*; but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in prize the tenure of the property seized is qualified, provisional, and destitute of absolute ownership. The Peterhof, Blatchf. Prize Cases, 620. To confiscate property seized upon land, resort must be had to the common-law side of the court. The Confiscation Cases, 20 Wall. 110. Prize proceedings are always in admiralty." *Winchester v. U. S.*, 14 Court of Claims, 13.

**CONDITION** (See also ESTATES; MORTGAGES.)—That on which anything depends; a pre-existing state of things requisite in order that something else may take effect.<sup>1</sup>

1. Where a State bank, being indebted to the State of Michigan, conveyed to the State, in satisfaction of such indebtedness, certain real and personal property, and it was expressly agreed that the assignment of the property was made upon and subject to the condition that the State should indemnify and save harmless the bank from and against certain claims and liabilities therein mentioned, it was held that this was a conveyance upon a "condition subsequent," and that the property would revert to the bank on failure of the State to perform the condition; the court, Whipple, J., saying: "What, then, is a condition, and what are its legal effects? Estates upon condition are such as have a qualification annexed to them by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed. 3 Kent's Com. 120; Co. Litt. 201. The following definition is more full and satisfactory: 'A condition is a restriction or a qualification annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantee does or omits to do a particular act, an estate shall commence, be enlarged, or defeated.' 2 Cruise's Dig. 2. Littleton divides them into two classes: 1st, estates upon condition implied or in law; and, 2d, estates upon condition express or in deed. Litt. § 325. The 'condition' in the case before us belongs to the second class, and is a condition express or in deed. The right to annex a condition to a conveyance results from the power of alienation; and this power of alienation is an incident to the right of property. If, then, that condition be precedent, and the act upon which the estate depends be not performed, the estate does not vest; but if the condition be subsequent, the estate does vest, and will continue to vest until defeated by a failure on the part of the grantee to perform the condition annexed to the estate; or, in other words, until there is a breach of the condition. If, for instance, a person have an estate in fee subject to a condition, he may convey or devise the same, and the grantee or devisee will continue to hold as though no qualification had been annexed; but until the condition be performed the estate is liable to be defeated; unless, indeed, the performance of the condition become im-

possible by the act of God or of the individual who imposes it. 'For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the estate of the feoffee shall not be avoided.' Co. Litt. § 334. 'And so it is in the case of a feoffment in fee with a condition subsequent that is impossible; the estate of the feoffee is absolute. And he that coveneth for a condition broken shall be seized in his first estate, or of that estate which he had at the time of the estate made upon condition.' Co. Litt. § 325. *Michigan State Bank v. Hastings*, Doug. (Mich.) 225.

In holding that a homestead right is a quality annexed to land whereby an estate is exempted from sale under an execution for debt, and cannot be defeated by the failure of the sheriff to have the homestead laid off by metes and bounds even where there is an actual adverse possession under a sheriff's deed, the court, Pearson, C. J., compared it to a "condition" which, he said, "is a quality annexed to land whereby an estate may be defeated." *Littlejohn v. Egerton*, 77 Car. 379.

A covenant against alienation if it is to be considered as a condition is void, though it may be supported as a personal undertaking in the nature of a mortgage. *Campan v. Chew*, 1 Mich. 400.

A mere covenant gives no right of entry and forfeiture on breach thereof, and in a case of doubt as to the true construction of a clause in a lease it should be held to be a covenant, and not a condition or limitation. *Johnson v. Garl*, 52 Tex. 222.

Where the payment of the purchase money has been made a condition precedent which must be fully performed before the part of the purchaser to entitle him to an estate in fee, it does not follow that the mere failure to pay the interest at the time it becomes due will of itself forfeit the estate of the purchaser in the land. *Smith v. White*, 5 Neb. 405.

A warranty of the existence of a certain set of facts at the time of making a contract is not a condition precedent to the contract, so as to make it part of a plaintiff's case that he shall aver the warranty and negative the breach of it. *Redman v. Aetna Ins. Co.*, 49 Wis. 43.

In holding that the covenants in a contract are not conditions precedent

subsequent to the performance of the contract. Welles, J., said: "By the word 'condition' is usually understood some quality annexed to real estate, by virtue of which it may be defeated, enlarged, or created upon an uncertain event; also, qualities annexed to personal contracts and agreements are frequently called conditions, and these must be interpreted according to the real intention of the parties. *Bac. Abr., Conditions.* The learning in the books relates principally to the former kind. Conditions of the latter class rest upon the same general reasoning with those of the former. 'Conditions precedent' are such as must be punctually performed before the estate can vest, but in a condition subsequent the estate is immediately executed; yet the continuance of the estate depends upon the breach or performance of the condition.' *Bac. Abr. Conditions.*" *Selden v. Prince*, 17 Barb. (N. Y.) 458.

**Condition Precedent.**—"A condition precedent," says Chancellor Kent, 4 Com. 125, "is one which must take place before the estate can vest or be enlarged." Therefore where a testator devised all his property to his wife for her life, with a remainder over "to Henry Clew, the young man who is now and has for a long time past lived with me, his heirs and assigns forever, upon the express condition, however, that he, the said Henry Clew, do remain with me and my wife during our lives, and the life of the survivor of us;" and Henry Clew, the devisee, survived the testator but died before the widow—it was held that the requirement that Henry Clew should remain with the testator and his wife during their lives, and the life of the survivor, constituted a "condition precedent," which being unperformed, prevented the estate from vesting in him, the consequence being that it passed to the heir at law. *Den ex dem. Blean v. Messenger*, 4 Vroom, (N. J.) Law, 499.

**Condition Subsequent.**—A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated. Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates. Therefore, it is doubtful whether a clause in a deed is a condition or a covenant, the courts will incline against the condition. A covenant is far preferable. Thus in construing a conveyance of land "in consideration of helping to support and maintain a school for the purpose of teaching the art of reading, writing, and

arithmetic," it was held that no forfeiture was worked, although no income having been realized from the lot thus conveyed, on three occasions timber was taken therefrom to make and repair other schoolhouses in the district, in which schools of the kind specified in the deed were kept. *Chapin v. School District*, 35 N. H. 445.

**Conditions Precedent and Subsequent Distinguished.**—Where an action of ejectment was brought for land conveyed to a railroad upon the express condition that the conveyance should be void unless the railroad was completed through the premises on or before a certain date, the court held that this was a condition subsequent, but that such conditions are not favored in law, and that such an estate is not defeated by a neglect to perform the condition, but voidable only by the grantor by some act equivalent to a re-entry at common law; and that such a voidable estate may be confirmed by the acts of the grantor, without a new grant; *Brown, J.*, saying: "Where a condition must be performed before the estate can commence, it is called a condition precedent. But when the effect of the condition is either to enlarge or to defeat the estate already created, it is then called a condition subsequent." *Ludlow v. New York & Harlem R. Co.*, 12 Barb. (N. Y.) 440.

**Condition and Limitation Distinguished.**—But where a condition subsequent is followed by a limitation over, in case the condition is not complied with, or there is a breach of it, it is termed a "conditional limitation," and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited. *Stearns v. Godfrey*, 16 Me. 158.

**Conditional Fee.**—See ESTATES TAIL.

**Conditional Contract.**—In holding that a contract whereby A. agreed to subscribe to the stock of a railroad, on condition that the railroad was placed on a certain course, was a conditional contract, and the subscriber was a conditional subscriber only, and not bound by the acts of a majority of the corporation, *Campbell, J.*, said. "A conditional contract is an executory contract, the performance of which depends upon a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do or not to do some thing; but it is a contract whose very existence depends upon a contingency and condition. . . The conditional subscriber was either never a stock-

## CONDITIONAL SALES. (See also CHATTEL MORTGAGE SALES.)

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**1. Definition.**—The parties to a contract of bargain and sale of goods may agree that the investiture of the purchaser with complete title to the thing sold, or his retention of it, shall depend upon a condition, precedent or subsequent. In either case the transaction is known as a conditional sale. If the condition is precedent, no title passes until it is performed, but after that the sale becomes absolute. If the condition is subsequent, the vendor takes a title which is subject to be divested by the performance of the condition.<sup>1</sup>

**2. Criteria and Requisites of Conditional Sales.**—The distinction between absolute and conditional sales lies chiefly in the position of title and the respective rights and remedies of the parties. Where a condition precedent is alleged, the test as to whether the property vests in the vendee or remains in the vendor is, whether the vendee could recover of the vendor, either at law or in equity, the interest or property he claims to have purchased.<sup>2</sup> But a

holder and member of the company if the condition was a precedent one, or ceased to be a stockholder and member on the violation of the condition, if the condition were a subsequent one, and violated after the payment of calls, or exercise by the subscriber of the right of a member; and the conditional subscriber, never having been a stockholder and member of the company, or having ceased to be so on the violation of the condition, the rule of law mentioned (namely, that a member of a corporation is ordinarily bound by the acts of the majority of the corporation) has no application to him." *N. & N. W. R. Co. v. Jones, 2 Coldw. (Tenn.) 574.*

<sup>1</sup> *Sewall v. Henry, 9 Ala. 24.*

In *Harkness v. Russell* (U. S. Sup. Ct.), 23 Repr. 65. Bradley, J., in speaking of conditional sales, observes: "Such contracts are well known in the law and often recognized, and when free from any fraudulent intent are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser."

<sup>2</sup> *Pierce v. Lyman, 28 Ark. 550.*

**Distinction between Absolute and Conditional Sales.**—This distinction is well illustrated in the case of *Green v. Ben*, 23 Mich. 464, as follows: Under a contract for the sale of the wood and timber on certain lands, to be removed at certain specified times, if the contract be construed as making an absolute sale, the wood and timber remain the property of the purchaser, though not removed within the time provided, and the taking of the removal of the same by the seller would be a wrongful conversion for which the purchaser has a clear right of action, though he may be liable for a breach of the covenant to remove the same within the times specified. But if the contract be construed as conditional, and the provision for removal of the timber within the specified periods is in the nature of a condition upon the purchaser, if the seller should remove the wood and timber not removed within the times specified, and the seller would have the right to insist upon the breach of condition, and hold the wood not thus removed, and this would constitute his only security against, and



which was absolute at its inception may be changed into a conditional sale by the subsequent agreement of the parties.<sup>1</sup>

The necessity for distinguishing between conditional sales and chattel mortgages chiefly arises in cases where the possession of personalty is transferred in consideration of an existing indebtedness, and the buyer's title depends upon a condition. Here the test is: if the conveyance merely secures the debt, it is a mortgage; if it extinguishes the debt, it is a sale, notwithstanding the reservation of a right to redeem.<sup>2</sup> But a transaction, in effect a conditional

remedy for, the failure to perform condition.

**Test of Warranty.**—A warranty in a contract of sale, that the article shall conform to inspection, is nothing more than a warranty of the soundness of the goods, and does not change the sale into a executory contract. *Gibson v. Stevens*, 8 How. (U. S.) 384.

A mere promise to sell when certain conditions are complied with does not create a title, but only creates an obligation which may be enforced by an action to compel a specific performance, or for recovery of damages. *Knox v. Payne*, 10 Ala. Ann. 361.

Where a note is given for the purchase of goods, the sale may be a conditional sale; if the note is secured upon other property, it is an absolute sale. *Silver Mining Co. v. Lowry*, 23 Repr. (Ilt.) 311.

A contract absolute in its inception, consummated by delivery, will not be converted into a conditional sale by an ambiguous phrase indorsed upon it, even if such would have been the effect if a part of the original contract. *Way v. Wallace*, 2 Ala. 542.

One sells and delivers property to another absolutely, and the parties subsequently make it a conditional sale, a change of possession is necessary to protect the property from attachment by creditors of the vendee. *Wright v. Smith*, 45 Vt. 369.

A contract for the sale of a steam-engine and the iron frame for a saw-mill, the buyer giving his notes in payment of the goods being delivered, after which the seller agreed that on non-payment of the notes the seller might repossess himself of the goods, *held* a conditional sale. *Wilmington Steam-engine Co. v. Davis*, 5 Del. (Del.) 192.

Where goods are purchased and paid for at a stipulated price, the sale is not affected or qualified by an agreement in the bill of sale that the seller will receive such sum as the goods will sell for above the price paid. *Lincoln v. Lincoln*, 2 Shep. (Me.) 116.

**Substitution of Goods.**—Where the vendor of personal property reserves a lien upon it at the time of sale, and the property is subsequently exchanged for other property, by the vendor's consent, with an agreement between him and the vendee that his original lien shall attach to the property exchanged for, such lien can be enforced. *Kelsey v. Kendall*, 48 Vt. 24.

*Parish v. Gates*, 29 Ala. 254; *Smith v. Beattie*, 31 N. Y. 542; *Houser v. Camp*, 3 Pa. St. 208; *Todd v. Campbell*, 32 Pa. St. 250; *Blodgett v. Blodgett*, 52 Vt. 32; *Wilmerding v. Mitchell*, 13 Vroom (N. J.), 476; *Robinson v. Willoughby*, 65 N. Car. 520; *Ruffier v. Womack*, 30 Tex. 332; *Reeves v. Sebern*, 16 Iowa, 234; *Cooper v. Brock*, 41 Mich. 488; *Musgat v. Pumpelly*, 46 Wis. 660; *Slowey v. McMurray*, 27 Mo. 113; *Moore v. Murdock*, 26 Cal. 514; 1 Benj. on Sales (4th Am. Ed.), p. 8.

In *Turner v. Kerr*, 44 Mo. 429, it is said by Currier, J.: "A conveyance to secure a debt is a mortgage, and the stipulations of the parties cannot make it otherwise. But a conveyance to pay a debt is a totally different affair. If the conveyance extinguishes the debt and the parties so intend, so that a plea of payment would bar an action, a subsequent or contemporaneous stipulation in the interest of the debtor, securing to him an opportunity to reacquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is no mortgage, but a conditional sale."

**Conditional Sales not Favored.**—The inclination of courts of equity always has been to lean against conditional sales; because an error which converts a conditional sale into a mortgage is not as injurious as one which changes a mortgage into a conditional sale; and this inclination is strongly manifested whenever the transaction had its origin in a proposition for a loan, or the relation of debtor and creditor existed between the parties. *Locke v. Palmer*, 26 Ala. 312; *Parish v. Gates*, 29 Ala. 254.

**Cases of Conditional Sales.**—Where upon



sale of a chattel, may be afterwards modified so as to make the contract a mortgage.<sup>1</sup>

Where one agrees, on receiving possession of personal property under a contract of sale, that the title shall remain in the vendor until the price is paid, this is not a bailment, but a conditional sale.<sup>2</sup> An oral condition cannot be attached to a written conveyance of chattels absolute on its face.<sup>3</sup> In several of the States all conditional sales must, to be valid as against third persons, be recorded in all respects like chattel mortgages.<sup>4</sup>

**3. Conditional Sales Disguised as Leases.**—Where the transaction between the parties is in reality, and in its legal effect, a contract of sale conditioned upon the payment of the purchase price in successive instalments, it cannot be modified, nor its legal effect avoided by the fact that they speak of it as a "lease," and call the instalments "rent."<sup>5</sup>

In the sale of a chattel the purchaser gave his note with sureties for the price, and it was agreed by parol between the parties at the time that the chattel should belong to the sureties until the note was paid. *Held*, that the effect of the agreement was to pass the title to the chattel from the seller to the sureties, and not from the seller to the purchaser, and then from him to his sureties for their indemnity, for in the latter case it would have been a mortgage, which would have been void for want of registration. *Worthy v. Cole*, 69 N. Car. 157.

An instrument under seal signed by B., promising to pay C. \$150 "for one bay horse bought of him, and to secure him the horse stands his own security," was held to be a conditional sale, and not a mortgage. *Clayton v. Hester*, 80 N. Car. 275.

An agreement to convey property on the payment of certain sums of money and the performance of certain conditions, followed by delivery of possession, constitutes a conditional sale and not a mortgage. *Rowan v. Union Arms Co.*, 36 Vt. 124.

**Sale with Right of Repurchase.**—Where there is an absolute conveyance of a chattel, but a right is reserved to the grantor to redeem or repurchase the same at a stipulated price within a given time, it is a conditional sale, and not a pledge or mortgage, if the exercise of such right is optional with the grantor and cannot be compelled by the grantee. *Conway v. Alexander*, 7 Cranch (U. S.), 218; *Logwood v. Hussey*, 60 Ala. 417; *Thompson v. Chumney*, 8 Tex. 389; *Glover v. Payne*, 19 Wend. (N. Y.) 518.

1. *Griffith v. Morrison*, 58 Tex. 46.

2. *Bryant v. Crosby*, 36 Me. 562; *Pennsylvania* and *Alabama* decisions take

a different view. See *Chamberlain v. Smith*, 44 Pa. St. 431; *Henry v. Paulson*, 57 Pa. St. 346; *Forrest v. Nelson*, 19 Repr. (Pa.) 380; *McCall v. Powell*, Ala. 254.

**Consignment to Sell.**—Where goods are delivered for the purpose of being sold at prices fixed by the consignor, and are to be paid for at fixed rates by the consignee after sale, accounts to be rendered monthly, the transaction imports a consignment for sale, and not a present sale. *Walker v. Butterick*, 105 Mass. 22; *Audenried v. Betteley*, 8 Allen (Mass.) 302. Compare *Nutter v. Wheeler*, 2 L. (U. S.) 346; *In re Linforth*, 4 Sawy. (C.) 370; *Fish v. Benedict*, 74 N. Y. 6.

3. A partner, being sick at the time, conveyed to his copartner, by a written instrument, all his interest in the firm, agreeing with him verbally at the same time that in case he should recover the sale was to be null and void, and he was to continue in the firm as before. *Held*, that this verbal condition was nugatory, and the sale absolute. *Wallace v. McVicker*, 6 Ind. 300.

The intention of the parties to a sale, as to the time when the title is to pass, can be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties, as applied to known usage and the subject-matter. It must be manifested at the time the bargain is made. *Foster v. Ropes*, 111 Mass. 10.

4. *New York*, Act of 1884, ch. 315, § 1, 2; *Iowa*, Rev. Code 1880, § 10; *Missouri*, Rev. Stat. 1879, § 2505; *Nebraska*, Genl. Stat. 1883, § 169; *South Carolina*, Genl. Stat. 1882, § 2022; *Act of 1882*, ch. 20.

5. **Sales Disguised as Leases.**—Transactions of this character are of frequent

in two States, however, a different view obtains.<sup>1</sup>

**Condition Precedent to be Performed by Vendor.**—Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into a deliverable state, the performance of these things will, in the absence of a contrary intention, be taken

as evidence, and principally in connection with the transfer of such articles as sewing-machines, pianos and organs, furniture, and rolling-stock on railroads. They usually provide for the immediate transfer of the property on what is called "lease;" that certain payments shall be made from time to time called "rent;" that the title is to remain in the "lessor" until all payments are made; that he may retake the property upon default in payment, and declare previous payments forfeited; and that, upon payment of the last instalment, the title is to vest in the "lessee" without further ceremony, and with or without a bill of sale or other conveyance. The object is to afford the vendor a better security, or to avoid the inconvenience of a chattel mortgage. But the courts now hold that a transaction is a conditional sale (not a contract of letting and hiring), and must be so considered for all purposes. *Hervey v. Locomotive Works*, 93 U. S. 664; *Heryford v. Davis*, 102 U. S. 35; *Myer v. Car Co.*, 102 U. S. 1; *Roberts v. Roberts*, 48 Conn. 267; s. c., 40 Am. Rep. 170; *Loomis v. Bragg*, 50 Mo. 228; s. c., 47 Am. Rep. 638; *Carter v. Scott*, 13 R. I. 477; *Whitcomb v. Woodward*, 54 Vt. 544; *Price v. Callister*, 3 Grant (Pa.), 248; *Greer v. Church*, 13 Bush (Ky.), 430; *Cole v. Fry*, 42 N. J. L. 308; *Singer Mfg. Co. v. Cole*, 4 Lea (Tenn.), 439; s. c., 40 Am. Rep. 20; *Murch v. Wright*, 46 Ill. 487; *Case v. Campbell*, 88 Ill. 447; *Sumner v. Cotley*, 71 Mo. 121; *Singer Co. v. Whitcomb*, 40 Iowa, 33; *Kohler v. Hayes*, Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Domestic Sewing Machine Co. v. Anderson*, 23 Minn. 57.

In the American editor's note to *Benj. Sales* (4th Am. Ed. p. 10), it is said: "The hardship of a forfeiture, where nearly all the price has been paid under the name of rent, has led to much litigation, in which the claim for the buyer is always made that the transaction is in fact a sale with a lien for price reserved. Generally, however, the courts have enforced these contracts according to their true terms, and have held that if the buyer saw fit to sign a lease, he must be regarded as bailee, and not as purchaser." With the exception of the Pennsylvania cases (to be presently noticed), this

proposition is supported only by the following decisions: *Sargent v. Giles*, 8 N. H. 325; *Bailey v. Colby*, 34 N. H. 29; *Austin v. Dye*, 46 N. Y. 500; *Bean v. Edge*, 84 N. Y. 510; *Haviland v. Johnson*, 7 Daly (N. Y.), 297. And all the latest authorities as above cited are directly opposed to it.

The conclusive argument, as it seems to us, is stated by *Davis, J.*, in *Hervey v. Locomotive Works*, 93 U. S. 664, where he says. "It was evidently not intended that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last instalment?"

**Rights of Mortgagees.**—In the case of *Carpenter v. Scott*, 13 R. I. 477, under an agreement similar to those above described, the conditional vendee mortgaged the property to a third person pending the term, and afterwards received from his vendor the bill of sale that had been stipulated for. *Held*, that the so-called lease was a conditional sale, and that the vendee had a right to mortgage the property, which, upon his making the last payment and receiving the bill of sale, vested in him, so that the mortgage took precedence of an attachment.

**Rights of Third Purchasers.**—It is also held, under the species of contracts now under consideration, that one who has in good faith bought and paid for the article from the conditional vendee, in ignorance that the latter has not yet paid in full, and in reliance on his possession and apparent ownership, will receive a good title. *Greer v. Church*, 13 Bush (Ky.), 430; *Domestic Sewing Machine Co. v. Anderson*, 23 Minn. 57. See, *infra*, section 13 of this article, "Rights of Third Parties."

**1. Pennsylvania and Alabama.**—In these two States, contrary to the general rule, the kind of contracts we are at present discussing are regarded, not as conditional sales, but as "bailments for use." Thus in *Forrest v. Nelson*, 19 Repr. (Pa.) 380, *Sterrett, J.*, observes. "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and

as a condition precedent to the vesting of the property.<sup>1</sup> Also when some act remains to be done (not by the buyer) in relation to property which is the subject of sale, such as weighing, counting, testing, or measuring to determine its identity or separating it from bulk, or to ascertain the price, and there is no evidence of an intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to the consummation of the contract, and until it is performed the property does not pass to the vendee.<sup>2</sup> The foregoing principles are commonly known as Lord Blackburn's two rules.

that in default of such payment the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts both are valid and binding; but as to creditors the latter is good while the former is invalid." See *Chamberlain v. Smith*, 44 Pa. St. 431; *Henry v. Patterson*, 57 Pa. St. 346; *Rowe v. Sharp*, 51 Pa. St. 26; *Becker v. Smith*, 59 Pa. St. 469; *Crist v. Kleber*, 79 Pa. St. 290; *Enlow v. Klein*, 79 Pa. St. 488.

So in *Alabama*. *McCall v. Powell*, 64 Ala. 254.

1. 1 Benj. on Sales (4th Am. Ed.), § 364; Blackburn on Sale, 151; *Elgee Cotton Cases*, 22 Wall. (U. S.) 180; *Smith v. Parkman*, 55 Miss. 649; *Bond v. Greenwald*, 51 Tenn. 453; *Pritchett v. Jones*, 4 Rawle (Pa.), 260; *Keeler v. Vanderore*, 5 Lans. (N. Y.) 313; *Foster v. Ropes*, 111 Mass. 10; *Groffe v. Belche*, 62 Mo. 400; *Wilkinson v. Holiday*, 33 Mich. 385; *McClung v. Kelley*, 21 Iowa, 508; *Cleaver v. Ogle*, 1 Houst. (Del.) 453.

Where the thing to be sold is yet to be manufactured, the title does not pass until there has been some act equivalent to delivery and acceptance. *Comfort v. Kiersted*, 26 Barb. (N. Y.) 472; *Andrews v. Durant*, 11 N. Y. 35; s. c., 62 Am. Dec. 55; *Williams v. Jackman*, 16 Gray (Mass.), 514; *West Jersey R. v. Trenton Car Works*, 32 N. J. L. 517.

**Condition Partly Performed.**—Where the vendor has performed everything that is required of him as to a portion of the things sold, but something still remains to be done as to the rest, the portion in regard to which the vendor has performed all his duty becomes the property of the vendee, but the portion in respect to which something is yet to be done still belongs to the vendor, and it makes no difference as to the operation

of this rule whether the contract is entirety or not. *Thompson v. Conover*, 3 Vroom (N. J.), 466.

**Acts to be Done after Delivery.**—Title to property in goods will pass, even though something remains to be done by the vendor in relation to the goods sold after their delivery to the vendee. *Hammond v. Anderson*, 1 B. & P. N. R. 1; *Greaves v. Hepke*, 2 B. & Ald. 1; *Mount Hope Iron Co. v. Buffington*, 1 Mass. 62; *Goddard v. Binney*, 115 Mass. 450; 1 Benj. on Sales (4th Am. Ed.) 378.

2. 1 Benj. on Sales (4th Am. Ed.) 364; Blackburn on Sale, 152; *Stone v. Peacock*, 35 Me. 385; *Handlette v. Toman*, 2 Shep. (Me.) 400; *Messer v. Woman*, 22 N. H. 172; *Smart v. Batchelder*, 57 N. H. 140; *Fuller v. Bean*, 34 N. H. 290; *Gilman v. Hill*, 36 N. H. 3; *Ockington v. Richey*, 41 N. H. 2; *Riddle v. Varnum*, 20 Pick. (Mass.) 2; *Sherwin v. Mudge*, 127 Mass. 547; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 2; *Rapelye v. Mackie*, 6 Cow. (N. Y.) 2; *Outwater v. Dodge*, 7 Cow. (N. Y.) 1; *Kein v. Tupper*, 52 N. Y. 550; *Nesbitt v. Burry*, 25 Pa. St. 208; *Nicholson v. Taylor*, 31 Pa. St. 128; *Devane v. Fennell*, 2 Ired. (N. Car.) 36; *Hudson v. Weir*, 29 Ala. 294; *Beller v. Block*, Ark. 566; *Chamblee v. McKenzie*, Ark. 155; *Moffatt v. Green*, 9 Ind. 1; *Commercial Bank v. Gillette*, 90 Ind. 2; s. c., 46 Am. Rep. 222; *O'Keefe v. Klogg*, 15 Ill. 347; *Frost v. Woodruff*, Ill. 155; *Courtright v. Leonard*, 11 Iowa 32; *Cunningham v. Ashbrook*, 20 N. H. 553; *Obe v. Carson*, 62 Mo. 209; *Latham v. Eggleston*, 27 Mich. 324; *Marshall v. Hurlbut*, 9 Minn. 142.

**Intention of Parties to Govern.**—If it appears by the terms of the contract that it was the intention of the parties that title to the goods should pass before they were weighed, measured, etc., this intention will override the general rule, and effect will be given to it. *Graff v. Fitch*, 58 Ill. 373; *Chapin v. Potter*

**5. Condition Precedent to be Fulfilled by Purchaser.**—Where the buyer is by the contract bound to do anything as a condition, whether precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered to the possession of the vendee.<sup>1</sup> Thus where, in a contract of sale, it is agreed that the title to the property is not to vest in the purchaser until the price is fully paid, the title remains in the vendor until that event, though the property was delivered at the time; the payment is strictly a condition precedent and must be complied with before the title passes.<sup>2</sup> So where the payment for the goods is to be made in notes of the vendee or mortgages,

(N. Y.) 366; *Young v. Matthews*, 2 R. 2 C. P. 127; *Turley v. Bates*, 2 R. & Colt. 200.

**Delivery.**—Delivery to the buyer will vest the title though the goods sold are intended to be weighed, counted, or measured. *Macomber v. Parker*, 13 Mass. 175; *Cunningham v. Ashcroft*, 20 Mo. 555; *Haxall v. Willis*, 15 Va. 434. In *Macomber v. Parker*, Pick. (Mass.) 175, *Wilde, J.* said: "Where the goods are actually delivered, it shows the intent of the parties to complete the sale by delivery; and the weighing, or counting, or measuring afterwards would not be considered as part of the contract of sale, but would be taken to refer to the adjustment of the final settlement of the price. The sale would be as complete as a sale on credit before the actual payment of price."

**Separation, when Necessary.**—Where there is a sale of a specified quantity of goods from a mass identical in kind and form in value, a separation of the quantity sold is not necessary to pass the title where the intention of the parties that the property should pass by the contract of sale is clearly manifested; otherwise where the articles composing the mass are of different qualities and values, making a selection, and not merely a separation, necessary. *Hurff v. Hires*, 1 J. L. 581.

*1 Benj. on Sales* (4th Am Ed.) § 366. *Fosdick v. Schall*, 99 U. S. 250; *Page v. Stubbs*, 26 Me. 243; *Rogers v. Dehouse*, 71 Me. 222; *Luey v. Bundy*, 1 H. 298; *Holt v. Holt*, 58 N. H. 276; *Wicks v. Pike*, 60 N. H. 447; *Manwell v. Briggs*, 17 Vt. 176; *Root v. Lord*, 23 Vt. 568; *Burnell v. Marvin*, 44 Vt. 277; *Gill v. Railroad*, 3 Gray (Mass.) 545; *Went v. Metcalf*, 5 Gray (Mass.) 306; *Werner v. Puffer*, 114 Mass. 376; *Salomon v. Hathaway*, 126 Mass. 482; *Goodwin v. Fairbrother*, 12 R. I. 233; *Skelton*

*v. Manchester*, 12 R. I. 326, *Brown v. Fitch*, 43 Conn. 512; *Hine v. Roberts*, 48 Conn. 267; *Herring v. Hoppock*, 15 N. Y. 409; *Herring v. Willard*, 2 Sandf. (N. Y.) 418; *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500; *Cole v. Mann*, 61 N. Y. 1; *Boon v. Moss*, 70 N. Y. 465; *Cole v. Berry*, 42 N. J. L. 308; *Enlow v. Klein*, 79 Pa. St. 488; *Hartley v. Decker*, 89 Pa. St. 470; *Walsh v. Taylor*, 39 Md. 592; *Leavell v. Robinson*, 2 Leigh (Va.) 161; *Clayton v. Hester*, 80 N. Car. 275; *Vasser v. Buxton*, 86 N. Car. 335; *Bennett v. Sims*, 1 Rice (S. Car.) 421; *Talmadge v. Oliver*, 14 S. Car. 522; *Jowers v. Blandy*, 58 Ga. 379; *Boyd v. Loftin*, 34 Ga. 494; *Dudley v. Abner*, 52 Ala. 572; *Ketchum v. Brennan*, 53 Miss. 596; *Christian v. Bunker*, 38 Tex. 234; *Patton v. McCane*, 15 B. Mon. (Ky.) 555; *Vaughn v. Hopson*, 10 Bush (Ky.) 337; *Price v. Jones*, 3 Head (Tenn.) 84; *Sumner v. McFarlan*, 15 Kans. 600; *Fleck v. Warner*, 25 Kans. 492; *Carroll v. Wiggins*, 30 Ark. 402; *Sanders v. Keber*, 28 Ohio St. 630; *Forrest v. Hamilton*, 98 Ind. 91; *Bradshaw v. Warner*, 54 Ind. 58; *Van Duzor v. Allen*, 90 Ill. 499; *Bailey v. Harris*, 8 Clarke (Iowa), 331; *Moseley v. Shattuck*, 43 Iowa, 540; *Little v. Page*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 Mo. 24; *Wrangler v. Franklin*, 70 Mo. 659; *Fifield v. Elmer*, 25 Mich. 48; *Hunter v. Warner*, 1 Wis. 141; *McClelland v. Nichols*, 24 Minn. 176; *Putnam v. Lamphier*, 36 Cal. 151; *Aultman v. Mallory*, 5 Neb. 178; *Cardinal v. Edwards*, 5 Nev. 36.

**Waiver of Condition.**—One who has contracted to purchase personal property on credit, the title to remain in the vendor till payment, does not forfeit his rights by mere neglect to pay by the day named, as the vendor may waive his right to a forfeiture for a prior neglect to pay by seeking afterwards to collect the balance due. *Devoe v. Jamison*, 33 Mich. 94.

the title will not pass until the giving of the notes or execution of the mortgages.<sup>1</sup> Other examples are given in the note.<sup>2</sup>

**6. Where Payment and Delivery are to be Concurrent.**—When time of payment is specified at the making of the contract, the law presumes that the sale is for cash; and in such a case payment and delivery are immediate and concurrent acts, and the seller has an indisputable right to refuse to deliver without payment.<sup>3</sup> A sale for "cash on delivery" is a conditional sale, not vesting until the condition is complied with.<sup>4</sup>

But where, in a contract of sale of personal property, the title to the property was to pass to the purchaser upon his deposit of the purchase-money in a particular bank by a certain day, *held* that the refusal of the bank to receive the deposit was no excuse for non-performance of the condition. *Thompson v. Ray*, 46 Ala. 224.

**Intent of Purchaser.**—Upon the question of the validity of a sale made upon a condition as to payment, the condition not being performed, the intent of the purchaser to pay or not is immaterial, where no fraud is imputed to him, or where he testified that he had no intention of taking the goods, and it is not error to exclude an inquiry as to whether he intended to pay. *Jessop v. Miller*, 2 Abb. App. Dec. (N. Y.) 449.

1 *Congar v. Railroad*, 17 Wis. 477; *Thorpe v. Fowler*, 57 Iowa, 541.

2. When a contract for the sale of goods by its terms provides that the property is to be delivered "subject to the inspection of B. or others mutually satisfactory," neither party has the right to demand inspection by any other person unless B. neglects or refuses to act. The fact that B. is one of the sellers makes no difference. *Dustan v. Andrew*, 44 N. Y. 72.

The ownership of a building sold as personal property, to be removed within a reasonable time, reverts to the owner of the land if the building is not removed, and the purchaser cannot recover back the money paid for such building, as the right to remove it was a sufficient consideration for the purchase-money. *Shaw v. Carbrey*, 13 Allen (Mass.), 462.

An agreement in a bill of sale "that this sale is upon this express condition that said steamboat is not within ten years from — to be run," was held to be a condition and not a covenant, there being no engagement or promise on the part of the vendee. *Hale v. Finch*, 104 U. S. 261.

Where by the terms of a deed in trust to pay debts, the trustee is required to give notice to the bargainor of the time

and place of sale, the giving of such notice is in the nature of a condition precedent, and if such notice is not given the sale is void, and communicates no title to the purchaser. *Henderson v. Gallo*, 8 Humph. (Tenn.) 692.

**Rights of Conditional Vendee.**—Where a party bargained for a horse, but was to perform a condition precedent to the vesting of his title and right of possession, and failed to perform such condition, *held* that he could not maintain an action of trover for the value of the horse against a bailee who was to deliver the horse on the performance of such precedent condition. *Ferrier v. Wood*, 4 Ark. 85.

3. *Southwestern Freight Co. v. P.*, 45 Mo. 517; *Talmadge v. White*, 3 N. Y. Super. Ct. 219.

Where delivery and payment are concurrent acts, the promises of the parties are dependent and conditional, neither can maintain an action against the other for non-performance without showing an actual performance or tender of performance on his part. *Keller v. Upton*, 5 Duer (N. Y.), 336.

4. *Evansville, etc., R. Co. v. Erwin*, Ind. 457; *Lanman v. McGregor*, 94 Ind.

But in *Wabash, etc., R. Co. v. Shryver*, 9 Ill. App. 323, it is held that a sale for cash may or may not be conditional according to circumstances and the intention of the parties, and it is error to instruct a jury that in a sale for cash the property does not pass until the price is paid.

In a sale of chattels, when the price is to be paid on delivery to the purchaser, the title remains in the seller until delivery. And this is so even where a partial payment is made to bind the bargain if no credit is contemplated after the delivery. *Pierson v. Hoag*, 47 Barb. (N. Y.) 243.

In case of a sale for cash on delivery, the transfer of a bill of lading to the purchaser before payment, though ordinarily constituting delivery, does not divest the vendor's title. *Evansville, etc., R. Co. v. Erwin*, 84 Ind. 457.

**7. Partial Failure of Delivery.**—Under a contract for the sale and delivery of a certain number of articles or a certain quantity of merchandise, at a stipulated price and within an agreed time, the delivery of the whole is a condition precedent to the seller's right of action; the buyer is not required to receive less than the designated amount, and, until full performance, there can be no recovery by the seller.<sup>1</sup> But where there is a delivery of a portion only of the goods agreed to be furnished by a contract entire in its nature and providing one gross sum for the whole, and the vendee accepts and appropriates them so as to derive a benefit therefrom, the vendor is entitled, in a proper case, to recover the reasonable worth of the goods delivered, not exceeding the contract price, subject to the vendee's right to recoup damages for breach of the contract.<sup>2</sup>

**8. Instalment Sales.**—Where goods are to be sold and delivered in instalments at fixed periods, default by the purchaser in accepting and settling for an instalment will relieve the vendor from forwarding subsequent instalments; and default on the part of the vendor in sending the first instalment will relieve the purchaser from his obligation in taking the other instalments.<sup>3</sup> A contract to build a vessel according to specifications, and to deliver it completed at a place designated before a day certain, for which payments are to be made as the work progresses, vests no title in the vendee until after the completion and delivery of the vessel.<sup>4</sup>

**Effect of Delivery.**—Where the agreement is that goods are to be paid for in cash on delivery, and the goods are delivered, the sale is complete whether the payment is made or not. *Warder v. Over*, 51 Iowa, 491. Compare *Dudley Sawyer*, 41 N. H. 326.

But where goods are sold for cash, and the seller delivers them to the buyer on faith of his paying cash for them, and immediately demands the cash, and the buyer refuses to pay, the delivery is an absolute but a conditional delivery, and if the buyer refuses to perform the condition, no property in the goods passes to him. *Refining Co. v. Miller*, 7 Phila. 97; *Harding v. Meitz*, 1 Tenn. Ch. 610. Where goods have been purchased for cash, which, by a custom of trade, is understood to mean payment at not ten days after the purchase, the contract imports that the delivery is qualified and that the property in the goods does not pass until payment. *Dous v. Johnston*, 28 Barb. (N. Y.) 393.

*Rockford, etc., R. Co. v. Lent*, 63 Ill. 288; *Smith v. Lewis*, 40 Ind. 98; *Ant v. Lyon*, 49 N. Y. 552; *Timmons v. Nelson*, 66 Barb. (N. Y.) 594.

Where there is a contract of sale of a certain quantity of goods to be shipped on the name of the vessel to be given as

soon as received, and the quantity is increased in the shipment and on notice accepted, the purchaser may refuse to accept delivery of less than the increased quantity, and by other shipments than that stated. *Salamon v. Boykin*, 23 Repr. (Md.) 366.

2. *Wilson v. Wagar*, 26 Mich. 452; *Flanders v. Putney*, 58 N. H. 358; *Matthews v. Holby*, 48 Barb. (N. Y.) 167.

But this right is an innovation upon the common law and is based on equity, and it should never be allowed to a vendor who wantonly or in bad faith refuses to perform his contract. *Wilson v. Wagar*, 26 Mich. 452.

3. *Hoare v. Remie*, 5 H. & N. 19; *Houck v. Miller* L. R. 7 Q. B. 92; *Phillips Co. v. Seymour*, 91 U. S. 646; *Dwinell v. Howard*, 30 Me. 258; *King Phillip Mills v. Slater*, 12 R. I. 82; *Reybold v. Voorhees*, 30 Pa. St. 116; *Hartje v. Collins*, 46 Pa. St. 268; *Robson v. Bohn*, 27 Minn. 333.

4. *Forsyth v. Dickson*, 1 Grant (Pa.), 26; *Edwards v. Elliott*, 36 N. J. L. 449; *Andrews v. Durant*, 11 N. Y. 35; *Mixer v. Howarth*, 21 Pick. (Mass.) 205; *Williams v. Jackman*, 16 Gray (Mass.), 514; *Green v. Hall*, 1 Houst. (Del.) 506. Compare *Wood v. Russell*, 5 B. & Ad. 942; *Clarke v. Spence*, 4 Ad. & E. 448.

Where the sale is conditional, and title is to remain in the vendor until the price is fully paid, any partial payments that may have been made are forfeited and irrecoverable by the buyer upon the latter's default in paying the residue.<sup>1</sup>

**9. Sales "To Arrive."**—A sale to arrive is conditional, and if the article do not arrive, as contracted for, either from the ship's being lost or other cause, the contract is at an end.<sup>2</sup>

In *Andrews v. Durant*, 11 N. Y. 35, A agreed by contract to build for B a vessel of certain dimensions and to deliver it finished on a day designated for \$5000, of which the sum of \$3000 was to be paid at specified stages of the work, and \$2000 when it was completed and delivered, the workmanship and materials to be inspected as the work progressed and to be approved by the superintendent of B, which was done. Held, that B had no property in the vessel until it was completed.

1. 1 Benj. on Sales (4th Am. Ed.), § 429 et seq.; *Fleck v. Warner*, 25 Kans. 492; *Seré v. McGovern*, 65 Cal. 244; *Angier v. Taunton Paper Co.*, 1 Gray (Mass.), 621; 2 C., 61 Am. Dec. 436; *Colcord v. McDonald*, 128 Mass. 470; *Knox v. Perkins*, 15 Gray (Mass.), 529; *Brown v. Haynes*, 52 Me. 578; *Everett v. Hall*, 67 Me. 497; *Duke v. Shackelford*, 56 Miss. 552; *Haviland v. Johnson*, 7 Daly (N. Y.), 297; *Singer Mfg. Co. v. Treadway*, 4 Brad. (Ill.) 57; *Latham v. Sumner*, 89 Ill. 233. Compare *Preston v. Whitney*, 23 Mich. 260; *Johnson v. Whittemore*, 27 Mich. 463.

In a *New York* decision it is said that where, in a case of conditional sale, the seller claims that the amount already paid is forfeited by the failure of the buyer to pay one of the instalments when due, it is his duty to inform the buyer of such claim, in order that the latter may pay or tender such amount. *Cushman v. Jewell*, 14 N. Y. Supreme Ct. 525.

**Forfeiture prevented by Statute.**—Whenever personal property is sold or delivered on a conditional sale or lease, an agreement that it shall remain the property of the vendor until payment is made or other condition performed, it is, in two States (Ohio and Missouri), made unlawful for the vendor or lessor to take possession or seize the property without refunding the sums actually paid by the lessee, less a reasonable compensation for use, in no case exceeding twenty-five per cent (in Ohio fifty per cent) of such sums paid, and for actual breakage or damage. *Ohio*, act of 1885, p. 239, § 2; *Missouri*, Rev. Stat. 1879, § 2508.

**Waiver of Forfeiture.**—If the seller, re-

taining title to property delivered on conditional sale, permits the buyer to retain possession and receives payment after the default, this operates as a waiver of the forfeiture. *Hutchings v. Mager*, 41 N. Y. 155; *Cushman v. Jewell*, 7 Hun (N. Y.), 525; *Taylor v. Finley*, Vt. 78; *Blair v. Hamilton*, 48 Ind. Compare *Hegler v. Eddy*, 53 Cal. 59.

A forfeiture in the sale of personal property waived where the seller, after default, makes a new contract with the buyer and others, and receives from them all past due instalments. *Hill v. Towns*, 69 Ala. 286.

2. *Shields v. Pettee*, 2 Sandf. (N. Y.) 262; *Benedict v. Field*, 4 Duer (N. Y.) 154; *Hooper v. Railroad*, 27 Wis. 81.

But a sale of an invoice of sugar ordered to board the vessel at the time, "more or less, to arrive on or before the first of August, to be of current quality," is an absolute sale and not a conditional sale. *Havemeyer v. Cunningham*, 35 B. (N. Y.) 515.

**Sales to Arrive—Effect of Different Terms.**—"A vendor may bind himself absolutely to deliver goods 'on arrival' of a particular ship by a contract to that effect. Whether delivery is conditional on the goods being on the ship, is to be determined by the construction of the particular contract. If I say that goods 'are now on passage' by a particular ship, and engage to deliver the goods on arrival of the ship, this is a warranty that the goods are on board, and makes me liable for the goods when the ship arrives. *Gorriessen v. Perrin*, 2 C. E. S. 681. And a contract to deliver goods 'on arrival' of a particular ship is an absolute engagement to deliver the goods when the ship arrives, so that the vendor is liable in case of the goods not coming in the ship. *Hale v. Rawson*, 4 C. E. N. S. 85. On the other hand, a vendor may avoid a warranty by using the terms 'expected to arrive by,' or even 'to arrive by,' or 'on arrival by' a particular ship, and in such case the delivery will be dependent not only on the arrival of the ship, but on the arrival of the goods on board. *Boyd v. Siffert*, Camp. 326; *Idle v. Thornton*, 3 C.



**Contract of "Sale or Return."**—Where goods are sold under a contract of "sale or return," the property passes to the purchaser subject to an option in him (condition subsequent) to return them within the fixed time, or within a reasonable time, if none is designated.<sup>1</sup> And where the contract provides that an article agreed to be sold (or to be manufactured for the vendee) shall be satisfactory to the purchaser, he cannot be required to take it because he ought to be satisfied with it; it must be in fact satisfactory to him or he is not bound to pay for it.<sup>2</sup> Under a contract of this character, if

*Novatt v. Hamilton*, 5 M. & W. 639. Vendor is not liable, on such a contract, where the goods intended to have been sold were not shipped, though others of similar character, consigned to the vendor, but sold to other parties, were on the same ship. *Smith v. Myers*, 5 Q. B. 429. Nor where goods of same class were shipped, but consigned to another person. *Gorrissen v. ...*, 2 C. B. N. S. 681. Nor where goods were on the ship, belonging to the vendor and unsold, but substantially different. *Vernede v. Weber*, 1 H. & N. 1. *Wharton on Contr.* § 563. Goods were sold to arrive by a certain date and to be paid for at the market on the paper of L. B., whom both parties supposed to be solvent, without reserve. Before the ship arrived L. B. died. *Held*, that the vendor was not bound to deliver the goods upon a substituted tender of the notes, though they were not entirely worthless. *Benedict v. ...*, 16 N. Y. 595.

**Caveat Emptor does not Apply.**—Where merchandise is sold to arrive, and the vendor has not on hand and neither party can inspect, it would be contrary to sound morality and public policy to enforce the doctrine of *caveat emptor* and compel the purchaser to pay for goods of an unmerchantable quality. The first principle of the civil law, *caveat venditor*, should be applied in such cases. *Wright v. Wall*, 35 N. Y. Super. Ct. 108. *Loss v. Sweet*, 3 Engl. Law & Eq. 205. *Perkins v. Douglas*, 7 Shep. (Me) 10. *Hotchkiss v. Higgins*, 52 Conn. 205; 12 Am. Rep. 582; *Schlesinger v. ...*, 9 R. I. 578; *Jameson v. Gregory*, 10 Ky. 363.

Where an article is sold on the condition that it may be returned if it does not correspond with a warranty, and the article is returned and accepted unconditionally by the vendor, the contract is terminated and the vendor cannot recover the price. *Manny v. ...*, 15 Wis. 50.

**Verment** it is thought that in a sale, the contract is not terminated. *3 C. of L.*—28

what is termed giving a refusal to a party who may take the article or not within a certain time, unless upon some other consideration or under seal, is not a valid contract in law, for want of consideration. *Faulkner v. Hebard*, 26 Vt. 452.

**Vendee's Risk.**—If the property is lost or accidentally destroyed before the purchaser has exercised his option in the matter of returning it, he must bear the loss, and the seller can recover the price. *Carter v. Wallace*, 32 Hun (N. Y.) 384. Compare *Pierce v. Cooley*, 20 Repr. (Mich.) 83.

*Silsby Mfg. Co. v. Chico*, 24 Fed. Repr. 893; *McCarren v. McNulty*, 7 Gray (Mass.) 139; *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Gibson v. Cranage*, 39 Mich. 49; *Gray v. Railroad*, 11 Hun (N. Y.) 70; *Heron v. Davis*, 3 Bosw. (N. Y.) 336; *Wood Reaper Co. v. Smith*, 50 Mich. 565; s. c., 45 Am. Rep. 57; *Grant v. Burch*, 26 Hun (N. Y.) 376.

**Buyer Must be in Fact Dissatisfied.**—Under such a contract, the buyer cannot get rid of his obligation by merely declaring the article not to be satisfactory to him when it really is. *Silsby Mfg. Co. v. Chico*, 24 Fed. Repr. 893.

Where the purchaser of a machine took it upon trial, and was to pay for it if he liked it and to return it to the vendor if he did not like it, it was held that he was bound to bring to the trial of it honesty of purpose and judgment according to his capacity. *Hartford Mfg. Co. v. Brush*, 43 Vt. 528. But compare the cases cited above.

One who buys a machine with election to return it and receive back the price in case it does not "prove to be suited to his purpose and entirely satisfactory in all respects," is not bound to give notice of dissatisfaction or opportunity to remedy the difficulty, and after return and demand may maintain an action for the price, although the seller manages to make it work well without alteration. *Aiken v. Hyde*, 99 Mass. 183.

One bought a fanning mill with a re-



the article is not returned, or the dissatisfaction of the buyer manifested within a reasonable time, or within the time agreed upon, the sale becomes absolute, and the price may be recovered in an action for goods sold and delivered.<sup>1</sup> A sale of personal property on condition that the vendee may return the article in a specified time becomes absolute if the vendee so misuse the property during that time as materially to impair its value.<sup>2</sup>

**11. Rights and Remedies of Conditional Vendor.**—The vendor of a conditional sale, upon breach of condition, may sue for the price or may bring replevin against the purchaser or his alienee for the goods.<sup>3</sup> If he has reserved the right to retake the property on default, or on deeming himself insecure, he has an implied irrevocable right of entry, and is not liable in trespass for retaking the goods.

Where the vendee is allowed until the end of the year to determine whether the conditional sale shall become absolute, he may make his election at any time before the expiration of the year, and is not confined to the last day of the year. *Reese v. Beck*, 24 Ala. 651.

**1. Moss v. Sweet**, 3 Engl. Law & Eq. 311; *Jameson v. Gregory*, 4 Metc. (Ky.) 363; *Jones v. Wright*, 71 Ill. 61.

**Reasonable Time.**—Where a sale is made conditioned on the article sold being satisfactory to the buyer, and no time is fixed within which the buyer is to manifest his approval or disapproval, he must do so within a reasonable time or the sale becomes absolute. *Hickman v. Shimp*, 20 Repr. (Pa.) 345; *Washington v. Johnson*, 7 Humph. (Tenn.) 468; *Quinn v. Stout*, 31 Mo. 160; *Spickler v. Marsh*, 36 Md. 222.

What is a reasonable time is generally a question of fact for the jury. *Washington v. Johnson*, 7 Humph. (Tenn.) 468.

Fifteen years is held to far exceed the reasonable time allowed a purchaser to accept an optional contract. *Cooper v. Carlisle*, 2 Green (N. J.) 525.

Where a cotton-gin was taken upon trial in the spring of the year, with an agreement to purchase if it answered its purpose, and notice was sent in October following by the party who took it that he would not keep it, *held*, that he had made his election seasonably. *Hall v. Meriwether*, 19 Tex. 224.

**Time Fixed by Contract.**—If the time within which the purchaser must exercise his option be designated in the agreement, he will make the sale absolute by retaining the property beyond that time. *Prairie Farmer Co. v. Taylor*, 69 Ill. 440; *Moore v. Piercy*, 1 Jones (N. Car.) 131; *Johnson v. McLane*, 7 Blackf. (Ind.) 501.

**2. Ray v. Thompson**, 12 Cush. (Mass.) 281.

**3. Salomon v. Hathaway**, 126 Mass. 482; *Brown v. Haynes*, 52 Me. 493; *Keitt v. Counts*, 15 S. Car. 493.

Where a sale is made upon credit on condition that security be given, and the purchaser takes the property without giving the security, an action for the price will lie before the term of credit expires. *Rice v. Andrews*, 32 Vt. 61.

**4. McClelland v. Nichols**, 24 Mass. 176; *Walsh v. Taylor*, 39 Md. 308; *Matthews v. Lucia*, 55 Vt. 308.

But such a right does not authorize the seller to enter the buyer's premises by force and violence, for the purpose of retaking the goods, nor surreptitiously in his absence. *Van Wren v. Flynn*, 1 La. Ann. 1158; *Drury v. Hervey*, 10 Mass. 519; *Churchill v. Holbert*, 10 Mass. 42.

Where, after a sale of machinery upon condition that the same should remain the property of the seller until full payment, the same was so affixed to the buyer's mill that it could not be removed without material injury to the mill, *held*, that the seller might enforce a lien on the buildings for the amount remaining due under the contract. *Cooper v. Cleghorn*, 50 Wis. 113.

A chattel was sold on installment, title to remain in the seller until full payment, and the agreement providing that the chattel should be kept at a certain place and should not be removed therefrom without the seller's written consent. The requisite consent to its removal

may also recover damages for injury to the chattels, although not entitled to the possession thereof at the time of the injury.<sup>1</sup> And if a sale is merely conditional, or by way of security, the seller retains an interest which is subject to levy and sale on execution.<sup>2</sup> Where an animal is sold on condition that it shall remain in the vendor's property until the payment of the price, its natural increase accruing before the performance of the condition belongs to the vendor.<sup>3</sup>

**2. Waiver of Conditions.**—Where goods are sold on condition of being paid for on delivery, and a delivery is made without exact performance of the condition, or anything being said or done to show an intention that the delivery should not be considered complete, the presumption is that the condition is waived.<sup>4</sup> But this presumption may be controlled and explained by extraneous evidence, and it is a question for the jury upon all the evidence whether the delivery was or was not subject to the condition.<sup>5</sup> The acceptance of past due instalments, where payment is to be made in that manner, will also amount to a waiver of any forfeiture that may have previously accrued.<sup>6</sup> But a mere mental

whether certain place was given. *Held*, this did not authorize a second removal to still another place. *Gibbons v. Duke*, 37 Hun (N. Y.), 576.

*Kent v. Buck*, 45 Vt. 18.

*McMillan v. Larned*, 41 Mich. 521;

*rett v. Hall*, 67 Me. 497.

*Clark v. Hayward*, 51 Vt. 14; *Buck-*

*er v. Smith*, 22 Vt. 203; *Allen v.*

*no*, 55 Me. 113; *Stewart v. Hall*, 33

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*Smith v. Lynes*, 5 N. Y. 41; *Cald-*

*v. Bartlett*, 3 Duer (N. Y.), 341;

*Dequin v. Sands*, 25 Wend. (N. Y.)

*Marston v. Baldwin*, 17 Mass. 606;

*h v. Dennie*, 6 Pick. (Mass.) 262;

*ow v. Ellis*, 15 Gray (Mass.), 229.

*Sage v. Sleutz*, 23 Ohio St. 1.

that a chattel to be delivered on

ment part in cash and part in

was delivered without asking for

payment, is presumptive evidence of

waiver of the condition and of an im-

mediate vesting of title in the vendee.

*v. Owen*, 9 Wis. 152.

*Farlow v. Ellis*, 15 Gray (Mass.),

*Seed v. Lord*, 66 Me. 580.

goods are sold on the condition that

shall be paid for by the promissory

note of the purchaser "satisfactorily in-

duced" by a third person, the taking of

note by the seller without an indorse-

ment on the promise of the purchaser

the indorsement shall be furnished,

making no subsequent demand for

indorsement, and failure to return

note, do not, as matter of law,

amount to a waiver of the condition. *Kenney v. Ingalls*, 126 Mass. 488.

**Custom of Trade.**—Proof is admissible of a custom among merchants, where merchandise is sold on condition, to deliver it to the buyer before compliance with the condition, and that such change of custody is not *de facto* a waiver of the condition, and the property does not pass thereby. *Farlow v. Ellis*, 15 Gray (Mass.), 229; *Fleeman v. McKean*, 25 Barb. (N. Y.) 474; *Bauendahl v. Horr*, 7 Blatchf. (U. S. Cir.) 548.

Where, upon a conditional sale, the property is delivered to the purchaser without a compliance with the condition being insisted on at the time, yet if it is insisted on immediately afterwards, when a bill of sale is rendered, and the vendee fully recognizes and acknowledges the condition as still subsisting and binding upon him, this is sufficient to uphold the condition. *Draper v. Jones*, 11 Barb. (N. Y.) 263.

8. Upon a conditional sale of a boat it was agreed that the purchaser should have possession, but if default should be made in the payment of any of the notes given for the purchase-money, the seller might retake possession of the boat. After the last note became due, although the purchaser had failed to make all the payments, he was allowed to retain possession, and the seller afterwards received a partial payment. *Held*, that this was an asset by the seller to delay in making payment and a waiver of his right to enforce forfeiture and a recogni-

determination to rest satisfied with the non-performance of the condition, not procured by the vendee nor notified to him, will not operate as a waiver of such condition so as to vest the property in the article sold in the vendee.<sup>1</sup>

**18. Rights of Third Parties.**—It is the general doctrine of the American cases that where, by a contract for the sale of personal property, the title remains in the seller until full payment, and the purchaser acquires merely the possession with the right to inventory himself with title at a future time by payment of the stipulated purchase-money, the vendee cannot confer a title by sale and transfer of the property, even to a *bona fide* purchaser in good faith and without notice of the original vendor's claim to the property. But this position is not universally acceded to, and there are many cases holding that where chattels are sold and delivered conditionally, the vendor's right to the property will remain good against the vendee and his voluntary assignee, but not as against

third parties. The purchaser to acquire title by payment of the residue of the purchase money, and a tender by the purchaser of the amount due, under the circumstances, discharged all lien or claim of title to the property by the seller. *Hutchings v. Munger*, 41 N. Y. 155; and see *Cushman v. Jewell*, 7 Hun (N. Y.), 525; *Taylor v. Finley*, 48 Vt. 78; *Blair v. Hamilton*, 48 Ind. 32. Compare *Hegler v. Eddy*, 53 Cal. 597.

1. *Maxwell v. Briggs*, 17 Vt. 176.

2. *Harkness v. Russell* (U. S. Sup. Ct. Nov. 8, 1886), 23 Repr. 65; *In re Binford*, 17 Nat. Bank. Reg. 353; *Brown v. Haynes*, 52 Me. 578; *Everett v. Hall*, 67 Me. 497; *McFarland v. Farmer*, 42 N. H. 386; *King v. Bates*, 57 N. H. 446; *Gray v. Stevens*, 28 Vt. 1; *Duncan v. Stone*, 45 Vt. 118; *Coggill v. Railroad*, 3 Gray (Mass.), 545; *Deshon v. Bigelow*, 8 Gray (Mass.), 159; *Burbank v. Crooker*, 7 Gray (Mass.), 158; *Carter v. Kingman*, 103 Mass. 517; *Benner v. Puffer*, 114 Mass. 376; *Lucas v. Birdsey*, 41 Conn. 357; *Brown v. Fitch*, 43 Conn. 512; *Dous v. Dennistoun*, 28 Barb. (N. Y.) 393; *Ballard v. Burgett*, 40 N. Y. 314; *Walker v. Mitchell*, 25 Hun (N. Y.), 527; *Kenny v. Planer*, 3 Daly (N. Y.), 131; *Wescott v. Tilton*, 1 Duer (N. Y.) 53; *Austin v. Dye*, 46 N. Y. 500 (compare New York cases cited in next note); *Cole v. Berry*, 42 N. J. L. 308; s. c., 36 Am. Rep. 511; *Clayton v. Hiester*, 80 N. Car. 275; *Guilford v. McKinley*, 61 Ga. 230; *Ketchum v. Brennan*, 53 Miss. 596; *Duke v. Shackelford*, 56 Miss. 552; *Sumner v. Woods*, 67 Ala. 139; s. c., 42 Am. Rep. 104; *Fairbanks v. Eureka Co.*, 67 Ala. 109 (overruling *Sumner v. Woods*, 52 Ala.

94; *Dudley v. Abner*, 52 Ala. 50; *Case v. Jennings*, 17 Tex. 661; *Holmes v. Molin*, 5 Cold. (Tenn.) 482; *Hall v. Draper*, 20 Kans. 137; *Sanders v. Keane*, 28 Ohio St. 630; *Lanman v. McGree*, 94 Ind. 301; *Hodson v. Warner*, 60 Iowa 214; *Baker v. Hall*, 15 Iowa, 277; *Palmer v. Catherwood*, 36 Mo. 479; *Sumner v. Cottey*, 71 Mo. 121; *Couse v. Tregel*, 11 Mich. 65; *Whitney v. McConnell*, 11 Mich. 12; *Aultman v. Mallory*, 5 Mich. 178; *Singer Co. v. Graham*, 8 Oreg. 178; *Kohler v. Hayes*, 41 Cal. 455; *Hobbs v. Zugbaum*, 5 Mont. 344; s. c., 36 Am. Rep. 59; *Warner v. Roth*, 2 Wyo. 63.

**Conflict of Laws.**—Where there is a sale of an article on instalments, to come the property of the purchaser on payment of the purchase price, though the contract is made in Pennsylvania, the law of which State a purchaser takes title to it from the conditional vendee, yet if the article is sold by the vendee in New Jersey, the law of the latter jurisdiction will apply, and the purchaser will take only the title of the purchaser, and the vendor's title will fail. *Marvin Safe Co. v. Norton*, 10 Repr. (N. J.) 243.

**Effect of Seller's Laches.**—A conditional vendor, entitled by his contract to retake the property in case of default, broken, loses his right as against a bona fide purchaser who buys from the conditional vendor without notice of the condition, if the seller is guilty of laches in asserting his right, or if his conduct has been such as to waive performance of the condition. *Robbins v. Phillips*, 10 Mo. 100.

*bona fide* purchaser without notice.<sup>1</sup> It is in general held that a sale and delivery of a chattel on condition that the title shall remain in the vendor until payment of the price, vests no title in the purchaser before such payment which can be taken and sold on execution against the vendee.<sup>2</sup>

1. *Wait v. Green*, 36 N. Y. 556; *Steel v. Singer*, 2 Hilt. (N. Y.) 96; *Western Trans. Co. v. Marshall*, 37 Barb. (N. Y.) 509; *Hall v. Hinks*, 21 Md. 406; *Old Dominion S. S. Co. v. Burckhardt*, 31 Gratt. (Va.) 644; *Carnall v. Clark*, 27 Ark. 500; *Brundage v. Camp*, 111 Ill. 330.

In *Hall v. Hinks*, 21 Md. 406, it is held that the supposed distinction between a sale and delivery of goods on condition, where the condition is not performed, and a sale and delivery procured by fraud, does not in reality exist as between the parties to the original contract; the vendee no more acquires the title in the latter case than in the former. As to these cases the principle that "a party having no title to property can pass none to others" does not apply.

**Distinction Taken in Pennsylvania.**—In Pennsylvania, as already stated (§ 3 of this article), the courts draw a distinction between sales under an agreement that the title shall not pass until the vendee pays the full price, and "bailments for use," coupled with an agreement whereunder the lessee may subsequently become owner of the property upon payment of stipulated price. As to creditors and purchasers, the latter species of contract is good, while the former is invalid. *Forrest v. Nelson*, 19 Repr. (Pa.) 380; *Chamblain v. Smith*, 44 Pa. St. 431; *Rowe v. Sharp*, 51 Pa. St. 26; *Crist v. Kleber*, 52 Pa. St. 290; *Enlow v. Klein*, 79 Pa. St. 488.

**Conditional Sales called "Leases."**—In several cases hold that, notwithstanding the parties to a contract for the transfer of personal property speak of it in the contract as "rented," and call the instalments to be paid "rent," to prevent the title from passing until payment in full has been made, yet if all the circumstances show that a sale was intended and the stipulated payments were really purchase-money, one who has in good faith bought and paid for the thing from the buyer, in ignorance that the latter has not yet paid in full, and in reliance on his possession and apparent ownership, will get a good title. *Greer v. Church*, 13 Bush (Ky.), 430; *Domestic M. Co. v. Anderson*, 23 Minn. 57; *Adfeldt v. Huntsman*, 92 Pa. St. 53; s. c. 37 Am. Rep. 661.

**Where Conditional Sales are Treated as Chattel Mortgages.**—"Since the enactment in most of the States of acts rendering chattel mortgages void as against the creditors of or *bona fide* purchasers from the mortgagor, unless filed or recorded, many decisions have been made holding conditional contracts of the class now under consideration to be chattel mortgages. This opinion is gaining ground, having been lately adopted by the United States Supreme Court." 1 *Benj. on Sales* (4th Am. Ed.), § 452, citing *Hervey v. Locomotive Works*, 93 U. S. 664; *Heryford v. Davis*, 102 U. S. 235; *Herring v. Hoppock*, 15 N. Y. 409; *Murch v. Wright*, 46 Ill. 487; *Hart v. Barney*, 7 Fed. Repr. 543.

Where one buys a chattel conditionally, and obtains possession by fraudulent representations and then sells to an innocent purchaser, the title vests in the latter. *Vaughn v. Hopson*, 10 Bush (Ky.), 337.

An owner of merchandise who, by intrusting it to a purchaser on a conditional sale, enables the purchaser to ship it and obtain a negotiable bill of lading, loses his title to the merchandise as against a *bona fide* purchaser or pledgee for value of the bill of lading. *Rawls v. Deshler*, 4 Abb. App. Dec. (N. Y.) 12.

2. *Blanchard v. Child*, 7 Gray (Mass.), 155; *Armington v. Houston*, 38 Vt. 448; *Bigelow v. Huntley*, 8 Vt. 151; *Cole v. Berry*, 42 N. J. L. 308; s. c. 36 Am. Rep. 511; *Thompson v. Walker*, 2 McCrary (U. S. Cir.), 33; *Piser v. Stearns*, 1 Hilt. (N. Y.) 86; *City Bank v. Tufts*, 63 Tex. 113. And see, generally, citations in the two preceding notes. Compare *Brunswick & Balke Co. v. Hoover*, 95 Pa. St. 508; *Heppe v. Speakman*, 7 Phila. (Pa.) 117; *Sinker v. Comparet*, 62 Tex. 470.

**Mortgage by Vendee.**—A sells furniture to B with the condition that the property shall remain in A until payment. B takes it into another county and mortgages it to C without notice. *Held*, that A's title overrides the claim of the mortgagee. *Goodwin v. May*, 23 Ga. 205; *Winchester v. King*, 46 Mich. 102.

**Authorities for Conditional Sales.**—*Benjamin on Sales*; *Blackburn on Sales*; *Langdell's Leading Cases on Sales*; *Story on Sales*; *Usher on Sales*; *Parsons on Contracts*; *Wharton on Contracts*;

**CONDITIONS.** See various titles.

**CONDONATION.** See DIVORCE.

**CONDUCT.**—Mode of action ; behavior.<sup>1</sup>

**CONFEDERACY** is when two or more combine together to do any damage or injury to another, or to do any unlawful act.<sup>2</sup> (See also CONSPIRACY.)

**CONFEDERATE MONEY.** See MONEY.

<sup>1</sup> Smith's Leading Cases (8th Ed.), 33, 34; 30 Am. Law Register, 224; 15 Am. Law Review, 380, on "Conversion by Purchase."

1. Where the main asset of a bankrupt was a reversionary interest under his father's will, contingent on his surviving his mother, and the trustee found that he could sell the bankrupt's interest if the purchaser could obtain a policy of insurance on the bankrupt's life, but the bankrupt refused to undergo a medical examination for the purpose of the insurance, it was held that such refusal, however unreasonable, is not "conduct" which the court can take into consideration on his application for his discharge; because said Lord Esher, M. R., "the examination required would not be in relation to any property of the bankrupt as it is, but to add a new value to it. When that value is added the trustee desires to sell the property of the bankrupt as so increased in value. If we allowed this appeal we should be overruling *In re Garnett*, 55 Law J. Rep. Q. B. 77, because if it is misconduct not to do this act, an order might be made to do it; but in my opinion that case was rightly decided, and Mr. Justice Cave arrived at his decision on the same ground as I do." *In re Betts*, 56 Law J. Rep. Q. B. N. S. 370; 2 C. 4 Bankr. Rep. 170.

**Right of Fishery as it has Heretofore been Conducted**—Where in a deed a grant is made of "our right and privilege of the fishery as it has heretofore been conducted," and a wharf was erected by an adjoining owner, B, whose grantor had originally conveyed the whole tract without reference to any servitude in B's deed, and subsequently conveyed to C the adjoining land to B's, with the right of fishery, covering in extent all of B's water-front, and C had afterwards, but prior to the erection of the wharf, conveyed by a deed containing the above language to D, who after said erection brought suit for damages against B, it was held that the language "as has heretofore been conducted" referred only to the manner in which the fishery was con-

ducted, and had no necessary relation to the extent thereof, and that also there was no such ambiguity in the grant as required extrinsic evidence of its extent. Paxson, J., saying: "The rule which allows extrinsic evidence to explain the intent of the subject sold has no application when a subject-matter exists which satisfies the terms of the instrument of conveyance. *Harvey v. Vandegrift*, 89 Pa. St.

**Conducting Actions or Suits.**—Where a borough council passed a resolution prescribing the duties of a town clerk, among which was the duty to "act as the professional adviser of the mayor and council in the business of the council," and that he should be paid the usual professional charges for conducting actions or suits at law or in equity, preparing leases, conveyances, and mortgages, and all charges for travelling, etc.; and the town clerk, having been subsequently appointed, was directed by the finance committee to prepare a bill of indemnity to the overseers of a township which had resisted the payment of a borough rate, and whose overseers had intimated that they would pay nothing except under legal obligation, the council had directed said committee to take proper proceedings to enforce payment and maintain the rate, and necessary give above bonds; and in performance the clerk attended conferences in London and went to various expenses sent in a bill,—the committee paid. It was held on *certiorari* that charges, so far as they regarded the direct course of the dispute, might properly be paid to the corporation, as not exceeding salary given for the performance of the ordinary duties of town clerk; and that charges were payable out of the fund, that the committee were directed to make the order. Reg. 1 B. 44.

<sup>2</sup> *State v. Crowley*, 41 Wis. 2d; *Watson v. Harlem & N. Y. Navigation Co.*, 52 How. Pr. (N. Y.) 353.

# CONFESSIONS.

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1. **Definition.**—A confession is a person's admission or declaration of his agency or participation in a crime, and is restricted to acknowledgments of guilt.<sup>1</sup> It must relate to a past or present state of facts.<sup>2</sup>

Confessions may be by acts as well as by words.<sup>3</sup>

1. *People v. Le Roy*, 4 Pac. Repr. (Cal.) 649; *People v. Velarde*, 59 Cal. 457.  
 A confession is rather a fact to be proved by evidence, than evidence to prove a fact. It is not so much proof of a particular thing took place, as it is a waiver by the party charged of his right to have certain facts alleged against him technically proved. *Whar. Cr. Ev.* (9th Ed.) § 623.  
 A confession of guilt is a direct admission of the criminal act, not of acts from which such criminal act may be inferred. *People v. Red* 53 Iowa, 69. See *Bergen v. People*, 17 Ill. 427; *s. c.*, 65 Am. Dec. 2. *People v. Parton*, 49 Cal. 632; *Waser v. State*, 55 Ga. 325.  
 A plea of guilty is an admission in the most solemn form. *Com. v. Ayers*, 115 Mass. 137.  
 A confession is not destroyed by a subsequent denial. *Jones v. State*, 13 Tex. 168.  
 Torture to extort confession is indictable

at common law. *State v. Hobbs*, 2 Tyler (Vt.), 388.

"In our law the term 'admission' is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term 'confession' being generally restricted to acknowledgments of guilt." *Greenleaf's Ev.* (14th Ed.) § 170.

2. *Whar. Cr. Ev.* (9th Ed.) § 624; *State v. Cox*, 65 Mo. 29.

3. *Whar. Cr. Ev.* (9th Ed.) § 683; *Russell v. Miller*, 26 Mich. 1; *Readman v. Conway*, 126 Mass. 374; *McGrath v. N. Y.*, etc., R. Co., 63 N. Y. 522.

In *Nolen v. State*, 14 Tex. App. 474, 484, the court said: "Suppose a prisoner charged with murder is asked the question 'Are you guilty of murder?' and instead of saying 'I am' he makes an affirmative movement of his head. Would this movement of the head be admissible evidence, while his confession by words would be inadmissible? Suppose he were told,

**2. Ground of Admissibility.**—The confessions of prisoners are received in evidence upon the same principle upon which admissions in civil suits are received, viz., the presumption that a person will not make an untrue statement against his own interest.<sup>1</sup>

"You murdered the deceased; you crushed in his head with an axe; you dragged him into yonder thicket and left him, after having robbed him," and in response to this charge the prisoner had not uttered a word, but had nodded his head in assent to the truth of the same; will it be contended that the *act* of nodding his head, because it is an *act* and not a statement or declaration, is competent evidence against him, when, if he had confessed the charge by *words*, such confession would have been excluded? We are unable to perceive the reason of the rule which admits the *acts* while it excludes the *words*. *Acts*, it is said, speak louder than *words*, and this being generally true, they should be regarded as confessions, as much so as words, and the law does so regard them. *Acts* are but a kind of language, expressing the emotions and thoughts of the person performing them, more forcibly and convincing sometimes than words, but still, like words, only a medium through which the inward feelings, thoughts, or intents of the person are outwardly indicated.

"In the case before us the prisoner pointed in the direction of where the body of deceased had been found, when asked what they had done with deceased. Instead of this response to the question, suppose he had said: 'We left the dead body of deceased on yonder hillside.' Would this answer have been admissible? We think not under the long line of decisions in this State. How, then, can it be said that his gesture is competent evidence? Upon what principle is this distinction founded? Can a confession be indirectly admissible which would not be directly so? Would not such a construction of the law defeat its purposes? Would it not probably lead to great evils? Under such a rule, extorted confessions of guilt, made by nods, winks, gestures, and other *acts* would be frequently paraded in cases to supply the absence of sufficient evidence to establish the guilt of the accused. Such evidence would be easily attainable in most cases, and would be as unreliable and objectionable in every respect as confessions by word. As said by Roscoe and Greenleaf: 'The influence which might produce a groundless confession might also produce groundless conduct.' Rosc. Cr. Ev. 51; 1 Greenl. Ev. sec. 232. In this case, for illustration, the same influences which might have prompted the

defendant to confess by words that he committed the murder might have prompted him to point in the direction where the dead body of the murdered had been found. Both the above questions standard authors lay down the rule the *acts* of the prisoner are in such cases placed upon the same plane with his words, and where the one is inadmissible, so is the other."

1. 1 Phill. Ev. (9th Ed.) 397; Roscoe Cr. Ev. (10th Ed.) 40; Whar. Cr. Ev. (10th Ed.) § 627; Greenleaf's Ev. (14th Ed.) 213; State v. Guild, 10 N. J. L. 163; 18 Am. Dec. 404; Com. v. Knapp, 10 Pick. (Mass.) 477; s. c., 20 Am. Dec. 181; Com. v. Galligan, 113 Mass. 202; Com. v. Sanborn, 116 Mass. 61; People v. McCall, 1 Wheel. C. C. (N. Y.) 108; People v. Harriden, 1 Park. C. C. (N. Y.) 108; Smith v. Com., 10 Gratt. (Va.) 734; State v. Jefferson, 6 Ired. (N. Car.) 305; State v. Huntley, 3 Ired. (N. Car.) 418; Burns v. Com., 12 Bush (Ky.), 181; Campbell v. State, 23 Ala. 44; Morgan v. State, 11 Ala. 289; Elland v. State, 52 Ala. 192; Keithler v. State, 10 S. & M. (Miss.) 192.

"Degree of Credit to be Given to.—"As to the degree of credit which should be attached to a confession, much difference of opinion has existed. By some it has been considered as forming the highest and most satisfactory evidence of guilt. *Per* Grose, J., delivering the opinion of the judges in R. v. Lambe, 2 Leach, 1137. 'The voluntary confession of the prisoner, if made in the face of the law, and against his interest,' says Chief Baron Gilbert, 'is reckoned the best evidence; for, if a man swears for his own interest can give credit, he must certainly give most credit when he swears against it.' Gilb. 137. So it is stated by the court in R. v. Warwickshall, 1 Leach, 263, that a voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt; therefore it is admitted as proof of the crime to which it refers. On the other hand it is said by Mr. Justice Foster (Discour. 243), that hasty confessions made to persons having no authority to examine are the weakest and most suspicious of evidence. Proof may be too easily procured, words are often misreported, through ignorance, inattention, or malice, and are extremely liable to misconstruction. Moreover, this evidence is not, in the u



course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, frustrated. This opinion has also been adopted by Blackstone. 4 Com. 357. It has been said that it is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were true. 1 Phill. Ev. (7th Ed.) 110. It cannot be doubted, however, that instances have occasionally occurred in which innocent persons have confessed themselves guilty of crimes of the gravest nature. Three men were tried and convicted of the murder of H. One of them confessed himself guilty of the fact, under a promise of pardon; the confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that H. was alive. MS. case, cited 1 Leach, 264 n. See Boorn Case, 1 Greenl. Ev. (14th Ed.) 214 n; Brister v. State, 26 Ala. 107; 4 Western Law Jour. 25; Whar. Cr. Ev. (9th Ed.) § 634.

"Mr. Phillips also, after stating that in criminal cases a confession carries with it a greater probability of truth than a confession in civil suits, the consequences being more serious and highly penal, and alluding to the maxim, *habemus optimum testem confitentem reum*, adds, "but it is to be observed there may not unfrequently be motives of hopes and fear, inducing a person to make an untrue confession, which motives operate in the case of admissions. And further, in consequence also of the universal eagerness and zeal which prevail at the detection of guilt when offences are of an aggravated character, in consequence also of the necessity of using testimony of suspicious witnesses for the discovery of secret crimes, the evidence of confessions is subject, in a very remarkable degree, to the imperfections attaching generally to hearsay evidence. See *per* Anderson, B., R. v. Simons, 6 C. & P. 1. Also 5 C. & P. 542. For these reasons the statements of prisoners are often excluded from being given in evidence in cases where they would be unobjectionable as to the admission of a party in a civil suit." 1 Phill. Ev. (10th Ed.) 12." Roscoe's Cr. Ev. (10th Ed.) 41.

A confession, freely and voluntarily made, is evidence of the most satisfactory character. But the presumption upon which weight is given to such evidence, namely, that an innocent man will not impair his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a

temporal nature held out by one in authority, touching the charge preferred, or because of a threat or promise made by, or in the presence of, such person, in reference to such charge. Hopt v. U. S., 110 U. S. 574.

A voluntary confession of one accused of crime, whether made before his apprehension or after his commitment, is admissible against him. State v. Suggs, 89 N. Car. 527; Adams v. Utley, 87 N. Car. 356; State v. Efler, 85 N. Car. 585; Com. v. Sanborn, 116 Mass. 61; State v. Brown, 48 Iowa, 553.

A confession of a defendant in a criminal action voluntarily made is competent evidence against him, although made when he was under arrest. People v. Druse, 103 N. Y. 655.

Where a crime has been committed, the admissions of a party charged with the crime, deliberately made, are admissible, and the jury may convict on such evidence, if they believe it sufficient. Andrews v. People, 7 N. East. Repr. (Ill.) 265.

A defendant, charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny;" and he was thereupon sentenced to imprisonment in the penitentiary. Held, that his confession of being guilty of a crime not charged in the indictment warranted no judgment against him. State v. Queen, 91 N. Car. 659. See Fletcher v. State, 12 Ark. 169; State v. Symonds, 57 Me. 148; Sutton v. Johnson, 62 Ill. 209.

A confession is not rendered inoperative by a subsequent retraction of it. Jones v. State, 13 Tex. 168; s. c., 62 Am. Dec. 550.

Defendant's declarations made after the commission of a homicide that he was sane when he committed it, are admissible against him for what they are worth. State v. Kring, 74 Mo. 612.

It being already in proof in a trial for theft of money that the defendant and her little daughter were arrested for the offence, and that disclosures made by the latter induced the officer to take the defendant to her house, with expectation of recovering the money there, the State was further allowed, over objection by the defence, to prove that the defendant, after reaching her home, and while still in arrest and uncautioned, voluntarily raised a plank and seemed to be searching under it for the money. Held, that there was no error in allowing this act of the defendant to be put in evidence. It was not a "confession." Rhodes v. State, 11 Tex. App. 563.

The State may prove any voluntary ad-



missions made by the defendant, but the defendant has no right to prove admissions made by himself to another person at a different time. *Butler v. State*, 34 Ark. 480.

Evidence of confessions is the weakest and the least to be relied on of any evidence known to be competent in law. *Vaugh v. Hann*, 6 B. Mon. (Ky.) 341.

The State is not obliged to accept the confession of the accused, but may prove the case by other evidence. *Com. v. Miller*, 3 Cush. (Mass.) 243.

It is error to instruct a jury that an admission by the prisoner is as good proof of his guilt as would be the evidence of an eyewitness of the crime. *Terry v. Farrell*, 9 Pac. Repr. (Mont.) 536.

**Innocence.**—Confessions made in jest or without sincerity have no weight. *Whar. Cr. Ev.* (9th Ed.) § 626.

**Sleep.**—Words spoken in sleep are not admissible. *People v. Robinson*, 19 Cal. 40.

**Mistake.**—A confession made under a mistake of fact will be disregarded. *Whar. Cr. Ev.* (9th Ed.) § 625; *Hall v. Huse*, 10 Mass. 39; *State v. Brown*, 1 Mo. App. 86; *State v. Welch*, 7 Port. (Ala.) 463. Compare *Blackburn v. Commonwealth*, 12 Bush (Ky.), 181.

**Statement by an Interpreter.**—A statement to a third party, by an interpreter, of admissions by the accused, though made in their presence, cannot bind them, when it appears that they did not understand the language in which it was made. Evidence of a statement made by an interpreter as to admissions made to him is hearsay evidence, and inadmissible. *Territory v. Big Knot*, 11 Pac. Repr. (Mont.) 670.

**Intoxication.**—Where a prisoner made a statement to a constable in whose custody he was, but he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so, and it was objected that what the prisoner said under such circumstances was not admissible, *Coleridge, J.*, said: "I am of opinion that a statement being made by a prisoner while he was drunk is not, therefore, inadmissible against him; and that, to render a confession inadmissible, it must either be obtained by hope or fear. This is matter of observation from me upon the weight that ought to attach to this statement, when it is considered by the jury." *R. v. Spilsbury*, 7 C. & P. 187. In a note to this case, 1 Phill. Ev. 465, it is observed, "The facts of the case as reported do not warrant the marginal note, which is as follows: 'Sed, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying some-

thing that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up.' It is not to be inferred from the case that a confession—so immorally, not to say criminally, extorted—would be received." The principle, however, on which the decision turned would seem to warrant the marginal note, as the mere giving liquor without any inducement in words could not operate as an inducement either by exciting hope of escape or fear of punishment. It is to be observed, also, that in all the cases where confessions have been excluded there has been an anticipation of benefit or injury after the confessing or non-confessing. Where liquor is given, the benefit (if it can be called any) is received already, and nothing further is in expectation. 3 Russ. on Cr. (9th Am. Ed.) 369, note. See *State v. Hopkirk*, 84 Mo. 278.

When the *corpus delicti* is proved, confessions made voluntarily, though the prisoner was intoxicated, if corroborated by circumstances, are sufficient to sustain a conviction. *Williams v. State*, 12 Lea (Tenn.), 211.

A confession made by a prisoner, under the influence of liquor furnished him with the consent of the officer having him in charge, but not influenced by anything said to him by the officer, held to be admissible in evidence. *People v. Ramirez*, 56 Cal. 533.

Intoxication of the accused at the time when he may have made a confession would have affected the weight of the confession as evidence against himself, but would not go to exclude the confession from being put in evidence. *State v. Grear*, 28 Minn. 426; s. c., 41 Am. Rep. 296; *Whitney v. State*, 8 Mo. 165; *Eskridge v. State*, 25 Ala. 30; *Lester v. State*, 32 Ark. 727; *Com. v. Howe*, 9 Gray (Mass.), 110.

Confessions made by one while intoxicated and suffering from *delirium tremens* are admissible; the weight to be given to such confession is for the jury. *State v. Feltes*, 51 Iowa, 495.

Confessions made by one so intoxicated as not to understand them are no evidence of guilt. Whether a party making confessions was so much under the influence of intoxicating liquor as not to understand what he was confessing, is a question for the jury. *Com. v. Howe*, 9 Gray (Mass.), 110.

**Adultery.**—A confession, to be entitled to any material weight as evidence of adultery, must not only be shown to be free from collusion, but, when made by the wife, must also be shown to have been

made freely, without compulsion or undue influence on the part of the husband; and it must also appear that the husband has not caused it to be prepared as a means of formal proof. *Summerbell v. Summerbell*, 37 N. J. Eq. 603. In this case Barker Gummere, Esq., filed an opinion, in which the cases are thus reviewed:

"In *Williams v. Williams*, 1 Hagg. 299, the confession was contained in a letter from the alleged adulteress to her sister, and there was proof *aliunde* that she frequently visited her alleged paramour and was with him alone at his lodgings, yet a divorce was refused.

"In *Mortimer v. Mortimer*, 2 Hagg. 310, the confession was made by the alleged adulteress when *in articulo mortis*, as she supposed, both to her husband and her sister-in-law, and was set forth in the husband's complaint, which was excepted to on the ground that the confession alone was insufficient, and that no other acts or facts were averred which were sufficient to sustain it, and the exception was sustained.

"In *Harris v. Harris*, 2 Hagg. 376, it was proved that the wife had conducted herself with general levity, had been very attentive to her alleged paramour and jealous of his attentions to other women; and on the occasion of a picnic party had persuaded another lady to separate themselves from the party and go into the wood, and that on arriving in the wood the wife 'whooped' until the paramour joined them; her companion, who was gathering flowers, observing the pair reclining on a bank, he with his arm round her waist, called to the wife to come away, and upon her refusing to do so, she left the pair in that position. Subsequently, upon being told by a friend of her husband that the paramour had admitted that he on that occasion had sexual intercourse with her, she did not deny it, but exclaimed, 'He is a dirty scoundrel,' and then said she knew it was impossible to live with her husband after what had happened, and that she would leave his house if promised that there should be no further investigation of her conduct. The entire absence of other proof than the confession in *Mortimer v. Mortimer*; the absence of any proof of personal familiarities or of indications of illicit affection in *Williams v. Williams*, although imprudent conduct and abundant opportunities were clearly proved, and the presence of proof in *Harris v. Harris* of illicit affection, of rendezvous, and of familiarities, position of parties, and circumstances leading to the very brink of the adulteries, sufficiently indicate the reasons for the status assigned

to the confessions in the respective causes.

"In *Burgess v. Burgess*, 2 Hagg. 223, the wife confessed her adultery to her husband, and afterwards admitted to a third person that she had so confessed, the proof *aliunde* was that her paramour, an inmate of her husband's house, paid her constant attentions; that she desired his attentions, and always wanted to sit next to him; that he sat so close to her as almost to be in her lap; that they took every opportunity to be alone together; that when on a fishing party they went off together to a spot a half-mile distant from the party; that when both were visiting a friend, she was seen coming out of her paramour's chamber, in which he was then present; that both left the drawing-room, and were absent about an hour, and on their return that both were flurried and a good deal heated. The confession was deemed to be sufficiently supported, and a divorce was decreed.

"In *Noverre v. Noverre*, 1 Rob. 428, the wife confessed her adultery to two persons other than her husband, and the proof *aliunde* was that the husband (a surgeon) left his house daily early in the morning, and was absent, generally, until evening; that the paramour, a pupil of the husband and an inmate of his house, sought the wife as soon as the husband left the house, and spent the time of his absence in her company in the drawing-room, walking in the garden, and sitting in the arbor, and that when the husband's return was announced they immediately separated; that she was often in the bedroom of her paramour when he was there sometimes for ten minutes at a time; that the wife and paramour retired for the night much earlier than the husband, who sat up to a late hour; and that the wife often came out of her room in her dressing-gown and stood on the stairs talking to the paramour until the servants went to bed, passing them and leaving them standing on the stairs, and that they behaved like lovers. The court held that extreme familiarity and ample opportunity being proved, and being convinced that the confessions were genuine, the spirit of the canon was not violated by pronouncing for a divorce.

"In *Owen v. Owen*, 4 Hagg. 261, the wife confessed her adultery in letters to a person other than her husband, and the proof *aliunde* was of great intimacy with the paramour; that on one occasion he passed the night at her house, while her husband was absent; that on two other occasions she was absent from her husband's house all night, and refused to say where she had been, although proved

not to have been at the house of the friend to which she had said she was going; and that she had tried to suborn witnesses to testify that on those occasions she slept where no suspicion could attach to her. The court held that there was no collusion in the confessions, and as there was sufficient evidence to corroborate them, a divorce should be ordered.

"In *Grant v. Grant*, 2 Curteis, 16, the confessions of the wife's adultery were contained in her letters to her paramour, and the proof *aliunde* was that there was great intimacy between them; and on one occasion improper personal liberties on his part; and that on another occasion he passed the night at her house during the absence of her husband; and that this visit was concealed from the husband. The court held that the letters were sufficiently corroborated, and a divorce was decreed.

"In *Tucker v. Tucker*, 11 Jur. 893, the confession of the wife's adultery was contained in a letter from the wife to the husband's father; and the proof *aliunde* was that after her husband sent her from his house, she went with her alleged paramour to a distant city, and there took lodgings and passed the night; there was no proof of improper intimacy between them before the confession. The court, without advertg to the corroborating circumstances subsequent to the confession, decreed a divorce seemingly upon the sole ground that the confession was not collusive. This ruling, if so intended, is certainly a relaxation of the rule theretofore enforced, but it does not seem to have been followed in subsequent cases.

"Thus in *Deane v. Deane*, 12 Jur. 63, the wife, while on a visit to a friend, left her house and went to the house of a young unmarried officer, and stayed there with him for a fortnight, refusing to leave him when requested to do so by her friend. Subsequently she wrote to her husband expressing her remorse for her guilty conduct, and though the confession was plainly free from collusion, yet the divorce was decreed, not upon the confession alone, but upon the whole testimony.

"And in *Shulldham's Divorce*, 12 Cl. & Fin. 363, a letter from the wife to the husband, confessing adultery, was held not to be sufficient evidence of adultery; but upon a commission being issued, it was further proved that the wife had been very intimate with the paramour in India; that she went with some friends, with her husband's consent, to the Cape of Good Hope, was soon joined there by her paramour, and after a time returned with him to India, and there lived with him

and gave birth to a child more than a year after leaving her husband, and upon a divorce was decreed.

"It is clear, therefore, that up to the time of the institution of the matrimonial court, no divorce was, in fact, granted in England solely upon the unsupported confession of the criminated party, as judged by the court to have been made without collusion. Although Dr. Lushington, in his later decisions, was inclined to magnify the importance of apparent non-collusive confessions, yet in *No. v. Noverre* he clearly states the fundamental difficulty in these words: 'The tribunal is to be trusted with the power to determine that which is impossible, namely, whether such a confession is genuine or not.'

"There are cases in the United States which seem to adjudge that a divorce may be decreed upon the confession alone, if the court be satisfied from surrounding circumstances that it was made without collusion. *Tewksbury v. Tewksbury*, How. (Miss.) 109; *Matchin v. Matchin*, 6 Pa. St. 332. But it is to be noted that in both of these cases there was, in fact, strong corroborative proof of the fact of adultery. The only case that I have found, in which a divorce has been granted solely upon a confession admitted to have been made without collusion, is *Billings v. Billings*, 11 Pick. (Mass.) 461.

"In our State the rigidity of the rule seems not to have been relaxed. The confession of the criminated party has not been uniformly required to be supported by proof of the fact of adultery; and the courts have treated confessions as only evidence of suspicion. Thus, in *Clutch v. Clutch*, 10 Sax. (N. J.) 474, the following language is used: 'In cases of this kind the court takes the confessions of parties with great caution, and they are never sufficient without strong corroborative circumstances.' In *Miller v. Miller*, 10 Green Ch. (N. J.) 139: 'These admissions are not to be received as a general confession with much faith, they are competent only when connected with other proof, but not otherwise. The reason assigned is, that there is great danger of collusion between the parties, or of confessions being extorted. And in *Jones v. Jones*, 2 C. E. (N. J.), 351, the present chief justice, acting as master, observes: 'Indeed, the approved rule of law appears to be that a divorce will not be granted where the admissions of the criminated party constitute the entire basis upon which the conclusion of guilt. Such evidence, it is said, may convince to a moral

**3. Nature and Effect.**—Confessions may be divided into two classes: judicial and extrajudicial. They may also be divided into plenary and non-plenary. A plenary judicial confession, i.e., a confession made by the accused before a tribunal competent to try him, is sufficient whereon to found a conviction.<sup>1</sup>

A plenary judicial confession is in other words a plea of guilty. An extrajudicial confession is good evidence, but not conclusive, even though plenary. Whether or not a plenary extrajudicial confession, uncorroborated in any way whatever, is sufficient whereon to found a conviction, has been the subject of some discussion.<sup>2</sup>

ity; but it does not fill the measure of al proof.' To these authoritative denunciations must be added the well-considered words of Chancellor Kent. He is in *Betts v. Betts*, 1 Johns. Ch. (N. Y.) 197: 'The party's confession may and should aid other proofs, but the decree must rest alone, nor perhaps, essentially, on such confessions; for there is great danger of collusion between the parties, of confessions extorted, or made deviously to furnish means of evidence.' These confessions, therefore, are to be received in this case with jealousy, and to be weighed with caution, and to be supported with facts and circumstances tending to demonstrate the charge to the satisfaction of the court." See *Hughes*, 19 Ala. 307; *Moyler v. Moyler*, 11 Ala. 620; *Buckholtz v. Buckholtz*, Ga. 239; *Woolfolk v. Woolfolk*, 53 Ga. 661; *Armstrong v. Armstrong*, 32 N. J. 279; *Stibbins v. Stibbins*, 1 Met. 476; *Latham v. Latham*, 30 Gratt. 307; *Matchin v. Matchin*, 6 Pa. St. 36; *Derby v. Derby*, 21 N. J. Eq. 36; *Clutch v. Clutch*, 1 N. J. Eq. 474; *Müller v. Müller*, 1 N. J. Eq. 386; s. c., 2 N. J. Eq. 354; *Callender v. Callender*, 53 How. Pr. 364; *Betts v. Betts*, 1 Johns. Ch. 197; *Roe v. Doe*, 1 Johns. Cas. 25; *Lyon v. Lyon*, 62 Barb. (N. Y.) 138; *Billings v. Billings*, 11 Pick. 461; *Robbins v. Robbins*, 100 N. H. 150; *White v. White*, 45 N. H. 103; *Richardson v. Richardson*, 50 Vt. 458; *Evans v. Evans*, 41 Cal. 103; *True v. True*, 6 Minn. 458; *Brainard v. Brainard*, Wright (Ohio), 354.

*Roscoe's Cr. Ev.* (10th Ed.) 40; *Mitchell v. Mitchell*, 26 N. J. Eq. 497.

is said by Lord Hale that, where the prisoner freely tells the fact, and declares the opinion of the court whether it is felony, though upon the fact thus it appears to be felony, the court must not record his confession, but admit him to plead to the felony not guilty. 2 P. C. 225.

A confession of guilt in open court, in the presence of the jury, is evidence enough to sustain a conviction. *Dantz v. State*, 87 Ind. 398.

*Roscoe's Cr. Ev.* (10th Ed.) 40.

It is said to have been decided to be so in *R. v. Wheeling*, 1 Leach Cr. Ca. 311 n; but it seems doubtful whether the language is to be taken in the unqualified sense which, at first sight, it appears to bear. The subject is ably discussed by Mr. Greaves in a note to 3 Russ. on Cr. (4th Ed.) 366; and he is of opinion that it has never been expressly decided that the mere confession of a prisoner alone, and without any other evidence, is sufficient to warrant a conviction. He says: "In Greenleaf's Evid. § 217, it is observed, 'In each of the English cases usually cited in favor of the sufficiency of this evidence, there was some corroborative circumstance. Wheeling's case seems to be an exception, but it is too briefly reported to be relied on. In the United States the prisoner's confession when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law,' citing *Guild's Case*, 5 Halst. (N. J.) 163, 185; *Long's Case*, 1 Hayw. 524 (455); 2 Hawk. P. C. c. 46, s. 36. The statement in 1 Leach, 311, is that in *R. v. Fisher*, 'The facts of W.'s house having been broken open in the night time, and the goods mentioned in the indictment stolen therefrom, were clearly proved; but there was no other evidence to fix those facts on the prisoner than his confession made before the committing magistrate, and there being no evidence that this confession was not reduced to writing, *viva-vox* testimony of it was rejected. But in the case of *Wheeling* it was determined

that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence.' This statement may mean that where the commission of a felony is proved by independent evidence, a prisoner may be convicted on his confession, though there be nothing to corroborate that confession as to his being the party who committed such felony; and the manner in which Wheeling's case is introduced plainly shows that that is the meaning of the statement. In *R. v. Eldridge, R. & R. 440*, on an indictment for stealing a mare, it appeared that the mare was seen on the 9th of October in the afternoon in the possession of one of the prosecutor's servants, who was taking it towards one of his fields, but neither that servant nor the prosecutor were called as witnesses; the mare was not found in the prosecutor's possession on the 11th of October. The prisoner had the mare in his possession on the 13th, and sold her under her value. A full confession before a magistrate was proved, and the prisoner convicted. The judges held 'that there was sufficient evidence to confirm the confession.' It is to be observed that, independently of the confession, the case was complete, with the exception of proving that the mare was put in the prosecutor's field by his servant. See *R. v. Yend, 6 C. & P. 176*; and *R. v. Fellows, 6 C. & P. 176*. In *R. v. Falkner and Bond, 1 Den. C. C. 517*, on an indictment for robbing one H., he was called on his recognizances, but did not appear, and the prisoner, F., had been desirous to send a message to H. to keep him from appearing. The only other evidence was that B. had confessed the offence to the constable who apprehended him, and that both the prisoners, on hearing the depositions read over to them which contained the charge, had admitted that they were guilty; the depositions charged the prisoners with robbing H. of certain quantities of copper. The prisoners were found guilty, and the judges held the conviction right, but no reason is stated for the decision. It is clear that the depositions were read in evidence at the trial, for their contents are stated in the case; and they were admissible, 1st, as showing the charge of which the prisoners admitted that they were guilty; 2d, if there were, as there seems to have been, evidence that the prosecutor was kept away by means of the prisoners. In *R. v. White and Langdon, R. & R. 508*, on an indictment for stealing oats, the prosecutor proved that he had sometimes

more, sometimes less, than 300 quarters of oats in his granary, the door of which had been fastened with a padlock, and was found by the prosecutor unhinged and drawn back on the 24th of December. At half-past two o'clock that morning two men were seen by a witness coming from the prosecutor's yard, each of them having a sack on his back, but the witness did not say that the men were the prisoners. White on the same day was in possession of some bags of black Irish kiln dried oats, of the same kind as those in the granary of the prosecutor, who could not, however, swear that he had lost any of his oats; each prisoner made an explicit confession of the offence, which was proved, and the prisoners found guilty; and the judges held the conviction right. In *R. v. Tippet, R. & R. 509*, which was an indictment for stealing oats from the same prosecutor, the same evidence was given as in the preceding case, with the addition that the prisoner was under-hostler in the prosecutor's stables, and a confession by the prisoner of his having stolen the oats in company with the prisoners in the preceding case was put in, and the prisoner convicted; and seven of the learned judges (all who met on the occasion) were of opinion that the conviction was right, 'as there was not only the confession but the evidence of the prosecutor also, which made it probable that oats had been stolen, as it appeared from such evidence that the door of the granary had been broken open, and most of the learned judges thought that, without the owner's evidence, the prisoner's confession was evidence upon which the jury might have convicted.' See *R. v. Burton, Dears. C. C. 282*, and the dictum of Maule, J. In *R. v. Tuffs, 5 C. & P. 167*, the prisoner was indicted for stealing two heifers, which were not missed by the prosecutor or any person in his service, and the only evidence against the prisoner was his own statement, when questioned on the subject, that he had driven away two heifers from his uncle's premises, 'The World's End Dolver'; the prosecutor and another person proved that the prosecutor's farm was called by that name, but they could not undertake to say that there was not any other of that name; Lord Lyndhurst, upon this, told the jury that under the circumstances, there was not any evidence of a stealing as to the heifers of the prosecutor; though if it had been proved that his was the only 'World's End Dolver,' it would have been sufficient. It does not, therefore, appear that it has ever been expressly decided that the mere confession of a prisoner alone,

and without any other evidence, is sufficient to warrant a conviction. In *R. v. Edgar*, Monmouth Spr. Ass. 1831. MSS. C. S. G., the prisoner was indicted for obtaining money of a friendly society by false pretences; the rules of the society had not been enrolled, but the prisoner, who was a member of the society, had acted under them, and it was contended that he had thereby admitted their validity, and the position in the text was cited as a stronger decision; on which Patterson, J., said: 'Could a man be convicted of murder on his confession alone, without any proof of the person being killed? I doubt whether he could.' In *R. v. Sutcliffe*, 5 Cox C. C. 270, where a robbery had been committed on a moonlight night, Cresswell, J., left the case to the jury on confessions of the prisoner, though the prosecutor swore the prisoner was not one of the men who robbed him. The remark on this case is that the prosecutor *might* be in error; the prisoner *must* know whether he was guilty or not."

In *Law v. Merrills*, 6 Wend. (N. Y.) 268, Walworth, Chan., said, "Evidence to establish a fact by the confessions of the party should always be scrutinized and received with caution; as it is the most dangerous evidence that can be admitted in a court of justice, and the most liable to abuse. Although a witness is perfectly honest, it is impossible, in most cases, for him to give the exact words in which an admission was made. And sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed to the witness." See *Malin v. Malin*, 1 Wend. (N. Y.) 625; *State v. Gardiner*, Wright (Ohio) 392; *Fouts v. State*, 8 Ohio St. 98; *People v. Gelabert*, 39 Cal. 663; *Com. v. Galligan*, 113 Mass. 202; *U. S. v. Nott*, 1 McLean (U. S.) 499.

The testimony of a witness called to prove a confession is inadmissible if he does not remember the substance of all that was said at the time. *Berry v. Commonwealth*, 10 Bush (Ky.), 15; s. c., 1 Am. Cr. Rep. 272; *People v. Gelabert*, 39 Cal. 663. Compare *Westmoreland v. State*, 45 Ga. 225.

A conversation between a husband and wife may be proved by a bystander who overhears it. *Com. v. Griffin*, 110 Mass. 181.

Where a fellow-prisoner conversed with the accused through the soil-pipes, held, that a confession thus made was admissible. *Brown v. Com.*, 76 Pa. St. 319.

A sheriff must give evidence of volun-

tary statements made by the prisoner after his arrest. *People v. Rodundo*, 44 Cal. 538.

**Corroboration.**—When the confession of the accused is corroborated by extraneous facts—as, in this case, by the discovery of a part of the stolen goods, in consequence of a statement made by him, in the possession of a particular person recently after the burglary—it is competent to prove to the jury his statement and the corroborating fact of the discovery; but this does not render competent his confession, at the same time, that he committed the burglary and larceny, if such confession was improperly procured by promises or threats. *Murphy v. State*, 63 Ala. 1. See *People v. Jones*, 32 Cal. 80. Compare *Sampson v. Commonwealth*, 84 Pa. St. 200; *State v. Mortimer*, 20 Kans. 93.

While confessions of guilt should be received with great caution, and will not, alone, justify a conviction, yet if they should be corroborated by circumstances, they would be sufficient for that purpose. *Anderson v. State*, 72 Ga. 98; *Nesbit v. State*, 43 Ga. 239; *Pitts v. State*, 43 Miss. 472; *Johnson v. State*, 59 Ala. 37; *State v. Patterson*, 73 Mo. 705; *State v. German*, 54 Mo. 526; *Bergen v. People*, 17 Ill. 426; *People v. Ruloff*, 3 Park. C. C. (N. Y.) 401; *Lyon v. Lyon*, 62 Barb. (N. Y.) 138; *Terry v. McClint*, 1 Mont. 394; *Strait v. State*, 43 Tex. 486; *Laros v. Commonwealth*, 84 Pa. St. 200; *Sampson v. State*, 54 Ala. 241; *Territory v. Farrell*, 6 Montana, 12; *Berry v. State*, 4 Tex. App. 492; *Smith v. State*, 21 Gratt. (Va.) 809; *State v. Gardiner*, Wright (Ohio), 392; *People v. Hennessey*, 15 Wend. (N. Y.) 147; *People v. Thrall*, 50 Cal. 415; *State v. Knowles*, 48 Iowa, 598; *Com. v. Smith*, 119 Mass. 305. Compare *State v. Cowan*, 7 Fred. (N. Car.) 239; *Stephen v. State*, 11 Ga. 225.

But such suppletory evidence need not be conclusive in its character. When a confession is made, and the circumstances therein related correspond in some points with those proven to have existed, this may be evidence sufficient to satisfy a jury in rendering a verdict asserting the guilt of the accused. "Full proof of the body of the crime, the *corpus delicti*, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient." *State v. Patterson*, 73 Mo. 705; *People v. Badgley*, 16 Wend. (N. Y.) 53; *People v. Hennessey*, 15 Wend. (N. Y.) 147, and cases cited; *Bergen v. People*, 17 Ill. 426; *State v. Lamb*, 28 Mo. 218; *Daniel v. State*, 63

Ga. 339; *People v. Ruloff*, 3 Park. Cr. (N. Y.) 401.

When upon a criminal trial there is, in addition to a confession of the defendant, proof of circumstances which, although they may have an innocent construction, are calculated to suggest the commission of the crime, and for the explanation of which the confession furnishes the key, there is sufficient "additional proof that the crime charged has been committed" to warrant a conviction, within the meaning of the provision of the Code of Civ. Proc. (§ 395) requiring such proof. A confession under said provision is competent proof both of the criminal agency of the defendant and of the body of the crime, but insufficient as to the latter to warrant a conviction without corroboration. *People v. Jaehne*, 103 N. Y. 182.

Where the fact of the commission of a larceny is shown by other and direct evidence, the defendant may be convicted of the same by proof of his admissions or confessions, deliberately made. *Andrews v. People*, 117 Ill. 195; *Selvidge v. State*, 30 Tex. 60.

Where, on a trial for murder, there is evidence to prove motive on the part of the defendant, as well as actual participation in the crime, admissions made by him to the effect that he was asked to take part in the murder, but declined, promising, however, to say nothing about the matter, are relevant and competent evidence, as they tend to show that the defendant was at any rate an accessory before the fact. *Ettinger v. Commonwealth*, 98 Pa. St. 338.

Proof of admissions by a prisoner, which, though they themselves do not involve his guilt, tend in connection with other facts to prove it, is competent, even without preliminary proof that they were voluntarily made. *People v. Le Roy*, 4 Pac. Rep. (Cal.) 649.

Any circumstances tending to show the guilt of the accused may be proved, although brought to light by a declaration inadmissible *per se*, as having been obtained by improper influence. So evidence as to the condition of the prisoner's hand at the time of holding the inquest is admissible, although the prisoner was then compelled to exhibit her hand by the coroner, after objection on her part. *State v. Garrett*, 71 N. Car. 85. See *White v. State*, 3 Heisk. (Tenn.) 338.

**Declarations Accompanying the Delivery of Stolen Property—Whether Admissible.**—Declarations accompanying an act done have been admitted in evidence. The prisoner was tried for stealing a guinea and two promissory

notes. The prosecutor was proceeding to state an inadmissible confession, when *Chambre, J.*, stopped him, but permitted him to prove that the prisoner brought him a guinea and a £5 Reading Bank note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him. The learned judge told the jury that, notwithstanding the previous inducement to confess, the prisoner might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence that it was a stolen note. A majority of the judges (seven) held the conviction right. *Lurence and Le Blanc, JJ.*, were of a contrary opinion, and *Le Blanc* said that the production of the money by the prisoner was alone admissible, and not that the confession said it was one of the notes stolen. *v. Griffin*, Russ. & Ry. 151. And see *v. Jones*, Russ. & Ry. 152, where the statement of the prisoner, on producing some money out of his pocket, that it was all he had left of it, was held inadmissible, the prosecutor having held out inducements to confess. Speaking of declarations accompanying an act, *Phillips* observes, "It may be thought that the only ground upon which such declarations can be received is, that they are explanatory of the act of delivery, and not a narrative of a past transaction." *Phill. Ev.* (8th Ed.) 432. *Yates v. State*, 1 S. Westn. Rep. (Ark.) 65; *Strait v. State*, 43 Tex. 486; *White v. State*, 3 Heisk. (Tenn.) 338; *State v. Garvey*, 28 La. Ann. 925; *Laros v. Commonwealth*, 84 Pa. St. 200.

**Proof of Corpus Delicti.**—An extrajudicial confession of murder, uncorroborated, is insufficient to authorize conviction. *Williams v. People*, 101 Ill. 3; *May v. People*, 92 Ill. 343; *State v. Knowles*, 48 Iowa, 598; *Smith v. State*, 17 Neb. 358; *Priest v. State*, 10 Neb. 3; *Smith v. State*, 22 N. W. Repr. (Neb.) 780; *State v. Patterson*, 73 Mo. 695; *State v. German*, 54 Mo. 526; s. c., 14 A. Rep. 481; *State v. Scott*, 39 Mo. 4; *State v. Lamb*, 25 Mo. 218; *Yates v. State*, 1 S. Westn. Rep. (Ark.) 65; *People v. Lane*, 49 Mich. 340; *People v. Lambert*, 5 Mich. 349; *State v. Davidson*, Vt. 377; *Com. v. McCann*, 97 Mass. 5; *Com. v. Smith*, 119 Mass. 305; *People v. Badgley*, 16 Wend. (N. Y.) 53; *People v. Hennessey*, 15 Wend. (N. Y.) 147; *People v. Ruloff*, 3 Park. Cr. 401; *People v. Bennett*, 49 N. Y. 137; *People v. Jaehne*, 103 N. Y. 182; *State v. Guild*, 10 N. H. 163; s. c., 18 Am. Dec. 304; *Com. v. Pettit*, 8 Phila. 608; *Com. v. Hanlon*, 10 Brews. (Pa.) 461; *Smith v. State*, 21 Gr.

**4. Must be Free and Voluntary.**—A confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence, because under such circumstances the party may

*State v. Stringfellow*, 26 Miss. 809; *Brown v. State*, 32 Miss. 433, 33 Miss. 347; *Pitts v. State*, 43 Miss. 472; *Winkus v. State*, 41 Miss. 582; *Winslow v. State*, 76 Ala. 42; *Matthews v. State*, Ala. 187; *Mose v. State*, 36 Ala. 211; *Johnson v. State*, 59 Ala. 37; *People v. Jones*, 31 Cal. 565; *People v. Ah How*, Cal. 218; *People v. Thrall*, 50 Cal. 5; *Butler v. Commonwealth*, 2 Duvall 435; *Tyner v. State*, 3 Humph. 383; *Dixon v. State*, 13 Fla. 631; *Stephen v. State*, 11 Ga. 225; *Earp v. State*, 55 Ga. 136; s. c., 1 Am. Cr. Rep. 1; *Daniel v. State*, 63 Ga. 339; *State v. Cowan*, 7 Ired. (N. Car.) 239; *State v. Lewis*, 1 Wins. (N. Car.) No. 1, 307; *S. v. Williams*, 1 Clif. (U. S.) 5.

Where the accused has expressly admitted that he did murder the deceased, it is unnecessary that the dead body be positively and directly identified. It is sufficient that there be such extrinsic corroborative circumstances as will, taken in connection with the confession, prove conviction of defendant's guilt in the minds of the jury. *State v. Patterson*, 73 Mo. 695.

*Winslow v. State*, 76 Ala. 42. In this case there was evidence tending to show a fresh track in the lane leading from the road to the house; that this track, and the track of the defendant, corresponded; that the track, when first discovered, was burning from the outside, about six feet from the ground, at a part of the house in which there had been no fire during the night; that the fire occurred about midnight, and spread so rapidly that only one bed and bedding were saved. While there was some conflict in the testimony, and there was evidence tending to show that the burning may have been accidental, the evidence tending to show the *corpus delicti* is sufficient to lay a foundation on which to rest the admissibility of the confessions.

At the trial of a capital case it was shown that the deceased, a woman of middle age, suddenly disappeared, under circumstances which tended to show that her disappearance was involuntary, and at a time during which the prisoner was known to have been in the vicinity. The prisoner had more than once been heard threaten the life of the deceased, and

had several times visited her house. About a year afterwards a human skull and a jaw-bone were found near the residence of the deceased showing the marks of deadly wounds. A lock of hair still attached to the skull was similar to that of the deceased, while the jaw-bone was identified as hers by persons who recognized peculiarities in its structure. *Held*, that these circumstances constituted sufficient proof of the *corpus delicti* to render a confession of the prisoner admissible in evidence. *Gray v. Commonwealth*, 101 Pa. St. 380; s. c., 48 Am. Rep. 733.

In a trial for the theft of a horse the only evidence inculpatory of the accused was a confession imputed to him by the prosecuting witness, who, being the half-brother of the accused, justified his unnatural attitude by a desire to separate the accused from evil associates. The testimony of this witness was contradictory in various particulars of his own deposition at the examining trial, and material statements which he ascribed to the accused were inconsistent with the evidence of other witnesses. Aside from the putative confession, the only proof of the *corpus delicti* was the fact that the animal was missed from a certain field; and, on the other hand, there was proof that it was repeatedly seen on its accustomed range soon after its disappearance from the field. *Held*, that evidence proved neither the *corpus delicti* nor the culpability of the accused. *Hill v. State*, 11 Tex. App. 132.

A conviction may be had upon a judicial confession without proof of *corpus delicti*. *Anderson v. State*, 26 Ind. 89; *State v. Guild*, 10 N. J. L. 163; s. c., 18 Am. Dec. 404.

Confession alone will warrant a conviction of misdemeanors, such as selling liquor contrary to statute. *State v. Gilbert*, 36 Vt. 145.

Where a letter calculated to induce the purchase of counterfeit money was sent through the mail, *held*, that the mailing of the letter and the letter itself, showing its unlawful character, constitute the *corpus delicti*. That defendant was the sender may be proved by his admissions to that effect. *U. S. v. Jones*, 10 Fed. Repr. 469.



have been influenced to say what is not true, and the supposed confession cannot safely be acted upon.<sup>1</sup>

1. 3 Russ. on Cr. (9th Am. Ed.) 367; State v. Grant, 21 Me. 171; State v. Day, 55 Vt. 510, s. c., 4 Am. Cr. Rep. 510; State v. Phelps, 11 Vt. 116; State v. Carr, 37 Vt. 191; State v. Walker, 34 Vt. 296; State v. Howard, 17 N. H. 171; State v. Squires, 48 N. H. 364; State v. Wentworth, 37 N. H. 196; State v. York, 37 N. H. 175; Com. v. Nott, 135 Mass. 269; Com. v. Smith, 119 Mass. 305; Com. v. Cullen, 111 Mass. 435; Com. v. Cuffee, 108 Mass. 285; Com. v. Preece, 5 N. Eastn. Rep. (Mass.) 494; Com. v. Knapp, 9 Pick. (Mass.) 496; Lambeth v. State, 1 Cush. (Mass.) 322; Com. v. Morey, 1 Gray (Mass.), 461; Com. v. Tuckerman, 10 Gray (Mass.), 173; Com. v. Whittemore, 11 Gray (Mass.), 201; Com. v. Taylor, 5 Cush. (Mass.) 605; Com. v. Howe, 2 Allen (Mass.), 153; State v. Potter, 18 Conn. 166; Ward v. People, 3 Hill (N. Y.), 395; People v. Burns, 2 Park. C. C. (N. Y.) 34; People v. Thoms, 3 Park. C. C. (N. Y.) 256; O'Brien v. People, 48 Barb. (N. Y.) 274; People v. McMahon, 15 N. Y. 384; People v. Phillips, 42 N. Y. 200; People v. Wentz, 37 N. Y. 309; Cox v. People, 60 N. Y. 500; People v. Mondon, 103 N. Y. 211; People v. Druse, 103 N. Y. 655; State v. Guild, 10 N. J. L. 163; s. c., 18 Am. Dec. 404; Derby v. Derby, 21 N. J. Eq. 36; Laros v. Commonwealth, 84 Pa. St. 200; Fife v. Commonwealth, 29 Pa. St. 429; Comm. v. Hanlon, 3 Brew. (Pa.) 461; State v. Harman, 3 Harr. (Del.) 567; State v. Bostick, 4 Harr. (Del.) 563; Nicholson v. State, 28 Md. 140; Smith v. Commonwealth, 10 Gratt. (Va.) 734; Vaughn v. Commonwealth, 17 Gratt. (Va.) 576; Thompson v. Commonwealth, 20 Gratt. (Va.) 724; State v. Mills, 91 N. Car. 581; State v. Patrick, 3 Jones (N. Car.), 443; State v. Lowhorne, 66 N. Car. 538; State v. Whitefield, 70 N. Car. 356; State v. Freeman, 1 Speers (S. Car.), 57; State v. Gossett, 9 Rich. (S. Car.) 428; Metzger v. State, 18 Fla. 481; Simon v. State, 5 Fla. 285; Frank v. State, 39 Miss. 705; Garrard v. State, 50 Miss. 147; Jordan v. State, 32 Miss. 382; Simmons v. State, 61 Miss. 243; Dick v. State, 30 Miss. 593; Cady v. State, 44 Miss. 332; Owen v. State, 78 Ala. 425; Kelly v. State, 72 Ala. 244; Young v. State, 68 Ala. 569; Redd v. State, 69 Ala. 255; Murphy v. State, 63 Ala. 1; Porter v. State, 55 Ala. 95; Dinah v. State, 39 Ala. 359; Miller v. State, 40 Ala. 54; Aaron v. State, 37 Ala. 106; Mose v. State, 36 Ala. 211;

Levison v. State, 54 Ala. 520; Bristol v. State, 26 Ala. 107; Ward v. State, 50 Ala. 120; Wyatt v. State, 25 Ala. 9; Frazer v. State, 28 Ala. 9; Joe v. State, 38 Ala. 422; Byrd v. State, 68 Ga. 661; State v. State, 11 Ga. 225; Jim v. State, 15 Ga. 535; Rafe v. State, 20 Ga. 60; Dummett v. State, 63 Ga. 600; Frain v. State, 48 Ga. 529; Earp v. State, 55 Ga. 136; s. c., 46 Am. Cr. Rep. 171; Johnson v. State, 605; State v. Garvey, 28 La. 925; State v. Revells, 34 La. Ann. 805; s. c., 44 Am. Rep. 436; State v. Nelson, 3 La. 497; Strait v. State, 43 Tex. 486; C. State, 18 Tex. 387; Barnes v. State, 11 Tex. 356; Grosse v. State, 11 Tex. 364; Nolen v. State, 14 Tex. App. 805; s. c., 46 Am. Rep. 247; Massey v. State, 10 Tex. App. 645; Rector v. Com., 8 Tex. 468; Young v. Commonwealth, 8 (Ky.), 366; Rutherford v. Commonwealth, 2 Metc. (Ky.) 387; Hudson v. Commonwealth, 2 Duvall (Ky.), 531; Young v. Commonwealth, 8 Bush (Ky.), 366; v. Rigby, 6 Lea (Tenn.), 554; White v. State, 3 Heisk. (Tenn.) 338; McGowan v. State, 2 Coldw. (Tenn.) 223; Boyce v. State, 2 Humph. (Tenn.) 57; Bryant v. State, 9 Humph. (Tenn.) 635; Long v. State, 22 Ark. 336; Runnels v. State, 121; Yates v. State, 47 Ark. 556; Austin v. State, 14 Ark. 556; Flanagan v. State, 25 Ark. 92; State v. Patterson, 73 Mo. 696; State v. Hagan, 54 Mo. 566; State v. Brockman, 46 Mo. 566; State v. Hopkirk, 84 Mo. 278; State v. Phelps, 128; Couley v. State, 12 Mo. 166; s. c., 22 Am. Dec. 454; People v. Wolcott, 51 Mich. 612; Flagg v. People, 40 Mich. 584; Spears v. State, 2 Ohio St. 584; Prater v. State, 18 Ohio St. 418; Fouts v. State, 3 Ohio St. 98; Hamilton v. State, 3 Ohio St. 552; Smith v. State, 10 Ind. 106; State v. Freeman, 12 Ind. 100; Miller v. People, 39 Ill. 457; Austin v. State, 51 Ill. 506; State v. Brown, 91 Ill. 506; State v. Ostrander, 18 Iowa, 435; State v. Ostrander, 39 Iowa, 179; State v. Sophers, N. Westn. Rep. (Iowa) 917; State v. Staley, 14 Minn. 105; People v. State, 15 Cal. 408; People v. Jim Ti, 33 Cal. 60; People v. Barrie, 49 Cal. 342; People v. Johnson, 41 Cal. 452; People v. Johnson, 49 Cal. 632; State v. Carrick, 16 Colo. 120; Beery v. U. S., 2 Colo. 186; v. Nott, 1 McLean (U. S.), 499; U. S. v. Pumphreys, 1 Cranch C. C. 74; U. S. v. Charles, 2 Cranch C. C. 76.

The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it would be better for him to admit himself to be guilty of an offence which he really never committed. In determining, therefore, whether a confession be admissible or not, "the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one." 3 Russ. on Cr. (9th Am. Ed.) 367.

Evidence of threats made after the confession of accused is clearly inadmissible. *Kollenberger v. People*, 11 Pac. Repr. (Colo.) 101.

Where an express denial is made of any inducement being held out to the prisoner, it will avail nothing if, in introducing evidence of the confession, it appeared that inducements were really though unintentionally held out. *Com. v. Taylor*, 5 Cush. (Mass.) 605; *State v. Patterson*, 73 Mo. 705.

Although confessions obtained by threats or promises are not evidence, yet if they are attended by extraneous facts which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony: e.g., where the party thus confessing points out or tells where the stolen property is; or when he states where the deceased was buried; or gives a clue to other evidence which proves the case. *Whar. Cr. Ev.* (9th Ed.) § 678; *Murphy v. State*, 63 Ala. 1; *Aikin v. State*, 35 Ala. 399; *State v. Brick*, 2 Harr. (Del.) 530; *State v. Crank*, 1 Bailey (S. Car.), 66.

"No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise proceeding from a person in authority and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and (in opinion of the judge) such inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. But a confession is not involuntary only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. The prosecutor, officers of justice having

the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority." *Steph. Dig. Evidence* (May's Ed. 1877), 72.

It is a mistaken notion that evidence of confessions obtained by promises or threats are to be rejected from regard to public faith. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not entitled to credit. A free and voluntary confession is deserving the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. *Warickshall's Case*, *Eyre and Nares*, BB., 1 Leach, 263. Three men were tried and convicted for the murder of H. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that H. was alive. 1 Leach, 263, note (a).

**What Confessions are Not Admissible in Evidence.**—*Prima facie*, as a matter of course, a confession by the prisoner is admissible as evidence against him. But there are certain grounds which may be shown by him sufficient to exclude the confession. The law, however, as it at present stands, is involved in considerable obscurity; and until it has received further discussion it is impossible to mark out precisely the limits of exclusion and admission. Thus much is certain, that no confession by the prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority; and, on the whole, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposition; but that this is so has not yet been distinctly stated, nor has the meaning to be attached to each branch of the proposition been as yet distinctly ascertained, as a perusal of the following cases will show. It is usual to speak of a threat or inducement as excluding the confession; and whether a man says, "If you do confess I will not do so and so," or whether he says, "If you do not confess I will do so and so," makes very little difference, if in substance the person accused is unduly

influenced. Roscoe's Cr. Ev. (10th Ed.) 42.

**What is an Inducement.**—The reported cases in which statements by prisoners have been held inadmissible are very numerous. Previous to the decision in *R. v. Baldry*, 2 Den. C. C. 430; 21 L. J. M. C. 130, which will be noticed presently, they had gone a very great length. In *R. v. Drew*, 8 C. & P. 140, the prisoner was told "not to say anything to prejudice himself, as what he said would be taken down, and would be used for or against him at his trial." Coleridge, J., considered this to be an inducement to make a statement, and rejected the evidence. In *R. v. Morton*, 2 Moo. & R. 514, the constable said to the prisoner, "What you are charged with is a very heavy offence, and you must be very careful in making a statement to me or to anybody else that may tend to injure you; but anything that you can say in your defence we shall be ready to bear, or to send to assist you." Coleridge, J., said: "Upon reflection, I adhere to my decision in *R. v. Drew*," and rejected the evidence. In *R. Furlley*, 1 Cox Cr. Ca. 76, the prisoner was told by the constable that whatever she told him would be used against her at the trial; and Maule, J., referring to *R. v. Drew*, rejected the evidence; and the same learned judge pursued the same. All the cases, however, are reviewed in *R. course in R. v. Harris*, 1 Cox Cr. Ca. 106. *v. Baldry*, *supra*, where the constable had said to the prisoner, after telling him the charge, "that he must not say anything to criminate himself; what he did say would be taken down and used as evidence against him." Lord Campbell, C. J., at the trial received the evidence, but reserved the point for the consideration of the court of criminal appeal, on the authority of the above cases. All the judges (Pollock, C. B.; Parke, B.; Erle, and Williams, JJ., and Campbell, C. J.) were of opinion that the statement was admissible. Pollock, C. B., said: "A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the statement being given in evidence; yet even in that case the person charged might have understood the caution as meaning that he could not tell the truth without confessing his guilt. It has been decided that that would not prevent the statement being given in evidence, by Littledale, J., in *R. v. Court*, 7 C. & P. 486; and by Rolfe, B., in a case at Gloucester, *R. v. Holmes*, 1 Car. & K. 248; *Aaron v. State*, 37 Ala. 106; *King v. State*, 40 Ala. 314; *Kelly v. State*, 72

Ala. 244; *State v. Hopkirk*, 84 Mo. 278. But where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable; the objectionable words being, 'that it would be better to speak the truth,' because they import that it would be better for him to say something. This was decided in *R. v. Garner*, 1 Den. C. C. 329; 2 C. & R. 920. The true distinction between the present case and a case of that kind is, that here it is left to the prisoner as a perfect matter of indifference whether he should open his mouth or not. With regard to the cases of *R. v. Drew*, 8 C. & P. 140, and *R. v. Morton*, 2 Moo. & R. 514, with the greatest respect for my brother Coleridge, I do not approve of the decision in the former, or the arguments used to support it in the latter. I think the statement in *R. v. Drew*, 8 C. & P. 140, ought not to have been rejected. With every veneration for the opinion of my brother Maule, I cannot agree with his view of the subject." Parke, B., said, "I have reflected on *R. v. Drew*, 8 C. & P. 140, and *R. v. Morton*, 2 Moo. & R. 514, and I have never been able to make out that any benefit was held out to the prisoner by the cautions employed in those cases." And Lord Campbell, C. J., said, "With regard to the decisions of my brother Maule and my brother Coleridge, with the greatest respect for them, I disagree with their conclusions."

"The case of *R. v. Court*, 7 C. & P. 486, above referred to, was this: The prisoner was taken before a magistrate on a charge of forgery; the prosecutor said, in the hearing of the prisoner, that he considered the prisoner as the tool of one G., and the magistrate then told the prisoner to be sure and tell the truth; upon which the prisoner made a statement. It was held by Littledale, J., that evidence of this statement was admissible. In *R. v. Holmes*, 1 C. & K. 248, the prisoner was before a magistrate on a charge of rape, and the magistrate said, 'Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial.' Evidence of the statement then made by the prisoner was held by Rolfe, B., to be admissible. In *R. v. Garnar*, 1 Den. C. C. 329, the surgeon told the girl, in the presence of her master and mistress (which, as we shall see presently, is the same thing as if the words had been used by the master or mistress themselves), that it was better for her to speak the

truth; evidence of the statement thereupon made was unanimously held by the court of criminal appeal to be inadmissible. See also *R. v. Jarvis*, L. R. 1 C. C. R. 96; 37 L. J. M. C. 3, *per* Willes, J., and *R. v. Fennell*, 7 Q. B. D. 147; *R. v. Reeve*, L. R. 1 C. C. R. 96. As the principles laid down in *R. v. Baldry*, 2 Den. C. C. 430, will doubtless now be considered conclusive, it is not considered necessary to refer at any greater length to a large class of previous cases which are of a similar character, and which are not altogether uniform; they will all be found in the elaborate argument of the learned counsel for the prisoner in *R. v. Baldry*, 2 Den. C. C. 430.

"In *R. v. Sleeman*, 1 Dears. C. C. 249, the prisoner, a maid-servant, was taken into custody on a charge of setting fire to her master's premises. She desired to change her dress, and was permitted to do so, being given, for that purpose, into the charge of her master's daughter. While she was changing her clothes, her master's daughter said to her, 'I am very sorry for you, you ought to have known better; tell me the truth, whether you did it or no.' The prisoner said, 'I am innocent.' The master's daughter replied, 'Don't run your soul into more sin; tell the truth.' The prisoner then made a full confession. The evidence was admitted; and the court of criminal appeal, on a case reserved, held that there was no inducement or threat, and affirmed the conviction. In *R. v. Upchurch*, 1 Moo. C. C. 465, the prisoner, a servant girl, aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered, her mistress said to her, 'Mary, my girl, if you are guilty do confess; it will perhaps save your neck; you will have to go to prison; if W. H. C. (a person whom the prisoner had charged) is found clear, the guilt will fall on you.' She made no answer. The mistress then said, 'Pray tell me if you did it.' The prisoner then confessed. The evidence was admitted, and the point reserved; but the judges thought that it ought not to have been received. See *State v. Hagan*, 54 Mo. 192; *State v. Whitefield*, 70 N. Car. 356. In *R. v. Hearn*, 1 Car. & M. 109, a servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two bedrooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner that if she did not tell the truth about the things found in the pump, he would send for the con-

stable to take her, but he said nothing to her respecting the fire. Coltman, J., held that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. Compare *Yates v. State*, 47 Ark. 172. Where the prisoner's master in the presence of two policemen said, 'I think it is right I should tell you, that besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue,' it was held that these words did not make the evidence inadmissible. Kelly, C. B., said, 'The words that have been used import advice only on moral grounds.' *R. v. Jarvis*, L. R. 1 C. C. R. 96; 37 L. J. M. C. 1. So also, where the mother of some little boys in custody said, 'You had better, as good boys, tell the truth,' it was held that a statement made thereupon was admissible, and that the cases to the contrary had gone too far. *R. v. Reeve*, L. R. 1 C. C. R. 362; 41 L. J. M. C. 92. Where the prosecutor said to the prisoner, 'The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you,' and the prisoner immediately after made a confession to the prosecutor in the presence of the inspector, the confession was held not admissible in evidence. *R. v. Fennell*, 7 Q. B. D. 147; 50 L. J. M. C. 126. Where the prisoner was in custody of a policeman on a charge of arson, and she said to her mistress, 'If you forgive me I will tell you the truth,' and the mistress without cautioning her said, 'Ann, did you do it?' Williams, J., rejected her confession. *Reg. v. Mansfield*, 14 Cox C. C. 639." Roscoe's Cr. Ev. (10th Ed.) 42.

So a confession induced by saying, "I am in great distress about my irons; if you will tell me where they are, I will be favorable to you," cannot be given in evidence. *Cass's Case*, 1 Leach, 293, note (a).

Where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" upon which the prisoner took 11s. 6<sup>d.</sup> out of his pocket, and said it was all he had left of it; a majority of

the judges held that the evidence was inadmissible. *Jones' Case*, R. & R. 152. Compare *R. v. Griffin*, R. R. 151.

Where also an attorney, who was endeavoring to discover some burglars for the purpose of prosecution, said to the prisoner, who had gone to him for the purpose of making some statements relating to the burglary, "I dare say you had a hand in it; you may as well tell me all about it;" it was held that this excluded a statement then made. *R. v. Croydon*, 2 Cox C. C. 67.

Nor does it matter that the feet of the prisoner were tied at the time. *Franklin v. State*, 28 Ala. 9.

While the prisoner was under arrest for murder, and in shackles, he was taken to the place of the homicide, and was asked what he had done with the body, and he pointed to the hill where the dead body had been found. He was not cautioned as to the effect of an admission. The court held that all evidence of such action on the part of the defendant was improperly admitted. *Nolen v. State*, 14 Tex. App. 474; s. c., 46 Am. Rep. 247.

The confession of an accused person while in the hands of his captors, not officers, and with a rope around his neck, is not free and voluntary, and is not admissible as evidence. *State v. Revells*, 34 La. Ann. 381; s. c., 44 Am. Rep. 436.

Witness testified that he, with other armed men, went to arrest the prisoner, and on finding him asked him, "What made you kill G.?" that the prisoner said, "Is he dead," and that the witness replied, "You ought to know he's dead when you killed him." *Held*, that the evidence of a confession thereupon made was not admissible. *State v. Dildy*, 72 N. Car. 325.

At the trial of a criminal case, an accomplice, who was a witness for the government, testified to the guilt of himself and of the defendant; and on cross-examination also testified that he made a confession of his guilt to the officer who arrested him; that such confession was induced by promises, on the part of the officer of protection and favor; and that the confession was true. *Held*, that the government might show, by the testimony of the officer, that the confession was voluntary. *Com. v. Ackert*, 133 Mass. 402.

It is no objection to the admission in evidence of statements made by the defendant in a criminal case, after his arrest, to the assignee in insolvency of his estate, that, at a former interview between them, the assignee held out inducements to the defendant to make

statements, if, at the interview during which they were made, enough was done by the assignee to remove from the defendant's mind the impression caused by the former interview. *Com. v. Howe*, 132 Mass. 251.

While the defendant was in a bar-room violating a city ordinance, the marshal of the city was notified, and summoned a posse and confined the defendant in a neighboring crib. *Held*, that notwithstanding the marshal's testimony that he did not "consider" that he had the defendant under arrest, the arrest was complete, and statements made by the defendant under such circumstances were not admissible as evidence against him. *Grosse v. State*, 11 Tex. App. 364.

A statement made by defendant to two of his bondsmen that he was short in his accounts, at a time when he was not charged with crime or under arrest, when no proceedings were threatened or any promise made to shield him from a criminal prosecution, *held*, admissible in evidence. *State v. Carrick*, 16 Nev. 120.

The confession of a prisoner of the locality of stolen property, though induced by threats, is admissible when verified by finding the property where he locates it; and all he says in conveying the information which is directly connected with or explanatory of the discovery is also admissible, but his confession that he stole it is not admissible. *Yates v. State*, 47 Ark. 172. See *Davis v. State*, 8 Tex. App. 510; *Strait v. State*, 43 Tex. 486; *White v. State*, 3 Heisk. (Tenn.) 338; *State v. Garvey*, 28 La. Ann. 925; *Laros v. Com.*, 84 Pa. St. 200.

In a trial for horse-theft the State was permitted, over objection by the defence, to prove that the defendant, while in legal custody and not warned that his statements might be used against him, said, in substance, that one S. got the animal at a certain locality and in the night, and brought it to him, the defendant, and that he took a bell from around its neck and rode it off. The State proved that the animal was taken in the night and from a locality corresponding with that described by the defendant, and that, when last seen before it was stolen, it had a bell around its neck; but, aside from the defendant's statement, there was no proof that he took the bell off the animal and rode it away. *Held*, that, assuming that these latter circumstances would, if shown to be true, conduce to establish the guilt of the defendant, the disclosure of them by the defendant, while he was in custody and uncautioned,

was not evidence against him; and their admission over his objection was error. *Kennon v. State*, 11 Tex. App. 356.

It was held in the case of *People v. Wentz*, 37 N. Y. 303, where the defendant was in custody upon a charge of arson, that a confession drawn out by questions, and preceded by the statement made by the officer to the prisoner, "that he was in a bad fix, and had got caught at last," was "wholly voluntary, and made uninfluenced by any threat, menace, promise, or other influence." See *People v. McGloin*, 91 N. Y. 241; *Cox v. People*, 80 N. Y. 500.

Three boys were arrested upon a charge of arson. One of them was taken into the presence of three officers, and made a confession. At the trial, one of the officers testified: "I did not tell him he had better tell about it. I think W. [one of the other officers] said he had better." W. testified that "he did not say to the boy that he had better tell the truth, but that he might have told him to tell the truth." The other boys denied their guilt; but, upon being confronted with the first boy, and hearing his statement, they confessed. *Held*, that it could not be said, as matter of law, that the confessions were not admissible. *Com. v. Preece*, 140 Mass. 276.

In *Hawkins v. State*, 7 Mo. 190, the sheriff observed to the prisoner that "it would be better in the long-run to tell the truth about the matter, and not any lies," but gave no reason why it would be better, and the confession made to a third person in the presence of the officer and occurring a few minutes thereafter, was held admissible. So in *Fouts v. State*, 8 Ohio St. 98, where the accused, being placed in custody, was told by his custodian, "if he was guilty it would not put him in any worse condition, and he had better tell the truth at all times," *held*, no ground for excluding the confession.

To say to the prisoner that "an honest confession is good for the soul," is not a promise of temporal benefit or discharge from punishment for the crime charged as will render a confession inadmissible. *Matthews v. State*, 9 Lea (Tenn.). 128.

The witness in this case, testifying to the prisoner's confessions while in custody, said that he used no promises nor threats to induce a confession, but added: "I said to him, 'You have got your foot in it, and somebody else was with you; now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and not-

ing but the truth.' I wanted to produce the impression on his mind that it was best for him to tell all about it, and I did produce that impression before he would tell me." *Held*, that the confession ought to have been excluded. *Kelly v. State*, 72 Ala. 244.

Two brothers, F. and J., being indicted for a murder, and F. being put upon his trial, a witness testified that P., a third brother, said to F., "J. has determined to make a confession, and we want your consent." F. said he thought it hard that J. should have the advantage of making a confession, since the thing was done for his benefit. P. said, "If J. is convicted there will be no chance for him, but if you are convicted you may have some chance for procuring a pardon," and P. asked the witness if he did not think so. The witness said he did not know; he was unwilling to hold out any improper encouragement. *Held*, that a hope of favor was held out to induce him to give his assent; and that all subsequent confessions at the same interview should be excluded. *Com. v. Knapp*, 9 Pick. (Mass.) 496.

**Whether the Inducement Must Have Reference to the Charge—Religious Inducement.**—Upon this point there are but few authorities. In *R. v. Sexton*, *Chetw. Burn*, tit. Confession, the prisoner said: "If you will give me a glass of gin, I will tell you all about it, and two glasses of gin were given him. He then made a confession, which Best, J., refused to admit. This decision has been repeatedly doubted. See *Deacon*, Dig. Cr. Law, 424; *Joy on Confessions*, 17; 3 *Russ. on Cri.* (5th Ed.) 445. In *R. v. Lloyd*, 6 C. & P. 393, a man and his wife were in prison in separate rooms, on a charge of stealing and receiving, and the constable said to the man, "If you will tell where the property is, you shall see your wife." *Patteson, J.*, held that a confession made afterwards was admissible. The report of *R. v. Green*, 5 C. & P. 655, which is sometimes cited on this point, seems too obscure to be relied on for any purpose whatever.

It is to be remarked that if it is necessary that the inducement should have reference to the charge against the prisoner, it is quite unnecessary to discuss, as was done in great length in *R. v. Gilham*, 1 Moo. C. C. 186, whether the inducement must be of a temporal nature. There the chaplain of the jail had had repeated interviews with the prisoner, and had strongly impressed upon him the religious duty of confession; coupling these exhortations with an expression of

belief that the prisoner was a guilty man, as indeed the prisoner himself in general terms admitted. The jailer had also conversed with the prisoner on the subject, and had held, in briefer terms, similar language. The prisoner at length, after being cautioned that what he said would be used in evidence against him, made a full confession to the jailer, and afterwards to the mayor. Both confessions were received by Garrow, B., the question of their admissibility being reserved for the opinion of the judges. The judges, without stating any reasons, held that the confessions (*both* according to the report) were properly received; and it is said in 3 Russ., 5th Ed. 453. that the ground of this decision was that there were no temporal hopes of benefit or forgiveness held out; and that such hopes, if referable merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded. Two other points were taken by the counsel for the prosecution; namely, that neither the chaplain nor the jailer were persons in authority, within the meaning of the rule which excludes confessions; and that there had been ample caution given to render the confessions admissible, even if what had previously taken place were open to objection. But there is no indication of the opinion of the court on either of these points." Roscoe's Cr. Ev. (10th Ed.) 45.

"In *R. v. Wild*, 1 Moo. C. C. 452, which is frequently quoted on this subject, a variety of confessions which had been made by the prisoner were received in evidence, and some of these, at least, are open to more than one objection. As it is said in the report that the confession was considered by a majority of the judges to be admissible, not saying which, and no grounds of the decision are given, no conclusion can be drawn from it. In *R. v. Nute*, Chetw. Burn, tit. Confession, 3 Russ. on Cr. (5th Ed.) 458, the question whether inducements not of a temporal nature coming from a person in authority are sufficient to exclude a confession, seems to have been considered by the judges, and by some, at least, to have been resolved in the negative.

"On the whole the authorities seem to be in favor of the proposition that the inducement must be of a temporal nature. Whether or no it must have reference to the charge, has scarcely been fully discussed. It is certainly possible to conceive cases in which a much stronger inducement might be held out to a prisoner than one having reference to an

escape from a charge not involving any very serious consequences." Roscoe's Cr. Ev. (10th Ed.) 46.

**When the Inducement Relates to Other Persons.**—Where the threats or promises held out affect other suspected persons, it is not relevant to inquire into them. *Flanagin v. State*, 25 Ark. 92.

**Inducement held out with Reference to a Different Charge.**—An inducement held out to a prisoner with reference to one charge will not exclude a confession of another offence, of which the prisoner was not suspected at the time the inducement was held out. The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf that one of them had improperly induced him to confess, and this constable was called and stated that whilst the prisoner was in his custody on another charge, and when he was not suspected of the offence for which he was then on his trial, he had made a statement in which he confessed himself guilty of a second charge. It was submitted that if a promise was held out to him, it was immaterial what the charge was. Little-dale, J., said, "I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge." The confession was admitted. *R. v. Warner*, Glouc. Spr. Ass. 1832, 3 Russ. on Cr. (5th Ed.) 452. But where a threat was held out to a prisoner without the nature of the charge being stated, but subsequently the nature of the charge was stated, and thereupon a confession was made, it was held to be inadmissible. *R. v. Luckhurst*, 1 Dears. C. C. R. 245.

**"Inducement must be held out by a Person in Authority.**—In *R. v. Spencer*, 7 C. & P. 776, Parke, B., stated that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, can be given in evidence; and the learned judge intended, had the evidence been pressed, to have received it, and to have reserved the point. But on the last-mentioned case being cited in *R. v. Taylor*, 8 C. & P. 733, Patteson, J., said, 'It is the opinion of the judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority.' And in *R. v. Moore*, 2 Den. C. C. 526, Parke, B., in delivering a carefully considered judgment of the court of criminal

appeal, said that if the inducement was not held out by a person in authority, it was clearly admissible. This question may therefore be considered as settled." *Roscoe's Cr. Ev.* (10th Ed.) 46. See *State v. Day*, 55 Vt. 510; *State v. Walker*, 34 Vt. 396; *State v. York*, 37 N. H. 175; *Com. v. Tuckerman*, 10 Gray (Mass.) 173; *Com. v. McCann*, 97 Mass. 580; *Com. v. Culver*, 126 Mass. 464; *People v. Wentz*, 37 N. Y. 303; *Vaughan v. Com.* 17 Gratt. (Va.) 576; *Smith v. Com.*, 10 Gratt. (Va.) 734; *State v. Low-horne*, 66 N. Car. 639; *State v. Kirby*, 1 Strob. (S. Car.) 155; *Spicer v. State*, 69 Ala. 135; *Ward v. State*, 50 Ala. 135; *Wilson v. State*, 3 Heisk. (Tenn.) 232; *Deathridge v. State*, 1 Sneed (Tenn.), 75; *Young v. Com.*, 8 Bush (Ky.), 366; *Rutherford v. Com.*, 2 Metc. (Ky.) 387; *Boyd v. State*, 2 Humph. (Tenn.) 39; *Austine v. People*, 51 Ill. 236; *People v. Barrie*, 49 Cal. 342; *State v. Witzengerode*, 9 Ore. 153.

Merely suggestions or advice to the accused to confess, or even solemn adjurations to do so, by one holding no official position, will not render the confession inadmissible. But in all cases the age, experience, and constitution of the person making the confession, and the circumstances under which it was made, should be taken into consideration in determining the question of its admissibility. *State v. Fredericks*, 85 Mo. 145.

Where a person in superior authority holds out an inducement to a prisoner to confess, a confession made to a person in inferior authority is not admissible, especially if such person do not give the prisoner any caution. Upon an indictment for arson, it appeared that the committing magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for him. The prisoner, after he was committed, made a statement to the turnkey of the jail, who had held out no inducement to him to confess, and had not given him any caution not to confess. *Parke, J.*: "I think I ought not to receive the evidence, after what Mr. Simeon (the committing magistrate) said to the prisoner, more especially as the turnkey did not give any caution to the prisoner." *R. v. Cooper*, 5 C. & P. 833.

**Confession in the Presence of the Police.**—In *Reg. v. Hatts*, 48 J. P. 248, the prosecutor had taken the prisoner into his office, and there, in the presence of two police officers, said, "I presume you know who these gentlemen are." The prisoner said he did, and one of the officers then said, "We are police officers."

Thereupon the prosecutor, addressing the prisoner, said: "I know what has been going on between you and Culiffe for some time. You had better speak the truth." The prisoner then made a confession, and the question was whether it was admissible in evidence. The court held that it was not, the case not being distinguishable from *Reg. v. Fennell*, 7 Q. B. D. 147. In that case the confession was made under the following circumstances. Previously to being charged, the prisoner was taken into a room with the prosecutor and a police inspector. The prosecutor then said to the prisoner, "He" (meaning the inspector) "tells me you are making house-breaking implements; if that is so, you had better tell the truth: it may be better for you." It was held that the statement made by the prisoner upon this was not admissible. The court did not, in either of these cases, deliver judgment at length. The ground of the decisions must, therefore, be sought in previous cases.

In *Reg. v. Baldry*, 2 Den. C. C. 430, a number of old cases were overruled, and the law on the subject was fully discussed. In that case a police constable who apprehended a man on a charge of murder, having told him the nature of the charge against him, added that he need not say anything to criminate himself, but that what he did say would be taken down and used as evidence against him. The prisoner thereupon made a confession. It was held that the confession was rightly admitted in evidence. The ground of this decision was the general one, that a confession may be received in evidence so long as it is voluntary, that is to say, if it is not made in consequence of some inducement or threat held out or made to the prisoner by some person having authority over him in connection with the prosecution. As will be seen hereafter, a policeman is a person having authority for the purposes of this doctrine. It follows, therefore, that statements to a police constable, made voluntarily, or even in answer to questions by him, are, in general, admissible in evidence against the prisoner, but that they may be inadmissible if made in consequence of any inducement or threat made by the officer. In the case last mentioned, *Pollock, C. B.*, pointed out that a simple caution by a constable to the accused to tell the truth, if he said anything, would not prevent the statement of the accused from being given in evidence; but that where the admonition to speak the truth was



coupled with any expression importing that it would be better for the accused to do so, the statement could not be admitted, the expression amounting to an inducement to confess. It will be observed, on comparing this judgment with the two cases referred to *supra*, that words to the effect that it would be better for the accused to tell the truth were held to prevent the statement made in reply from being admitted in evidence.

In *Reg. v. Sleeman*, 6 Cox C. C. 245; 23 L. J. M. C. 19, a maid-servant, under a charge of setting fire to a farm building belonging to her master, was given into the temporary custody of a married daughter of her master, who did not live in the house and had no control over her as a mistress. She had been given into the custody of a policeman, and the officer had given her leave to change her dress, on the understanding that while doing so she was to be in the charge of the married daughter of her master, as already stated. While they were alone together the daughter said to the prisoner, "I am sorry for you, you ought to have known better; tell the truth whether you did it or no," and upon the prisoner replying, "I am innocent," added, "Don't run your soul into more sin, but tell the truth." The prisoner then confessed. Barke, B., admitted the confession in evidence. He held that the words used did not amount to a threat or inducement, nor were they used by a person in authority.

In *Reg. v. Bate*, 11 Cox C. C. 686, the prisoner was charged with having concealed the birth of her child. Being questioned by a police constable she gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie." It was held by Montague Smith, J., that a further statement thereupon made by the prisoner to the constable was inadmissible in evidence against her.

In *Reg. v. Doherty*, 13 Cox C. C. 23, the prisoner was charged with murder. After he was taken into custody he was told by the police constable in whose charge he was that it would be better for him to tell the truth, and not to put people to the extremities he was doing. This happened at ten in the morning. At six in the evening of the same day another constable who was in charge of the prisoner in answer to a request by the prisoner to see his father, cautioned him not to say anything to criminate himself, for that anything he might say would come in evidence against him. A confession made to the latter constable was rejected by Whiteside, C. J. He said:

"If a person in authority—and it has been decided that a constable having a prisoner in charge comes within that definition—makes use of the expression, 'it would be better for you to tell the truth,' it is as clear as light that any admission or confession afterwards made, under the influence of that impression, should not be received." As it was considered that any subsequent confession such as had been given must be set aside to have had the effect of removing from the prisoner's mind all hope or expectation of gain or favor to be derived from the making of the confession. This was a very strong case, but it seems to be strictly in accordance with the principle laid down by the earlier decisions.

In order to exclude a confession made to or in the presence of a police constable there must have been something to the nature of an inducement or a threat held out or made by the constable in his presence. A mere exhortation to speak the truth has been shown not to amount to an inducement when made by a person not having any authority in connection with the accusation. And it seems that such an exhortation, even if made in the constable's presence, does not amount to an inducement. Thus in *Reg. v. Jarvis*, L. R. 1 C. C. R. 96, the prisoner was called by his master and told, "You are in the presence of two police officers, and they should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." The master afterwards added, "Take care, we know more than you think." The prisoner thereupon made a statement. It was held that the statement was receivable in evidence against him on his trial for larceny. Kelly, C. B., said that the words "had better tell the truth" seemed to have acquired a sort of technical meaning, importing either a threat or a benefit, if they had not been so used. All the other words had said consisted of warning or advice to speak the truth on moral grounds, which was not enough to exclude the statement made in consequence thereof. This case was followed in *Reg. v. R. L. R. 1 C. C. R. 362*. There the prisoner, two children, one aged eight and the other a little older, were charged with attempting to obstruct a railway line. It was proved that the mother of the prisoners and a policeman being present, after they had been apprehended, the mother of the prisoners said: "You

er, as good boys, tell the truth," upon both the prisoners confessed, was held that the confession was admissible in evidence. From the fact that the court professed to follow *Reg. v. Jar-*  
*L. R. 1 C. C. R. 96*, it would seem that they looked upon the words "as good boys" as showing that the whole of the advice given to the boys was in the nature of exhortation on moral grounds. The mere fact that two officers who arrested a boy 13 or 14 years old, without a warrant, upon suspicion of having committed a crime, after searching him, stripping him of his clothing, and locking him into a cell at the police station, took him from the cell late at night and questioned him for two hours, without warning him of his right not to answer, or offering him any opportunity to consult friends or counsel, does not render the confession in the conversation inadmissible. *Com. v. Cuffee*, 108 Mass. 285.  
If an accused party has been made a prisoner, anything which may be said to him by the officer by whom he is held in custody will always be scrutinized with the greatest care, and slight promises or threats coming from him will be considered a sufficient reason for rejecting all subsequent confessions. *Com. v. Luckerman*, 10 Gray (Mass.), 173; *St. v. Curtis*, 97 Mass. 578.  
In *State v. Branham*, 13 S. Car. 389, the court said: "It is especially necessary to guard with jealousy all confessions made by prisoners in arrest in the hands of the officers of the law; but it is impossible to lay down any rule that will determine every case. As is said in some of our cases, there is no difficulty in the principle itself, but its application is beset with difficulties. In practice, what is and what is not a violation of the principle must of necessity be left, for the first instance, to be determined by the circuit judge, whose situation best enables him to decide in each case whether the confessions are voluntary. The judge, being familiar with all the facts, ruled that the confessions were voluntary in this case, and, upon review, refused a new trial, and it is difficult to say, as a matter of law, that he was in error. The manner of the officer was compulsory, but no inducements were held out and there was some corroborating testimony. Some of the earliest cases held that all confessions of one in custody, made to an officer in authority, were assumed to be induced and were inadmissible, but that rule, if ever established, has certainly been modified." A confession made to an officer will

not be excluded from the jury merely because it appears that the accused was previously in the custody of another officer; and the court will not, as a condition precedent to the admission of such evidence, require the prosecution to call the latter, unless the circumstances render it probable that the accused held a conversation with the first officer upon the subject of a confession, or justify the belief of collusion between the officers. *Hopt v. U. S.*, 110 U. S. 574. See *Com. v. Cullen*, 111 Mass. 435, *Walker v. State*, 2 Tex. App. 326; *Harris v. State*, 6 Tex. App. 97; *State v. Guy*, 69 Mo. 430; *Ballard v. State*, 28 N. W. Repr. (Neb.) 271; *People v. Abbott*, 4 Pac. Repr. (Cal.) 769; *King v. State*, 40 Ala. 314, *People v. Rogers*, 18 N. Y. 9; *Cobb v. State*, 27 Ga. 648.

**Who is a Person in Authority.**—The decisions are numerous and undoubted that the prosecutor, or the person who in the ordinary course of things will become so, the constable in charge of the prisoner, and any person having judicial authority over the prisoner, are persons in authority within the meaning of the rule. The rule also extends to the master or mistress of the prisoner, but only where the offence concerns the master or mistress. *Roscoe's Cr. Ev.* (10th Ed.) 46; *Austine v. People*, 51 Ill. 236; *State v. Tatro*, 50 Vt. 483; *Com. v. Sego*, 125 Mass. 210; *Vaughan v. Commonwealth*, 17 Gratt. (Va.) 576; *Shifflet v. Commonwealth*, 14 Gratt. (Va.) 652; *State v. Gossett*, 9 Rich. (S. Car.) 428; *Ward v. State*, 50 Ala. 120; *Beery v. U. S.*, 2 Colo. 186; *State v. Bostick*, 4 Harr. (Del.) 564. This was decided in *R. v. Moore*, 2 Den. C. C. 526, where the prisoner was charged with killing or concealing the birth of her infant child, and had made a confession to her mistress after an inducement, which was held admissible. The previous cases were there discussed by Parke, B., and shown to be in conformity with that decision. In *R. v. Luckhurst*, 1 Dears. C. C. 245, the owner of a mare was held to be a person from whom a threat coming would exclude the confession of a prisoner that he had had connection with the mare. In *R. v. Kingston*, 4 C. & P. 387, Park, J., after conferring with Littledale, J., held that an inducement held out by a surgeon was sufficient to exclude a confession. This appears to be the only decision on this point. In *R. v. Garner*, 2 C. & K. 920, the inducement was held out by the surgeon, and the confession was made to him, but the master and mistress were present, and, as will be seen presently, that is the same as if the in-

Where there were three prisoners in custody on the same charge, and one said to another: "Well, John, you had better tell Mr. Walker (the prosecutor) the truth," and the prisoner addressed thereupon made a confession, evidence of this confession was received, and its admissibility reserved for the consideration of the court of criminal appeal: that court affirmed the conviction. No counsel appeared, and no reasons were given; but probably it was thought that though what is said in the presence of a person in authority may generally be considered as said with his sanction, yet that this did not apply to what was said by one prisoner to another, as it could hardly be imagined

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in the custody of a woman whilst he was to the inquest, to prevent her going away, and the woman held out an inducement to her, it was held that a statement made in consequence was not admissible, as it was made after an inducement held out by a person who had her in custody. *R. v. Enock*, 5 C. & P. 539. A confession obtained by means of an improper inducement held out by a person who has no authority in the place of a person having authority, without his consent, it is not admissible. It is not necessary that the person holding such authority should express his consent in words; for if he be silent he may be presumed, as he did not express dissent, to have sanctioned the inducement. Where the constable who took the prisoner into custody was present, and had the prisoner in custody when a confession was procured by inducements held out by the innkeeper, and the constable being present did not caution the prisoner in any way, Lord B., said: "I have a very strong opinion against its admissibility; but there are opinions which I am bound to respect, opposed to my own, I had better receive the evidence; if it should become necessary, I will reserve the point for the consideration of the judges." The prisoners were acquitted. *R. v. Pountney*, 7 C. & P. 302. On an indictment for housebreak- ing it appeared that the prisoner resided with her husband, and that a constable went to their house and charged her with breaking into the prosecutor's house, which she denied; but her husband coming in shortly afterwards, he told her she knew anything about it to be the truth; the constable, though present, made no observation, except that she must take her to the station-house, and desired her to go upstairs and put her things on; while she was up she desired the constable to call her husband, and then made a statement about certain articles of dress, which she produced, as having been purchased with money which had been stolen. It was objected that what the prisoner said was inadmissible, as it was obtained by an inducement held out by her husband in the presence of the constable; and as evidence of the stolen property was found in the husband's house, he was *facie* liable to account for it, and the statement made by the wife in the presence of and under the coercion of the husband, by which she accused herself and exculpated him, was clearly caused by the undue influence on her mind; Pollock,

C. B.: "The fact of the constable being present and not dissenting from what was said places the expressions used by the husband on the same footing as if they had been used by the constable; and I think that, as the constable was a person in authority, such an inducement ought to be sufficient to exclude the admission. Besides, I think there is a great deal of weight in what is urged as to the effect of the prisoner's statement being to exculpate her husband, and that I ought to be careful not to admit anything which may have been said in consequence of his coercion." *R. v. Laughter*, 2 C. & K. 225.

So where two prisoners charged with murder were being conveyed in a cart, and the constable was in the cart with them, and could hear all that passed, and one prisoner said to the other: "You had better speak the truth," and the constable made no remark; Wightman, J., after consulting Parke, B., held that a statement then made was inadmissible, as the inducement appeared to have the sanction of the constable who was present, and apparently assented to it. *R. v. Millen*, 3 Cox C. C. 507.

So where, upon an indictment for setting fire to the house of L., it appeared that on the morning of the fire the prisoner, who was the servant of the prosecutor, was sent for into the parlor, in which Mrs. L. and W. were; and that W., who was not a constable, or in any office or authority, said to the prisoner: "You had better tell how you did it;" and that thereupon she made an answer,—Patteson, J., said: "It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in this case I should have received the evidence of the statement made to W. if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. L., who was the wife of the prosecutor, and also the mistress of the prisoner, was present with W., and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. L., who was a person in authority over the prisoner, and that therefore the evidence is inadmissible." *R. v. Taylor*, 8 C. & P. 733.

On an indictment for a misdemeanor in attempting to set fire to her master's house, it appeared that the prisoner, a girl aged thirteen, was a domestic servant to the prosecutor, whose wife lived

with him, and took her share in the management of the house. After the attempt to set fire to the house was discovered, the prisoner's mistress, in the absence of the prosecutor, said to her: "Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if W. [another person suspected, and whom the prisoner had charged] is found clear, the guilt will fall on you." She made no answer. The mistress then said: "Pray tell me if you did it." The prisoner then confessed. It was contended on the part of the prosecution that the wife had no authority, real or apparent, over the prisoner, so as to hold out any hope which could influence the prisoner to make a false statement, in order that her life might be spared, and therefore that the confession was admissible. The confession was admitted, and the question as to its admissibility reserved for the consideration of the judges, who thought the confession ought not to have been received. *R. v. Upchurch*, R. & M. C. C. R. 465.

So where, upon an indictment for stealing the goods of two partners, the wife of one of the partners said, "I told the prisoner it would be better for him if he would tell how we had been robbed, and put us on our guard. I occasionally take the management of the shop. I manage the shop in my brother and husband's absence," for the prosecution it was urged that an inducement by the prosecutor's wife rendered a confession inadmissible only when it was held out in the presence of her husband. An inducement by the wife of a constable would not vitiate a confession. *Parke, B.*: "The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority. I think this confession inadmissible." *R. v. Warringham*, 2 Den. C. C. R. 447, note.

Upon the trial of a prisoner for murder there was offered in evidence against her a confession made by her in the presence of her mistress to a surgeon, who was attending her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found with the string round its neck. Her mistress had told her before the surgeon came in that "she had better speak the truth," and in answer she said she would tell it to the surgeon. An objection was taken that any subsequent confession was inadmissible. After consulting Coleridge, J., *Parke, B.*, received

the evidence, being of opinion that in this case her husband, not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could be considered as having any control over the prosecution so as to raise a presumption that the inducement held out to her would be likely to cause her to tell the truth. And upon a case reserved for argument for the prisoner, *Parke, B.* delivered judgment: "A rule has been laid down, that if the threat or inducement is held out actually or constructively by a person in authority, the confession cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, the confession is clearly admissible. But in reference to the cases where the master or mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In the present case the offence of the prisoner, in killing her child and concealing its dead body, is in no way an offence against the master of the house. She was not the mistress then, and there was no probability of herself or the husband being the subject of an indictment for that offence. In practice the prosecution is the result of the coroner's inquest. Therefore we are clearly of opinion that the confession was properly received." *R. v. Moore*, 2 Den. C. C. 522; *R. v. K.* 153. See *R. v. Upchurch*, 1 Den. C. C. 465.

The preceding cases clearly establish the position that, if a threat or inducement be held out in the presence of a person in authority, the effect is precisely the same as if it had been held out by a person in authority. *R. v. Parker*, 1 Den. C. 42.

A person who lives in the jailer's house and who sometimes has the keys of the jail, and when the jailer is absent has control of the jail, but is not a sworn officer of any kind, is not a "person in authority," whose persuasions or threats addressed to a prisoner will exclude a confession. *Shifflet's Case*, 14 Va. 652.

Where a detective, in the guise of a friend, induced a suspected party to make a confession of a crime, without any threat of any kind, except, at his request, he said that he had consulted an attorney for the prisoner, who said "he [the prisoner] had better tell the facts of the

and that they would be likely to do him as much good as anything he could do; that there was no use of lying about it, and he had better tell the truth;" *Held*, that the alleged confession was admissible in evidence; (2) that the credibility of a witness who, by deceit, misrepresentation, and other disreputable means, has obtained an alleged confession from a prisoner, is for a jury, who should be specially instructed on that point. *Heldt v. State*, 20 Neb. 492.

A private detective employed by the owners, underwriters, and salvage company, with authority to collect, settle for, and recover all goods lost or plundered from a wrecked vessel, and to institute civil or criminal prosecutions necessary for that purpose, is not a person in authority so as to exclude confessions made to him, although there were promises or threats made to induce them. *U. v. Stone*, 8 Fed. Repr. 232.

Although the more recent authorities on the admissibility of confessions, unless they are shown to have been made under the influence of promises or threats on the part of an officer of the law; yet a court, constrained by its former decisions, holds a confession inadmissible, even induced by hope or fear excited in the mind of the accused, by the representations of any person connected with the prosecution, or with the accused himself, so, considering his relations and condition, may fairly suppose that such person has power to secure the performance of his promises or threats; and excludes confessions of the accused in this case, made while he was in jail under a charge of burglary, to a clerk in the warehouse alleged to have been broken open and entered, who was also a part owner of the goods said to have been stolen from it, and induced by his promises to prosecute the accused, and not to appear as a witness against him unless compelled. *Murphy v. State*, 63 Ga. 1.

Confessions of guilt are inadmissible when persons, apparently acting by authority, obtain them by making respondents believe that he will get off easier by making them. So held where the confessions were made to persons who were given access to the prisoner's cell after midnight. *People v. Wolcott*, 51 Mich. 1.

Acknowledgments of his presence by a defendant, without any promise or threat held out to him by the witness, are admissible, though the witness received the defendant from a detective who had held out the promise to him that he

would protect him from all danger. *Dumas v. State*, 63 Ga. 600.

Where one of the company engaged in the apprehension of a prisoner, in the presence of the officer and the prosecutor, held out promises of benefit to him, under the influence of which he made a confession, it was held that such confession was not admissible in evidence. *Morehead v. State*, 9 Humph. (Tenn.) 635.

M. accompanied the officer who made the arrest, and after the arrest was made and as they were riding together, M. said to the accused, "I know your father, and you had better tell me so I can tell him all about it, so that he can help you." *Held*, that a confession made at the time was admissible. *Ulrich v. People*, 39 Mich. 245.

#### Confessions to Persons Not in Authority.

—Mr. Russell says (3 Russ. on Cr., 9th Am. Ed. 393): "There has been a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable: some of the judges thinking it receivable, and others thinking it is not so. *R. v. Spencer*, 7 C. & P. 776. And several cases have occurred in which confessions made to persons without authority, in consequence of inducements held out by such persons, have been rejected. *R. v. Dunn*, 4 C. & P. 543. But it is said to be 'the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority.' *R. v. Taylor*, 8 C. & P. 733. The result of these cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner: for a promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent." See *Cunningham v. Commonwealth*, 9 Bush (Ky.), 149; *Young v. Commonwealth*, 8 Bush (Ky.), 366; *State v. Fortner*, 43 Iowa, 494; *Com. v. Sego*, 125 Mass. 210; *State v. Darnell*, 1 Houst. C. C. (Del.) 321; *Ulrich v. People*, 39 Mich. 245; *Cady v. State*, 44 Miss. 332; *State v. Kirby*, 1 Strob. (S. Car.) 378. Compare *State v. George*, 15 La. Ann. 145.

In *Beggarly v. State*, 8 Baxt. (Tenn.) 520, the court said: "In regard to the person by whom the inducements were

A confession can never be received in evidence if the prisoner has been influenced by *any* threat or promise, and the court cannot measure the force of the influence used, or the effect upon the mind of the prisoner, and therefore the confession is a declaration if *any* degree of influence has been exerted. It is a question for the court, and not for the jury, to determine whether, under the particular circumstances of the case, the confession is admissible. The general principle on which the courts have proceeded seems to be this: If, under the circumstances, there be reasonable ground for believing that the disclosure was made under the influence of a threat of a temporal nature, the evidence ought not

to be offered there has been conflict in the authorities—some holding that the inducements held out by private persons, not being prosecutor, officer, or having any authority over the prisoner, are not sufficient to exclude confessions thus obtained; but the sounder rule manifestly is, that this is a mixed question of law and fact for the judge, and while it is proper to note the difference between confessions obtained by prosecutor, officer, or person in authority, and those obtained by private persons, yet if in fact the confessions were forced from the prisoner through hope or fear presented to his mind by a third person, it should be rejected."

In *R. v. Dunn*, 4 C. & P. 543, a witness proved that the prisoner wished to sell a stolen book to him, and that he told him he had better tell where he got it. Bosanquet, J.: "Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person. Whether a prisoner's having been told by one person that it will be better for him to confess, will exclude a confession subsequently made to another person, is very often a nice question; but it will always exclude a statement made to the same person." In *R. v. Slaughter*, 4 C. & P. 543, note (a), the same learned judge rejected a confession made by the prisoner to one of his fellow-workmen, who had told him it would be better for him to confess. In *R. v. Arundel*, Gloucester Summer Assizes 1830, the same learned judge ruled the same way, saying: "If an unauthorized person makes a promise, it will not prevent a statement made to another person from being received in evidence; but if the statement be made to the person who makes the promise, I think it ought not to be received." The same distinction is also adverted to in a note to *R. v. Gibbons*, 1 C. & P. 97. For

this distinction, however, is a sufficient reason. The inducement in every case is, whether it was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty than to not commit. If it was, the confession made under its influence is inadmissible. If the party using the inducement is a person in authority, the same time it must exclude the confession, as it is deserving of consideration with others, that the inducement make the confession inadmissible. The inducement at the time, afterwards to another person, to show that he was influenced by the inducement, is not sufficient; and this is the rule in the court seems to have been established in *Gibbons*. See also *J. & W. v. Gibbons*, 1 C. & P. 97.

1. 3 Russ. on Cr. 100; *State v. Patterson*, 7 Mo. 192; *Hagan*, 54 Mo. 192; *Mo. 278*; *Hector v. State*, 22 Am. Dec. 454; *Mo. 128*; *State v. Campbell*, 49 Ala. 520; *Ala. 425*; *Redd v. State*, 26 Ala. 54; *Porter v. State*, 95; *Murphy v. State*, 81; *Commonwealth v. Rigsby*, 6 Lea (Tenn. State, 61 Miss. 243; 24 Miss. 512; *Jordan v. State*, 63 Ga. 600; 70 N. Car. 356; *State v. Cox*, 563; *Cox v. People v. Wentz*, 37 Phelps, 11 Vt. 116; 672; *State v. Walker*, 135 Mass. 210; 108 Mass. 285; *Com. v. Gibbons*, 505; *Com.*



ray (Mass.), 190; *Pife v. Commonwealth*, 29 Pa. St. 429; *State v. York*, 37 N. H. 175; *State v. Guild*, 10 N. J. L. 3, s. c., 18 Am. Dec. 404; *People v. Polcott*, 51 Mich. 612; *Flagg v. People*, Mich. 706; *Smith v. State*, 10 Ind. 6; *Miller v. People*, 39 Ill. 457; *Spears v. State*, 2 Ohio St. 584; *Metzger v. State*, 18 Fla. 481; *Runnels v. State*, 28 Ark. 121; *Cain v. State*, 18 Tex. 387; *Watts v. State*, 2 Tex. App. 588.

It is for the court to determine whether the circumstances attending such admissions or confessions are such as that they could be received as the deliberate and voluntary statements of an accused person. The usual practice is to make the inquiry before the admissions or statements are shown, but if this inquiry is made in advance it may be made at any time, and if it shall appear that the statements were not voluntary, or were induced by improper influences, the testimony should be excluded from the consideration of the jury. The true rule is that the circumstances under which the declarations or admissions were made should be shown, and if they appear to have been voluntary to submit the evidence to the jury, and if otherwise to exclude it. *Metzger v. State*, 18 Fla. 481; *Simon v. State*, 5 Fla. 285; *Dixon v. State*, 13 Fla. 631; *Murphy v. State*, Ala. 1; *King v. State*, 40 Ala. 314; *State v. Bob*, 32 Ala. 560; *State v. Vann*, N. Car. 631; *Com. v. Culver*, 126 Mass. 464; *People v. Soto*, 49 Cal. 67; *Watts v. State*, 36 Tex. 350; *Cain v. State*, 18 Tex. 387; *Harding v. State*, 54 Ark. 359; *Murphy v. People*, 63 N. Y. 1; *State v. Fildment*, 35 Iowa, 541; *State v. Ostrander*, 18 Iowa, 435; *State v. Duncan*, 64 Mo. 262; *State v. Patterson*, 73 Mo. 695; *Young v. Commonwealth*, 8 Bush (Ky.), 366; *Hudson v. Commonwealth*, 2 Duv. (Ky.) 531; *Waley v. State*, 11 Ga. 123; *State v. Harvey*, 28 La. Ann. 925. Compare *Garland v. State*, 50 Miss. 147; *State v. Brite*, N. Car. 26.

It is for the trial court, in each case, to determine, as a preliminary question, whether the confession was made with a degree of freedom which ought to justify its admission; and unless there is manifest error in the ruling, its admission should not cause a reversal of the judgment. *State v. Patterson*, 73 Mo.

The competency of confessions is a preliminary inquiry for the court, which should not admit them unless they clearly appear to have been made in such a manner as to be evidence, and should exclude

them after they are admitted if it appears that they were improperly obtained. *Simmons v. State*, 61 Miss. 243.

Where the preliminary examination as to the admissibility of confessions was conducted in the presence of the jury, and being found competent, they were admitted, this was not such error as would require a new trial; *aliter*, had the confessions been inadmissible. *Anderson v. State*, 72 Ga. 98.

It is for the court to determine whether the confessions of a prisoner are voluntary or involuntary, and the court's decision of the question cannot be reviewed by the jury. Hence, a charge is erroneous which submits to the jury the decision of this legal question, and should, for that reason, be refused. *Redd v. State*, 69 Ala. 255.

The circuit judge having permitted evidence of a confession of guilt made by a prisoner to the committing magistrate to go to the jury, the appellate court will refuse to interfere upon that ground, although the manner of the officer was rude, and his caution to the prisoner not as explicit as it should have been. *State v. Branham*, 13 S. Car. 389.

After deciding that the evidence may be submitted, it is error without prejudice to defendant to charge the jury that they should decide whether or not the confession was voluntary. *State v. Moorman*, 2 S. East. Repr. (S. Car.) 621.

When confessions are admitted by the court, the jury must receive them as competent evidence. It is without their province to reject them as incompetent. But the credibility of the confessions, or the effect or weight to which they are entitled as evidence, it is the province of the jury to determine. In the consideration and determination of these inquiries, they must look to all the facts and circumstances under which the confessions were made—the facts and circumstances which were introduced before the court, if shown to them, and any other facts or circumstances which may be in evidence. *State v. Guild*, 10 N. J. L. 163; s. c., 18 Am. Dec. 404; *Young v. State*, 68 Ala. 569; *Brister v. State*, 26 Ala. 107; *Bob v. State*, 32 Ala. 560; *Redd v. State*, 68 Ala. 492. Any act, declaration, or admission received as evidence, the jury should take and consider in connection with the circumstances under which it was done or made. If, in view of all the circumstances, the jury are not satisfied that the confessions were made freely, voluntarily, and intelligently; if they believe that they originated from fear of present peril, or hopes of personal benefit, excited by



others, supposed—fairly and reasonably supposed—to have the authority to assure the benefit or to avert the danger; or the confessions are not harmonious and consistent with the other evidence,—they should reject them as wanting in credibility, or as not entitled to weight in passing upon the question of guilt or innocence. But although they may regard the confessions as springing from the hopes or fears of the accused unduly excited, yet if there is evidence corroborating them, or if they are harmonious and consistent with the other evidence, if of their truth they have no reasonable doubt, the confession should be accepted and acted upon by them. *Young v. State*, 68 Ala. 569; *Brister v. State*, 26 Ala. 107.

In *Com. v. Piper*, 120 Mass. 185, the court says: "When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements were shown; and the finding of the court upon this question cannot be revised upon a bill of exceptions, unless it involves some ruling in matter of law, or the whole evidence is reported with a view of submitting its sufficiency to the appellate court. If the presiding judge is satisfied that there were such inducements, the confession is to be rejected; if he is not satisfied, the evidence is admitted. But if there is any conflict of testimony, or room for doubt, the court will submit this question to the jury, with instructions that if they are satisfied that there were such inducements they shall disregard and reject the confession." This seems to state the matter

toxicating liquors were used to induce confession, the confession will not be rejected. *State v. Hopkirk*, 84 Mo. 695; *State v. Patterson*, 73 Mo. 695; *State v. Phelps*, 74 Mo. 128, *Levison v. State*, Ala. 520.

Mr. Taylor says (1 *Taylor's Ev.* Ed. § 807): "What language is sufficient to constitute such inducement or threat remains undetermined; and here the reported decisions certainly furnish an unsatisfactory guide. Some reason may be given for applying the rule to words as these: 'Unless you give a more satisfactory account, I will take you before a magistrate.' *R. v. Thompson*, 1 Lea, 291; *R. v. Luckhurst*, P. & D. 1; *R. v. Richards*, 5 C. & P. 318. 'If you will tell me where my goods are, I will be favorable to you.' *R. v. Cass*, 1 C. & P. 293, n. 2; *Boyd v. State*, 2 Hu. & N. (Tenn.) 37. 'I only want my money, and if you give me that, you may go to the devil.' *R. v. Jones*, R. & M. 152. 'If you will not tell all you know about it, of course we can do nothing.' *R. v. Partridge*, 7 C. & P. 551. 'You are under suspicion of this, and you had better tell all you know.' *R. v. Henson*, 4 C. & P. 387; *R. v. Cheverton*, F. & F. 833. 'The watch has been found, and if you do not tell me your partner was, I will commit you to prison.' *R. v. Parratt*, 4 C. & P. 1; *R. v. Upchurch*, 1 Mood. C. C. 353. 'You had better split, and not suffer all of them.' *R. v. Thomas*, 6. C. 353. But when confessions have been rejected in consequence of such expressions as the following having been used: 'It will be better for you to speak truth.' *R. v. Carr*, 1 C. & P. 1.

in your defence we shall be ready to  
 ear, or send to assist you.' *R. v. Mor-*  
*n, 2 M. & R. 514*,—in these and the  
 cases it is only too apparent that  
 sense and common-sense have been sac-  
 rificed on the shrine of mercy. Indeed,  
 the judges themselves have of late years  
 come to this conclusion, and after a sol-  
 emn discussion of the subject in the court  
 of criminal appeal, they have expressly  
 overruled the last three decisions cited  
 above, as cases which are discreditable  
 to the law. So anxious was the court at  
 the time to exclude evidence of confes-  
 sions, that exhortations not to tell lies,  
 or to speak the truth, have been deemed  
 only to induce a false acknowledgment  
 of guilt; and, consequently, admissions  
 made after such exhortations have more  
 than once been rejected. But this para-  
 doxical opinion is now happily exploded.  
 As to what shall be considered as a  
 promise or inducement, saying to the  
 prisoner that it would be better for him  
 if he did confess, is sufficient to exclude  
 the confession. *2 East P. C. c. 16, § 94*,  
*659; Newman v. State, 49 Ala. 9; s. c.*  
*1 Am. Cr. Rep. 173; People v. Bar-*  
*ber, 49 Cal. 342; State v. Day, 55 Vt. 510;*  
*4 Am. Cr. Rep. 510. Compare Com.*  
*Mitchell, 117 Mass. 431; Fouts v.*  
*State, 8 Ohio St. 98; Kelly v. State, 72*  
*Id. 341.*

Where, on an indictment for robbery, a  
 witness stated that he had said to one of  
 the prisoners, "You had better split, and  
 suffer for all of them," the statement  
 of the prisoner was rejected. *R. v.*  
*Thomas, 6 C. & P. 353.* So where a per-  
 son said to the prisoner in the police bar-  
 racks, "If any other person had to do in  
 your case, it is better you should tell;" the  
 statement there made by the prisoner was  
 rejected. *Moody's Case, 2 Crawf. & D.*  
*C. Joy, 12.* So where on an indict-  
 ment for larceny, a witness proved that  
 he had said to the prisoner, "It would  
 have been better if you had told at first;"  
 the statement of the prisoner was re-  
 jected; *Gurney, B.*, saying, "That is an  
 inducement. It amounts to this, that if  
 it would have been better then, it would  
 be better now. I think it hardly safe to  
 admit the evidence after that." *R. v.*  
*Wilkey, 6 C. & P. 175.*

Where a constable, whilst he had a pris-  
 oner in custody on a charge of larceny,  
 asked him whether he had committed the  
 offence, which he denied, and then said,  
 "It is no use for you to deny it, for there  
 are the man and boy who will swear that  
 they saw you do it;" *Gurney, B.*, held  
 that this was an inducement to say some-  
 thing, and therefore what the prisoner

said was not admissible. *R. v. Mills, 6*  
*C. & P. 146.* So where, on an indictment  
 for administering arsenic, it appeared  
 that the surgeon who was called in saw  
 the prisoner, and said to her, "You are  
 under a suspicion of this, and you had  
 better tell all you know," it was held that  
 a statement made after this to the sur-  
 geon was inadmissible. *R. v. Kingston,*  
*4 C. & P. 387.* So where it appeared, on  
 an indictment for larceny, that the pris-  
 oner, being in the custody of a constable,  
 the latter said to the prosecutor, "You  
 must not use any threat or promise to  
 the prisoner," and immediately after this  
 the prosecutor said to the prisoner, "I  
 should be obliged to you if you would tell  
 us what you know about it; if you will  
 not, we, of course, can do nothing; I  
 shall be glad if you will." The confes-  
 sion was held inadmissible; *Patteson, J.*,  
 saying, "I think this is a distinct prom-  
 ise; what could the prosecutor mean by  
 saying, that if the prisoner would not  
 tell, they could do nothing, but that if  
 the prisoner did tell, they would do some-  
 thing for him?" *R. v. Patridge, 7 C. &*  
*P. 551.*

The sheriff and State's attorney talked  
 with the respondent while in jail. The  
 sheriff first testified that no inducements  
 to confess were held out, but afterwards  
 said "that he presumed he and the  
 State's attorney both told the respondent  
 it would be better for her to tell the  
 whole story, and the punishment would  
 be likely to be lighter." *Held*, that his  
 testimony was not admissible. *State v.*  
*Day, 55 Vt. 510; s. c. 4 Am. Cr. Rep.*  
*510.*

Where A, whose property was stolen,  
 said to B, "You had better return that  
 chair," and B replied he would do so,  
*held* inadmissible. *Lacey v. State, 58*  
*Ala. 385.*

A confession was obtained from a  
 weak-minded person under arrest for  
 crime, by telling him that the best thing  
 he could do was to own up, giving him  
 drink, and taking him in irons to a law-  
 yer's office, where he was interrogated  
 with bolted doors and in the presence of  
 those who were hostile to him, and where  
 his answers were taken down in writing  
 and sworn to. *Held*, that the confession  
 was not voluntary, and could not be used  
 against him. *Flagg v. People, 40 Mich.*  
*706.*

Where a prisoner was told by the com-  
 mitting magistrate, "If you do not tell  
 the truth I will commit you," *held*, that  
 the confession was not admissible. *Com.*  
*v. Harman, 4 Pa. St. 260.*

Where an officer said to a prisoner

others, supposed—fairly and reasonably supposed—to have the authority to assure the benefit or to avert the danger; or the confessions are not harmonious and consistent with the other evidence,—they should reject them as wanting in credibility, or as not entitled to weight in passing upon the question of guilt or innocence. But although they may regard the confessions as springing from the hopes or fears of the accused unduly excited, yet if there is evidence corroborating them, or if they are harmonious and consistent with the other evidence, if of their truth they have no reasonable doubt, the confession should be accepted and acted upon by them. *Young v. State*, 68 Ala. 569; *Brister v. State*, 26 Ala. 107.

In *Com. v. Piper*, 120 Mass. 185, the court says: "When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements were shown; and the finding of the court upon this question cannot be revised upon a bill of exceptions, unless it involves some ruling in matter of law, or the whole evidence is reported with a view of submitting its sufficiency to the appellate court. If the presiding judge is satisfied that there were such inducements, the confession is to be rejected; if he is not satisfied, the evidence is admitted. But if there is any conflict of testimony, or room for doubt, the court will submit this question to the jury, with instructions that if they are satisfied that there were such inducements they shall disregard and reject the confession." This seems to place the matter upon the proper foundation, and properly guards and protects the rights of the accused. *Com. v. Preece*, 5 N. Eastn. Rep. (Mass.) 494; *Com. v. Nott*, 135 Mass. 269; *Com. v. Smith*, 119 Mass. 305; *Com. v. Cuffee*, 108 Mass. 285; *People v. Barker*, 27 N. Westn. Rep. (Mich.) 539.

It is by no means necessary that the confession be spontaneous, otherwise no confession ever made would be receivable. It is only where the confession may be said to be extorted, dragged reluctantly from the breast of the prisoner, through exciting his hopes or practising on his fears, by some promise or some threat, that the confession subsequently made is inadmissible, and a mere adjuration to speak the truth, no threats or promises being employed, or if it be apparent that there was no connection between the promise or threat and the confession, or that trick or artifice or in-

toxicating liquors were used to induce confession, the confession will not be rejected. *State v. Hopkirk*, 84 Mo. 695; *State v. Patterson*, 73 Mo. 695; *State v. Phelps*, 74 Mo. 128; *Levison v. State*, Ala. 520.

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Where an officer said to a prisoner



others, supposed—fairly and reasonably supposed—to have the authority to assure the benefit or to avert the danger; or the confessions are not harmonious and consistent with the other evidence,—they should reject them as wanting in credibility, or as not entitled to weight in passing upon the question of guilt or innocence. But although they may regard the confessions as springing from the hopes or fears of the accused unduly excited, yet if there is evidence corroborating them, or if they are harmonious and consistent with the other evidence, if of their truth they have no reasonable doubt, the confession should be accepted and acted upon by them. *Young v. State*, 68 Ala. 569; *Brister v. State*, 26 Ala. 107.

In *Com. v. Piper*, 120 Mass. 185, the court says: "When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements were shown; and the finding of the court upon this question cannot be revised upon a bill of exceptions, unless it involves some ruling in matter of law, or the whole evidence is reported with a view of submitting its sufficiency to the appellate court. If the presiding judge is satisfied that there were such inducements, the confession is to be rejected; if he is not satisfied, the evidence is admitted. But if there is any conflict of testimony, or room for doubt, the court will submit this question to the jury, with instructions that if they are satisfied that there were such inducements they shall disregard and reject the confession." This seems to place the matter upon the proper foundation, and properly guards and protects the rights of the accused. *Com. v. Preece*, 5 N. Eastn. Rep. (Mass.) 494; *Com. v. Nott*, 135 Mass. 269; *Com. v. Smith*, 119 Mass. 305; *Com. v. Cuffee*, 108 Mass. 285; *People v. Barker*, 27 N. Westn. Rep. (Mich.) 539.

It is by no means necessary that the confession be spontaneous, otherwise no confession ever made would be receivable. It is only where the confession may be said to be extorted, dragged reluctantly from the breast of the prisoner, through exciting his hopes or practising on his fears, by some promise or some threat, that the confession subsequently made is inadmissible, and a mere adjuration to speak the truth, no threats or promises being employed, or if it be apparent that there was no connection between the promise or threat and the confession, or that trick or artifice or in-

toxicating liquors were used to induce confession, the confession will not be rejected. *State v. Hopkirk*, 84 Mo. 100; *State v. Patterson*, 73 Mo. 695; *State v. Phelps*, 74 Mo. 128, *Levison v. State*, Ala. 520.

Mr. Taylor says (1 Taylor's Ev., Ed. § 807): "What language is sufficient to constitute such inducement or threat remains undetermined; and here the reported decisions certainly furnish a very unsatisfactory guide. Some reason may be given for applying the rule to words as these: 'Unless you give me a more satisfactory account, I will take you before a magistrate.' *R. v. Thompson*, 1 Lea, 291; *R. v. Luckhurst*, P. & D. 107; *R. v. Richards*, 5 C. & P. 318. 'If you will tell me where my goods are, I will be favorable to you.' *R. v. Cass*, 1203, n. 2; *Boyd v. State*, 2 Hum. (Tenn.) 37. 'I only want my money, and if you give me that, you may go to the devil.' *R. v. Jones*, R. & F. 152. 'If you will not tell all you know about it, of course we can do nothing.' *R. v. Partridge*, 7 C. & P. 551. 'You are under suspicion of this, and you had better tell all you know.' *R. v. Kingston*, 4 C. & P. 387; *R. v. Cheverton*, F. & F. 833. 'The watch has been found, and if you do not tell me your partner was, I will commit you to prison.' *R. v. Parratt*, 4 C. & P. 100; *R. v. Upchurch*, 1 Mood. C. C. 100. 'You had better split, and not suffer all of them.' *R. v. Thomas*, 6 C. & P. 353. But when confessions have been rejected in consequence of such expressions as the following having been used: 'It will be better for you to speak the truth.' *R. v. Garner*, 2 C. & K. 100. 'The inspector tells me you make breaking tools; if so, you had better tell the truth, it will be better for you.' *R. v. Fennell*, L. R. 7 Q. B. D. 147. 'If of no use to deny it, for there are a man and boy who will swear they saw you do it.' *R. v. Mills*, 6 C. & P. 100. 'Now, be cautious in the answers you give me to the questions I am going to put to you about this watch.' *R. v. Fleming*, 1 Arm. M. & O. 330. 'Whatever you say will be taken down and read against you.' *R. v. Harris*, 1 Cox C. C. 106. 'Do not say anything to prejudice yourself, as what you say I shall take down, and it will be used for evidence against you at your trial.' *R. v. Dyer*, 8 C. & P. 140. 'What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else, that tends to injure you; but anything you

in your defence we shall be ready to  
ar, or send to assist you.' *R. v. Mor-*  
*n, 2 M. & R. 514*,—in these and the  
e cases it is only too apparent that  
justice and common-sense have been sac-  
ced on the shrine of mercy. Indeed,  
e judges themselves have of late years  
me to this conclusion, and after a sol-  
an discussion of the subject in the court  
criminal appeal, they have expressly  
eruled the last three decisions cited  
ove, as cases which are discreditable  
the law. So anxious was the court at  
e time to exclude evidence of confes-  
sions, that exhortations not to tell lies,  
t to speak the truth, have been deemed  
ely to induce a false acknowledgment  
guilt; and, consequently, admissions  
de after such exhortations have more  
n once been rejected. But this para-  
ical opinion is now happily exploded." *As to what shall be considered as a*  
*omise or inducement, saying to the*  
*soner that it would be better for him*  
*he did confess, is sufficient to exclude*  
*confession. 2 East P. C. c. 16, § 94,*  
*659; Newman v. State, 49 Ala. 9; s.*  
*1 Am. Cr. Rep. 173; People v. Bar-*  
*49 Cal. 342; State v. Day, 55 Vt. 510;*  
*s. 4 Am. Cr. Rep. 510. Compare Com.*  
*Mitchell, 117 Mass. 431; Fouts v.*  
*te, 8 Ohio St. 98; Kelly v. State, 72*  
*s. 244.*

Where, on an indictment for robbery, a  
ness stated that he had said to one of  
prisoners, "You had better split, and  
suffer for all of them," the statement  
the prisoner was rejected. *R. v.*  
*omas, 6 C. & P. 353.* So where a per-  
said to the prisoner in the police bar-  
ks, "If any other person had to do in  
case, it is better you should tell;" the  
ement there made by the prisoner was  
ected. *Moody's Case, 2 Crawford & D.*  
*C. Joy, 12.* So where on an indict-  
nt for larceny, a witness proved that  
had said to the prisoner, "It would  
e been better if you had told at first;"  
statement of the prisoner was re-  
ed; *Gurney, B.*, saying, "That is an  
ucement. It amounts to this, that if  
ould have been better then, it would  
better now. I think it hardly safe to  
nit the evidence after that." *R. v.*  
*lley, 6 C. & P. 175.*

Where a constable, whilst he had a pris-  
r in custody on a charge of larceny,  
ed him whether he had committed the  
ny, which he denied, and then said,  
is no use for you to deny it, for there  
he man and boy who will swear that  
y saw you do it;" *Gurney, B.*, held  
t this was an inducement to say some-  
g, and therefore what the prisoner

said was not admissible. *R. v. Mills, 6*  
*C. & P. 146.* So where, on an indictment  
for administering arsenic, it appeared  
that the surgeon who was called in saw  
the prisoner, and said to her, "You are  
under a suspicion of this, and you had  
better tell all you know," it was held that  
a statement made after this to the sur-  
geon was inadmissible. *R. v. Kingston,*  
*4 C. & P. 387.* So where it appeared, on  
an indictment for larceny, that the pris-  
oner, being in the custody of a constable,  
the latter said to the prosecutor, "You  
must not use any threat or promise to  
the prisoner," and immediately after this  
the prosecutor said to the prisoner, "I  
should be obliged to you if you would tell  
us what you know about it; if you will  
not, we, of course, can do nothing; I  
shall be glad if you will." The confes-  
sion was held inadmissible; *Patteson, J.*,  
saying, "I think this is a distinct prom-  
ise; what could the prosecutor mean by  
saying, that if the prisoner would not  
tell, they could do nothing, but that if  
the prisoner did tell, they would do some-  
thing for him?" *R. v. Patridge, 7 C. &*  
*P. 551.*

The sheriff and State's attorney talked  
with the respondent while in jail. The  
sheriff first testified that no inducements  
to confess were held out, but afterwards  
said "that he presumed he and the  
State's attorney both told the respondent  
it would be better for her to tell the  
whole story, and the punishment would  
be likely to be lighter." *Held*, that his  
testimony was not admissible. *State v.*  
*Day, 55 Vt. 510; s. c., 4 Am. Cr. Rep.*  
*510.*

Where A, whose property was stolen,  
said to B, "You had better return that  
chair," and B replied he would do so,  
*Held* inadmissible. *Lacey v. State, 58*  
*Ala. 385.*

A confession was obtained from a  
weak-minded person under arrest for  
crime, by telling him that the best thing  
he could do was to own up, giving him  
drink, and taking him in irons to a law-  
yer's office, where he was interrogated  
with bolted doors and in the presence of  
those who were hostile to him, and where  
his answers were taken down in writing  
and sworn to. *Held*, that the confession  
was not voluntary, and could not be used  
against him. *Flagg v. People, 40 Mich.*  
*706.*

Where a prisoner was told by the com-  
mitting magistrate, "If you do not tell  
the truth I will commit you," *Held*, that  
the confession was not admissible. *Com.*  
*v. Harman, 4 Pa. St. 260.*

Where an officer said to a prisoner

that "he could make him no promises, but if he made any disclosures that would be of benefit to the government, the officer would use his influence to have it go in his favor," *held*, that the confession was not admissible. *Com. v. Taylor*, 5 Cush. (Mass.) 606.

An acquaintance said to the prisoner, "Tom, this is mighty hard; they have got the deadwood on you, and you will be convicted," and at the same time said something about "owning up." The prosecutor said to the prisoner, "You are very young to be in such a difficulty as this; there must have been some one with you who is older, and I, if in your place, would tell who it is; it is not right for you to suffer the whole penalty, and let some one who is guiltier go free, it may go lighter with you." *Held*, that the confession was not admissible. *Newman v. State*, 49 Ala. 9; *s. c.*, 1 Am. Cr. Rep. 173.

While a confession induced by a promise made to the defendant by the prosecutor to dismiss the prosecution would not be admissible in evidence, yet if the confession was antecedent to, and therefore uninfluenced by, the promise, it is admissible. *Murdock v. State*, 68 Ala. 567. See *Boyd v. State*, 2 Humph. (Tenn.) 39.

Admissions by a prisoner charged with murder that he committed the crime are incompetent if fairly traceable as the inciting cause to a promise made by the chief prosecuting attorney that if the prisoner would confess he would do all he could to save him. *Simmons v. State*, 61 Miss. 243.

Any words spoken in the hearing of the defendant while in custody, which might generate hope or fear on his part, are sufficient to exclude his confessions thereby induced; and when a confession has been thus improperly obtained, any subsequent repetition of it must also be excluded, unless it is affirmatively shown that the effect of the improper influence had been entirely removed. Under these rules, as applied to the facts shown in this case, the defendant's confessions ought not to have been admitted. *Owen v. State*, 78 Ala. 425.

The mere dread of legal punishment is not such compulsion, nor the mere hope of immunity such persuasion, as destroys the voluntary character of a confession. But a confession obtained by an official promise to put an end to a prosecution is not admissible. *Lopez v. State*, 12 Tex. App. 27.

The words, "You had better own up," followed by, "I was in the place when

you took it; we have got you down this is not the first you have taken have got other things against you no as good as this," spoken by one police officer to another in a police station, in the presence of the superior officer, the person addressed and of the speaker who has detected him in the act of stealing, will render a subsequent confession of guilt by the accused person inadmissible at the trial of an indictment against him for the larceny. *Com. v. Nott*, Mass. 269. In this case the court said: "The words, 'You had better tell the truth,' have sometimes been held to render a subsequent confession inadmissible, because they would probably be understood to mean that it would be better to say something, and that 'truth' in the mind of the speaker implied a confession of guilt. *The Queen v. Vis*, L. R. 1 C. C. 96, 99; *R. v. Fen*, 14 Cox C. C. 607; *R. v. Doherty*, 13 C. C. 23. But similar words, when implying that the speaker expected a confession, but only the truth, have been held or said not to render a subsequent confession inadmissible. *The Queen v. Reeve*, L. R. 1 C. C. 362; *s. c.*, 12 C. C. 179; *R. v. Baldry*, 5 Cox C. C. 523, 529. In the present case, the words used were, in the first place, 'You better own up;' and these were equivalent to saying, 'You had better confess.' The words which follow imply that a denial would be useless, because the defendant had been seen to do the act. First there was an intimation that other criminal acts could be proved against him. These words were spoken before arrest, to be sure, but by a police officer at the police station, and in the presence of the officer in charge, who appears to have been the common superior of the speaker and of the defendant. They were simply an admonition to tell the truth, but they held out an inducement to make a confession of guilt. The confession, therefore, should have been excluded, and on this ground only the exception must be sustained."

While a person was under arrest for the larceny of two barrels of whiskey, the arresting officer told him "that they had evidence enough to bind him, that they had found one barrel of whiskey and the other would do him good, and that he had better tell, or not as well tell, him where the other barrel was;" and the accused person thereupon admitted that he took the whiskey, told the officer where the barrel could be found. On the trial of the person for larceny, at the close of all the evidence

the defendant asked the judge to rule that the admission of the defendant to the officer should not be considered by the jury. The judge declined so to rule, but instructed the jury that, if they found that the officer said in substance, "We have found one barrel of the whiskey, and it will be better for you to tell where the other is," the jury should disregard the admission altogether. *Held*, that the defendant had no ground of exception. *Com. v. Kennedy*, 135 Mass. 543.

A confession of larceny of meat by an employee, induced by a statement from his employer that "if he would bring up the meat, there was a probability the whole matter could be settled," should not have been admitted. *Byrd v. State*, 58 Ga. 661.

R. testified that \$393.50 in gold and \$30 or \$40 in paper were stolen from his bureau-drawer, and while the appellant and S. were under guard on their way to the county of K., where the money was stolen, and whence they had fled, that "both told him where the money was hid, and how they had divided it," and he found \$3 and the sack his money was in when it was stolen where appellant said some of the money was hid, and that he found \$300 in gold where S. told him the money was; that "he had held out the promise to R. and S., if they would tell him where the money was, that he would not prosecute *him* heavy, and told R. it would go better with him to tell him where the money was; that all he wanted was his money, and if R. would tell him where it was he would not prosecute him hard, or get the record from M. county." *Held* inadmissible, as under coercion. *Rector v. Commonwealth*, 80 Ky. 468.

Where a constable, who apprehended a prisoner for stealing a brass tap, asked him what he had done with the tap he had stolen from the prosecutor's premises, and said, "You had better not add to the crime of theft," and desired him to go with another constable and show him where he had put the tap; Gaselee, J., after expressing some doubt, refused to receive a confession made to the constable who had addressed these observations to the prisoner. *R. v. Shepherd*, 7 C. & P. 579. Mr. Joy (Joy on Conf. 8) observes "that the manner in which these words were used may have been considered by the learned judge, who saw and heard the witness, to be of a threatening nature, and calculated to lead the prisoner untruly to confess himself guilty; or the words may have been deemed in effect the same as if the con-

stable had said, 'You have committed a theft, it will be better for you not to deny it—that is, to confess.' The words, viewed in this light, imply an inducement rather than a threat." "This case has been controverted," Joy on Conf. 8, note (a), but it is not stated upon what occasion. It is difficult to see how the observations of the constable could induce the prisoner to state what was false, especially as he desired the prisoner to go and show where he had put the tap; and therefore the case seems at variance with *R. v. Court*, 7 C. & P. 486, which seems to have proceeded on the correct principle, namely, that a confession is admissible unless it has been obtained by the prisoner being induced to suppose that it will be better for him to admit himself guilty of an offence which he really never committed.

Where an officer promised a girl of 14 that if she would tell, she should not be hurt, *held*, that the confession was inadmissible. *Earp v. State*, 55 Ga. 136; s. c., 1 Am Cr. Rep. 171.

Where the accused said of a witness who had testified against him, "that what he said was true as far as it went, but that he did say all, or enough," *held*, not admissible as a confession. *Finn v. Commonwealth*, 5 Rand. (Va.) 701.

*Duress*.—Where a party is compelled by duress to make a self-disserving statement, this statement cannot be put in evidence against him. *Whar. Cr. Ev.* (9th Ed.) § 661. *Summerbell v. Summerbell*, 37 N. J. Eq. 603.

"It has been thought that illegal imprisonment is calculated to exert such influence upon the mind of the prisoner as to justify the inference that his confessions made during its continuance were not voluntary; and on one occasion they appear on this ground to have been rejected. *R. v. Ackroyd*, 1 Lew. C. C. 49. But this doctrine cannot yet be considered as satisfactorily established. *R. v. Thornton*, 1 Mood. C. C. 27." *Taylor's Ev.* (8th Ed.) § 806.

Where the confession of a prisoner to an officer is voluntarily made, evidence thereof cannot be rejected, because of the fact that the officer held the prisoner in custody at the time upon an invalid process, or without any process or lawful right. *Balbo v. People*, 80 N. Y. 484.

Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible. *Day v. State*, 63 Ga. 667. *Compare State v. Graham*, 74 N. Car. 646.

**Confession Made When Under Arrest.**—It is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put by him, or that it was made under hope or promise of a benefit of a collateral nature. *Cox v. People*, 80 N. Y. 500; *State v. Tatro*, 50 Vt. 483; *Redd v. State*, 68 Ala. 492; *Spicer v. State*, 69 Ala. 159; *Jackson v. State*, 69 Ala. 251; *State v. Guy*, 69 Mo. 430.

The fact that the prisoner's feet were tied at the time of making the confession does not render it inadmissible. *State v. Patterson*, 73 Mo. 695.

Evidence of confessions made by a defendant while under arrest are admissible, if voluntarily made; the fact that defendant was under arrest not necessarily proving that the declarations were involuntary. *People v. Abbott*, 4 Pac. Repr. (Cal.) 769.

Confessions made under arrest, though not voluntary or after warning, may be used in evidence to the extent that the accused made statement of facts and circumstances found to be true, and no further. Only so much of the confession is admissible as was indicative of verified and inculpatory disclosures. *Massey v. State*, 10 Tex. App. 645; *Davis v. State*, 2 Tex. App. 588.

The kind of fear must be something more than the fear which is produced by the fact that the defendant was accused of a crime, and was arrested or taken into custody. *Com. v. Smith*, 119 Mass. 305; *Com. v. Mitchell*, 117 Mass. 431; *Com. v. Preece*, 140 Mass. 276; *State v. Carlisle*, 57 Mo. 102.

In *People v. McMahon*, 15 N. Y. 384, the defendant was arrested by a constable, without warrant, on a charge of having murdered his wife. The constable took him before the coroner, who was holding an inquest on the body, by whom he was sworn and examined as a witness. It was held that the evidence thus given was not admissible on the prisoner's trial for the murder, and his conviction was reversed upon that ground. In the judgment all the judges who heard the case concurred. See *People v. Mondon*, 103 N. Y. 211.

The prisoner was charged with killing his wife; the murder was committed in the city of New York; the prisoner on the night of the murder left that city and went to Wheeling, W. Va., where he was arrested without a warrant by police officers who had followed him. While on the way to and before reaching this State

he made a confession to one of the officers having him in charge, to the effect that he killed his wife. It was shown that no promises were held out, or threats used to induce the confession. It was held that it was properly received in evidence, that conceding the fact that the prisoner was at the time under illegal arrest, did not render it inadmissible. *Balbo v. People*, 80 N. Y. 484.

See EXAMINATION UNDER OATH, § 1. See, generally, *Cobb v. State*, 27 Ga. 648; *Stephen v. State*, 11 Ga. 225; *Jefferson v. State*, 58 Miss. 349; *State v. Jefferson*, 6 Ired (N. Car.) 305; *Com. v. Mosley*, Pa. St. 264; *People v. McMahan*, 2 P. C. C. (N. Y.) 663; *People v. Murphy*, N. Y. 590; *People v. Rogers*, 18 N. Y. 500; *Cox v. People*, 80 N. Y. 500; *Austin v. State*, 14 Ark. 556; *Com. v. Cuffee*, Mass. 285. Compare *People v. Webb*, 37 N. Y. 303; *Young v. Com.*, 8 B. (Ky.) 366.

Under the Texas statute a judicial confession made while in custody is not inadmissible. *Speer v. State*, 4 Tex. A. 474.

**Violence of Mob.**—Two prisoners had been committed to jail on a charge of murder, then recently perpetrated. They were taken in a few days after their commitment, without legal authority, by a body of forty unarmed men; and handcuffed, chained together, and guarded, they were carried seven miles into the country to a church near the scene of the murder, before arriving at which place the crowd had increased to seventy. These men had obtained the keys of the jail from the sheriff on the assurance that they would restore to him the prisoners unharmed, accompanied with a threat that they would have the prisoners if he did not let them have the keys. Their purpose in taking the prisoners, as stated by them to the sheriff, was to get some money alleged to have been taken at the time of the commission of the offence; but it was not shown that the prisoners were informed of the assurance given the sheriff, or of the crowd's avowed purpose in taking them from jail. About ten minutes after arriving at the church, one of the prisoners, without any solicitation, so far as shown, asked permission to have a "friendly" talk with one of the crowd, whom the prisoner designated by name, and the privilege having been granted by the leader, the prisoner, with a party selected by him, and another of the original forty men, went a short distance into the woods, and there the prisoner admitted that he assisted in killing the victim; the confession then ceased; and afterwards the other pris-

"also confessed under similar circumstances." While going from the jail to the church, silence towards the prisoners was enjoined in their presence and afterwards observed. The prisoners at no time gave the slightest exhibition or evidence of apprehension or fright, and it was shown that no threats in words or otherwise than as above stated were made, or any inducement offered to the prisoners to obtain their confessions. *Held*, that the prisoners' confessions are not shown to have been uninfluenced by their surroundings, suspicious and menacing in their character as they were, and are therefore not shown to have been voluntary, and were not admissible in evidence. *Young v. State*, 68 Ala. 569.

Where a confession was made at a late hour of the night to the sheriff of the county by a prisoner who was confined in jail on a charge of murder, and who had been advised that a mob was gathering in town to rescue him from jail, and who knew that a guard of eight or ten persons had been summoned to protect him, one of whom had asked him "whether he was afraid of a mob," to which he replied in the negative, and to whom the sheriff himself, in the presence of a half-dozen of the guards, had stated that he was "in a bad fix," and, in reply to a question put by the prisoner, had told him that "sometimes in cases of assault and battery and similar cases it would be best to plead guilty,"—*held*, that such confession was obtained under the combined influence of both hope and fear, and was inadmissible. Another confession of a similar character made by the prisoner on the following morning to the jailer, when he went up to feed the prisoners, which seems to have been elicited by a question put by him to the prisoner, asking whether the prisoner had anything to say to him, is presumed to have originated from the same motives, and is inadmissible, in the absence of evidence showing that the influence exerted upon the mind of the prisoner by the events of the previous night had been removed. *Redd v. State*, 69 Ala. 255.

A confession was held admissible, notwithstanding that on the day before the prisoner, when confined, was actually threatened by third persons with violence. *Mose v. State*, 36 Ala. 211.

The defendant was arrested in the night of the day on which the poisoning was alleged to have been done, on suspicion of being the person who had done it. After her arrest she made her escape, but was recaptured a day or two afterwards, and was confined by a chain

around her neck, in a negro-house about one hundred yards from the residence of R., and was guarded by a negro constable. About dark, witness and H., another neighbor, fearing she might again escape, concluded to carry her to the house of R., and remain there with her that night. They started with her from the negro-house to the house of R., with the chain around her neck, and the negro constable and some other negroes along with them. After going a short distance they came to a tree, when the defendant, without any one having said anything to her on the subject, said to them, "If you will stop here I will tell you all about it," or that in substance. Thereupon they all stopped, and the defendant stated to them that she took the morphine out of the bottle in the trunk and put it in the cup of coffee which she had prepared and was carrying to Mrs. R.; that she was mad with R., and wanted to kill him, but concluded to try it on Mrs. R. first. Witness testified also, that after they stopped, and defendant began to tell them about it, other negroes came up to where they were, and when defendant had finished telling them about it, he supposed there were fifteen or twenty, or probably more, present; that after defendant said she had put the morphine in the coffee, as above stated, one of the negroes said to her that she ought to have her neck broken, and made demonstrations of violence towards her; but witness and said H. told them they should not hurt her, and then carried her to the house of R. Witness testified also that up to the time when defendant told them to stop and she would tell them all about it, no threat of any kind had been used, and no promise or inducement of any kind made or held out to induce her to tell, and that no threat was made during the entire time, except as above stated. *Held* admissible. *Kendall v. State*, 65 Ala. 493.

The prisoner after his arrest was tied by a party of negroes and taken to the spot where the body of the murdered man lay. A large party of negroes, mostly armed, were present. They were all greatly excited, and insisted that the prisoner should be hung. He then confessed. *Held*, that the confession was admissible. *Cady v. State*, 44 Miss. 332. See *State v. Ingram*, 16 Kan. 14.

Where a mob surrounded the jail, and the sheriff told the prisoner that she was "gone up," *held*, that her confession was not admissible. *Self v. State*, 6 Baxt. (Tenn.) 244.

The prisoner, accused of murder, was

brought handcuffed to a place where a number of the relatives and neighbors of the deceased were assembled, and he was threatened with violence. The officer assured him that he would be protected. *Held*, that confessions made while he was handcuffed and after the threats, and without any solicitations, were admissible. *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

**When Admissible** — "The cases excluding confessions on the ground of unlawful inducement have gone too far for the protection of crime." *R. v. Reeve*, 12 Cox C. C. 179.

"The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth for fear of the threat, or hope of profit from the promise." Keating, J., in *R. v. Reason*, 12 Cox C. C. 228.

The hope or fear of some collateral benefit or injury does not render the confession inadmissible. *State v. Wentworth*, 37 N. H. 196. Thus where one was notified by his employer that he would be discharged unless he settled for the stolen property with the owner, but that if he would settle he should be kept at work, and a promise by the employer to say nothing about it to hurt him if he would settle, do not render confessions subsequently made in the same conversation incompetent. *Com. v. Howe*, 2 Allen (Mass.), 153.

Where the owner of stolen property, not suspecting the defendant, offered him a reward if he would get the property and thief, and the defendant a few days thereafter brought back the property and demanded the reward, and on being refused because he had not brought the thief, replied that he was the thief, and again demanded the reward, *held*, that such declarations were admissible as confessions of guilt. *McIntosh v. State*, 52 Ala. 355.

The fact that the defendant, in making the confession, was actuated by the belief that he was suspected of the offence and was in danger of being prosecuted for it, does not make the confession a compulsory one. *Allen v. State*, 12 Tex. App. 190.

Where the prisoner, who was tied, said to the officer, "If you will untie me I will tell you," and on being loosened confessed, *held* admissible. *State v. Cruse*, 74 N. Car. 491. See *State v. Tatro*, 50 Vt. 483.

In *Fife v. Com.*, 29 Pa. St. 429, the jailer, in a conversation with a prisoner respecting herself and other prisoners,

had said to her "that if the community wealth would use any of them as a witness, I suppose it would prefer you either of the others," and she afterwards made a confession. It was held that there was nothing in this expression of the jailer which amounted to a promise or which should cause the confession to be rejected.

On the trial, P., the father of I., a witness for the State, testified that in conversation with the defendant he, defendants, commenced telling on him, and witness cautioned him not to tell anything to convict himself, and said to "that he did not come there to get evidence to convict him, but he wanted to use him as a witness;" that he made no promise, and thereupon the defendant admitted his taking his girl off, that he did it; that prior to that time he had no information of the defendant's guilt. *Held* admissible. *State v. Geo*, 93 N. Car. 567.

The witness stated: "I told him to tell on himself; but if there were others in with him, to tell it; we could then use him as a State witness against them. He then said he stole the horse and no one else had anything to do with it." *Held*, though confessions made under persuasion or threats, however light, weak, must be excluded, this confession was voluntary. *State v. Rigby*, 6 (Tenn.), 554.

Where an employer said to his clerk, "I am satisfied that there are other receivers whom we have not yet discovered. I should like to have you make a confession in breast of this matter, as W. has done." *Held*, that the confession was admissible. *Com. v. Sego*, 125 Mass. 210.

The watch of the deceased had been found upon the prisoner's person. The officer then asked him where the real Mrs. H.'s jewelry was. The prisoner replied that he knew nothing about Mrs. H.'s jewelry. Afterwards the officer repeated the question, and the prisoner said, "Will you do me a favor?" The officer replied, "I will if I can; I sympathize with you," or "I pity you;" "You are in a bad fix." The prisoner then requested that the officer would send his clothing and things to his mother, and not let his mother know that anything had happened to him. The prisoner then in answer to a question put by the officer who asked him to tell about the murder, went on to make a detailed statement how he entered the house and what he did. The subsequent confessions were made to other parties; they were objected to on the ground that they were made



After the supposed inducements held out by the officer. *Held*, the confession was admissible. *Cox v. People*, 80 N.Y. 500. Upon trial of an indictment for larceny, it appeared that while officers were making a search of defendant's house for the stolen property, one of them said to her that she might as well own up, as they had proof sufficient to convict her, and that she might consider herself under arrest. Thereafter she made certain statements, which were proved under objection and exception. *Held*, that conceding the statements so made would be regarded as confessions, evidence thereof was competent under the Code of Cr. Proc. (§ 395); it could not be considered that the statement of the officer was a threat, or that the declarations of defendant were induced by fear. *People v. McCallam*, 103 N. Y. 587.

Confession voluntarily made to members of the same church is admissible. *Com. v. Drake*, 15 Mass. 161.

The confession of the accused, if made voluntarily, not being induced by hope or fear excited by others, are admissible evidence against him, though made while he is under arrest to the officer having him in custody, and in response to inquiries addressed to him by the officer, though a mob was threatening violence. *Edwards v. State*, 68 Ala. 492; *Rice v. State*, 71 Ala. 38.

The fact that a prisoner had been threatened with personal violence does not disqualify his subsequent confession, voluntarily made, when he was entirely removed beyond and relieved from the influence of such threats. *Walker v. State*, 9 Tex. App. 38. See *Wilson v. State*, 3 Heisk. (Tenn.) 232.

Where it appeared that the officer making the arrest was accompanied by two other men, and that they were all large, strong men, but were not armed, and the prisoner was a small, weakly man, but that no threats or violence were used and no inducements held out, *held*, that confessions could not be excluded on the ground that the defendant was put in fear by force and numbers. *State v. Howard*, 92 N. Car. 772.

The State was allowed, against defendant's objection, to prove by one L., a deputy-sheriff, a confession made to him by the defendant, upon, in substance, the following preliminary proof: When the defendant rode off in the direction of his home after killing C., several armed persons followed for the purpose of arresting him. Three of the number found him in a field near his house, about two miles from J., with his gun, and drew their

guns on him. About this time the witness L. and others came up, and the defendant said to him, "You are an officer and a gentleman. Don't let these men hurt me." He was arrested by L. without resistance, and carried back to J., he and L. riding in a buggy, with some of the crowd in the rear and some in front. After going a short distance the witness said to the defendant, "I am sorry you have got into trouble;" and thereupon the defendant made the confession, which was as follows: "The defendant said he had done wrong; that he expected they would hang him or penitentiary him, and that he did not care a d—n which; that he did not intend to employ a lawyer; and that he had consulted his family about it last night, and it was all right." He also said in the same conversation that "C. [the deceased] had beat him up and broke two of his ribs, and that he was an old man." It was also shown that no threats or inducements were made against or offered to the defendant before he made the confession. *Held* admissible. *De Arman v. State*, 71 Ala. 351.

Where representations of the infamy which would attend concealment were made, and the accused, while greatly agitated, confessed, *held*, that it was admissible. *State v. Crank*, 2 Bailey (S. Car.), 66.

A confession induced by wrong means may be used to the extent of showing that the prisoner had knowledge of the facts to the discovery of which his confession has led. *White v. State*, 3 Heisk. (Tenn.) 338.

A and B were jointly indicted for larceny. A witness who had also had property stolen testified that he went to A, while in jail, and told him that B had turned State's evidence, and asked A to do likewise in order to convict B, promising that if he would do so he would "clear A of the charge of taking another's property." A said he did not take witness's property, but did take the prosecuting witness's. *Held*, the testimony was admissible. *State v. Fortner*, 43 Iowa, 494.

Where the accused was urged to confess if guilty, but not to confess if innocent, *held* admissible. *Meinaka v. State*, 55 Ala. 47.

Where A threatened B with a gun, whereupon he surrendered to arrest, and after walking two miles together, upon A's assuring him that he would not be harmed, B confessed. *Held* admissible. *Wilson v. State*, 3 Heisk. (Tenn.) 232.

A confession obtained by a private



person by saying to the accused, "I know your father, and you had better tell me, so I can tell him so that he can help you," is admissible. *Ulrich v. People*, 39 Mich. 245.

See further, for facts of admissible confessions, *Com. v. Mitchell*, 117 Mass. 431; *Com. v. Morey*, 1 Gray (Mass.), 461; *Com. v. Tuckerman*, 10 Gray (Mass.), 173; *Com. v. Whitmore*, 11 Gray (Mass.), 201; *Com. v. Howe*, 2 Allen (Mass.), 153; *State v. Tatro*, 50 Vt. 483; *State v. Howard*, 17 N. H. 171; *State v. Wentworth*, 37 N. H. 196; *State v. Patter*, 18 Conn. 166; *People v. Phillips*, 42 N. Y. 200; *Ward v. People*, 3 Hill (N. Y.) 395; *People v. Burns*, 2 Park. C. C. (N. Y.) 34; *State v. Carlisle*, 57 Mo. 102; *Hawkins v. State*, 7 Mo. 190; *State v. Brockman*, 46 Mo. 566; *Austine v. State*, 51 Ill. 236; *Cropper v. U. S.*, 1 Morris (Iowa), 259; *Fouts v. State*, 8 Ohio St. 98; *Cunningham v. Commonwealth*, 9 Bush (Ky.), 149; *Spence v. State*, 17 Ala. 192; *Carrol v. State*, 23 Ala. 28; *Aaron v. State*, 37 Ala. 106; *Frain v. State*, 40 Ga. 529; *Dick v. State*, 30 Miss. 593; *Lynes v. State*, 36 Miss. 617; *People v. Cotta*, 49 Cal. 167; *State v. Cook*, 15 Rich. (S. Car.) 29; *State v. Cowan*, 7 Ired. (N. Car.) 239; *State v. Freeman*, 12 Md. 100; *Com. v. Dillon*, 4 Dall. (U. S.) 116.

If what is said to a prisoner have no tendency to induce him to make an untrue statement, his confession is admissible. 3 Russ. on Cr. (5th Ed.) 442. On an indictment for cattle-stealing, a witness stated that he had had a conversation with the prisoner, in which the prisoner asked the witness if it would be better for him to confess; upon which the witness replied that it would be better for him not to confess, but that the prisoner might say what he had to say to him, for it should go no further; it was objected that the statement made to the witness was not receivable, as it had been obtained under a promise. Coleridge, J.: "The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one. I think that what was said in the present case must have had a contrary tendency." *R. v. Thomas*, 7 C. & P. 345. So if what is said to a prisoner contain neither a promise, threat, nor inducement to confess, the statement of the prisoner is admissible. The prisoner having been charged on oath by B., an accessory before the fact, with having set fire to three hay stacks belonging to O., N., and G., the constable went with a warrant, specifying all the three charges, and stating them to have been made on the oath

of the accessory, and when the prisoner was apprehended she was told that there was a very serious oath laid against her by B., who had sworn that she had set fire to O.'s, N.'s, and G.'s ricks, which the prisoner made a statement in which was allowed to be given in evidence. *R. v. Long*, 6 C. & P. 179.

If a person advise a prisoner to be sure to tell the truth, and he then makes a statement, such statement is admissible on the ground that such advice cannot be supposed to induce the prisoner to confess that he is guilty of a crime of which he is really innocent. On an indictment for forgery, the committing magistrate proved that no inducement was held out to the prisoner to confess, but the prosecutor had said, in the presence of the prisoner, that he considered the prisoner as the tool of one G., where the magistrate then told the prisoner to be sure to tell the truth: on which the prisoner made a statement. It was objected that this statement was not receivable, though this was not, in form, an inducement to confess, it was in effect so. A person in authority advising a prisoner to tell the truth, conveyed to the ears of the accused that it would be better for him if he confessed the charge. Lord Hale, J.: "I think I ought to receive this evidence. It can hardly be said that in telling a man to be sure to tell the truth, he is advising him to confess what he is really not guilty of. The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed." *R. v. Court*, 7 C. & P. 48.

So where at the conclusion of the examinations before the magistrate the prisoner began to make a statement, where the magistrate said to him, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial," it was objected that the statement made was inadmissible; it was answered that the only proper question was whether the words said to the prisoner had a tendency to induce him to make a untrue statement. Here the prisoner was told not to say anything that was false, and the preceding case was expressed in point. Rolfe, B.: "I am glad to find that there is such an authority; then, in some previous cases the other way, where it was held that it was an inducement to tell a prisoner that it would be better to tell the truth. I think this state-

admissible." *R. v. Holmes*, 1 C. & K. 48.

The prisoner was indicted for setting fire to her master's farm-building; she was about to go away from a policeman, but he prevented her, saying she was his prisoner upon the charge of this arson. He desired to change her dress. He said she might do so, but she must remain in custody, and he gave her into the charge of Mrs. A., who was a married daughter of her master, but did not live with her father, and had no control over the prisoner by reason of any relation of master and servant. Mrs. A. went with her into a laundry where her clothes were; but both Mrs. A. and the prisoner considered that the latter was in custody. Mrs. A. said to her, "Jane, I am very sorry for you; you ought to have known better; tell me the truth whether you did or not." She said, "I am innocent." Mrs. A. said, "Don't run your soul into more sin, but tell the truth." The prisoner then confessed. And on a case reserved upon the question whether the confession was legally admissible in evidence, it was held that there was no threat or inducement, and no sufficient authority on the part of Mrs. A. to exclude a statement made in consequence of any inducement to confess held out by her. *R. v. Sleeman*, Dears. C. C.

J. and G. were indicted for stealing and receiving hops, the property of A., a policeman, had gone to G.'s house, where J. and another brother, W., then were, and had found some hops in a room upstairs. He and the prosecutor then went into a parlor, where J., G., and W. were. L. then charged W. and J. with stealing the hops, and G. with receiving them, knowing them to have been stolen; which W. said, "Well, J., you had better tell Mr. A. the truth." Neither the prosecutor nor L. dissented from or marked on W.'s advice; whereupon J. said, "I will tell the truth. I did take some hops, and must risk it." L. then took the three to the Bridewell, and on their way J. said of his own accord, "I'll tell you how I got them hops," etc. Upon a case reserved, which stated that "if the confession was, under the circumstances, receivable, the conviction was to stand," the conviction was affirmed. *R. v. Parker*, L. & C. 42.

The result of these cases is that "as a general rule, an exhortation to speak the truth ought not to exclude a confession" *R. v. Erle*, J., *R. v. Moore*, 2 Den. C. C. 1.

But it has been repeatedly held that to

tell a prisoner that it would be better for him to tell the truth will exclude a confession. See *per* Maule, J., in *R. v. Garner*, 1 Den. C. C. 329; *per* Pollock, C. B., in *R. v. Baldry*, 2 Den. C. C. 430.

Where a prisoner and his wife were both in custody on a charge of receiving bank-notes, but in separate rooms, and a person said to him, "I hope you will tell, because the prosecutrix can ill afford to lose the money," and the constable said, "If you will tell where the property is, you shall see your wife;" Patteson, J., said, "I think that this is not such an inducement as will exclude the evidence of what the prisoner said: it amounts only to this, that if he would tell where the money was, he should see his wife." And the statement made by the prisoner was received. *R. v. Lloyd*, 6 C. & P. 393.

It is no objection to receiving a confession that the party to whom it was made takes an oath that he will not reveal what is told to him. After the prisoner had been committed on a charge of murder, a fellow-prisoner said to him, "I wish you would tell me how you murdered the boy; pray split." The prisoner said, "Will you be upon your oath not to mention what I tell you?" The other prisoner went upon his oath, that he hoped, if he told, that he might never stir out of that place again. The prisoner then made a statement. It was held that this was not such an inducement as to render the statement inadmissible, and that, although such oaths were very wrong and wicked, still they were not binding; and that every person, except counsel and attorneys, were bound to reveal what they might have heard. *R. v. Shaw*, 6 C. & P. 372.

So where a constable told a prisoner that his father had been charged with murder. He had been previously cautioned not to criminate himself, as the witness would bring it all against him. The prisoner said he hoped no one would be charged with the murder but himself, and then made a confession. *Doherty*, C. J., having conferred with *Torrens*, J., admitted the confession, observing that, although such announcement was likely to act upon the feelings of the prisoner, he would not be warranted on that ground in refusing to receive it. *Nolan's Case*, Joy on Conf. 16; 1 *Crawf. & Dix* C. C. 74. So where the prisoner was indicted for concealing the birth of her child, a medical witness said that he examined the prisoner in custody, and found that her breasts were full of milk, and asked her whether she had not recently had a child, and added that if she

refused to tell he would examine her person more closely; the prisoner then said, "It is unnecessary to examine me, for I had a child." *Torrens, J.*, admitted this confession, on the ground that the witness was endeavoring to ascertain a fact within his own province, and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes confessions. *Cain's Case, Joy on Conf. 16; 1 Crawf. & Dix C. C. 37.*

If the proposal to confess comes from the prisoner, it seems that his confession is admissible, although the prosecutor, in consideration of his doing so, says he will do all he can for him. Upon an indictment for housebreaking, it appeared that the prisoner being in the shop of the prosecutor, handcuffed, some recommendations to confess had been, in the absence of the prosecutor, made to him by the person who had been left in charge of the house; and the prisoner said, that if the handcuffs were taken off he would tell where he put the property. He had expressed doubts whether, if he told where the property was, he could rely on being leniently dealt with, and, after the prosecutor came in, he was told that they would do all they could for him. It was objected that the statement was inadmissible, as it was made under duress, and to deliver himself from the confinement. *Bosanquet, J.*: "I do not think there is anything in the objection, but I will take a note of it." *Taunton, J.*: "I take it no man ever makes a confession voluntarily, without proposing to himself in his own mind some advantage to be derived from it." The statement was received. *R. v. Green, 6 C. & P. 655.*

In a case where *M.*, the chief officer of the police at Liverpool, stated that on the 18th of November the prisoner, a boy of fourteen years of age, was apprehended by his directions, without any warrant, between twelve and one o'clock, and that he was carried to the police office about one o'clock. The magistrates were then sitting at a very short distance, and continued sitting till between two and three, and till the business presented to them was finished; but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell on his own authority, between four and five o'clock; and between five and six o'clock he told the prisoner that, in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt but he had set the premises on fire; and he therefore asked him if any person had been

concerned with him, or induced him to do it? The prisoner said he had not done it. The police officer replied that he had not have told so many falsehoods, had if he had not been concerned in it. He again asked him if anybody had induced him to do it? The prisoner began to cry, and made a full confession. In speaking of the falsehoods, the officer referred to an examination of a prisoner he had himself made. The prisoner was taken before he had dinner, and had had no food from the time he was apprehended till after his confession. *Levy, J.*, thought it deserved consideration whether a confession so obtained, the detention of the prisoner was not illegal, and when the conduct of the prisoner was calculated to intimidate, was admissible in evidence, and reserved the question for the opinion of the judges, a majority of whom held the confession rightly received, on the ground that no threat or promise had been used. *R. v. Thomas, 1 R. & M. C. C. R. 27.*

In another case, *R. v. Derrington, 1 R. & P. 418*, where the prisoner, while in jail, asked the turnkey if he would put a letter into the post for him, and, after promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, gave it to the visiting magistrates of the jail, who gave it to the prosecutor. *Row, B.*, held that the letter so obtained was admissible in evidence, and he remembered making an objection, at the bar, to evidence under the circumstances before *Gould, J.*, who overruled it.

Upon an indictment for murder, it appeared that the prisoner, who was of the age of fourteen, was taken into custody by *W.*, not a constable, and on the same night was in the parlor of the house in which he was taken; several persons, neighbors, but no constable, were in the room, and had been asking him questions about the children whom he was charged with drowning. One *C.*, who was present when *W.* took the prisoner up, and who was not a constable, stated, "I took him to kneel down and tell the truth." *W.* took him into Adams' parlor, and to question him how the children came to get into the pit; whether they fell in, or were put in; he said he should not say anything about it. *W.* asked him if he would tell any one else, if he would go out of the parlor; the prisoner said no. *W.* then went out. *I.* said to the prisoner, "Now kneel you down by the side of the pit and tell me the truth." *I.* believed that was the first thing. He did kneel down

said I was going to ask him a very serious question, and I hoped he would tell me the truth in the presence of the Almighty. I then said, "Did these children fall into the pit?" He said he pushed one in with one foot, and the other with the other, but not purposely. M. asked him if he had any malice or revenge; he said, No. Subsequently to this, the son of the innkeeper stated that next day the prisoner said he would tell him all about it. He neither promised nor threatened him. The prisoner then made a statement to him, which was given in evidence. Other declarations also were given in evidence. An examination of the prisoner, who could not write, was put in; it began, "W. Wild being cautioned," etc., and the evidence being read over to him, said, "I can give no other account than I have already given," etc. The prisoner having been found guilty, upon a case reserved as to the admissibility of the evidence, the judges present were unanimous that the confession was strictly admissible, but they much disapproved of the mode in which it was obtained. *R. v. Wild, R. & M. C. C.* 452.

**Inducement by Offer of Pardon.**—The mere knowledge by a prisoner of a handbill, by which a government reward and promise of pardon are held out to any accomplice, does not furnish sufficient grounds for rejecting the confession of a prisoner. But where it was shown that the prisoner had asked to see any handbill that might appear, and one was accordingly shown him, in which a promise of pardon was held out to an accomplice, upon which the prisoner said he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any one of the parties concerned who had not struck the blow, he would tell all about the matter, and accordingly did so, *Cresswell, J.*, held the confession inadmissible, as it was sufficiently clear that the prisoner was influenced by the offer of pardon. *R. v. Cresswell*, 6 Car. & M. 584. In *R. v. Blackburn*, 6 Cox Cr. Ca. 334, a statement made by the prisoner in a room, in which a large printed handbill, containing an offer of reward and pardon, was hanging up, was rejected by Talfourd, J., after consulting with Williams, J., the prisoner appearing to have the notion that he would be admitted as witness for the crown. In *R. v. Dingley*, 1 C. & K. 37, the prisoner asked the chaplain of the jail if any offer of pardon had been made; the chaplain said there had, but added that, if the prisoner made a state-

ment, he hoped he would understand that he (the chaplain) could offer him no inducement, as it must be his own free and voluntary act. The prisoner afterwards signed a confession before a justice, in which he distinctly stated that no person had made any promise, or held out any inducement to him to confess anything. *Pollock, C. B.*, held that the confession was admissible."

**Inducement by Promise of Immunity from Prosecution.**—See *People v. McCallam*, 103 N. Y. 587; *People v. Druse*, 103 N. Y. 655; *People v. Mondon*, 103 N. Y. 211.

**Inducement by Accepting as State's Evidence.**—If the accused receives a promise that he shall not be prosecuted if he will become State's evidence, and make a full disclosure, and upon such promise he makes a confession, but afterward refuses to testify, the confession will be admissible in evidence against him. *Com. v. Knapp*, 10 Pick. (Mass.) 477. See *Lopez v. State*, 12 Tex. App. 27; *Hamilton v. People*, 29 Mich. 173.

Where an intimation is given that the accused might be accepted as State's evidence, but no promise is made, his confession is admissible. *State v. Squires*, 48 N. H. 364. Compare *State v. Thompson*, Kirby (Conn.), 345; *State v. Phelps*, Kirby (Conn.), 282.

Where a promise is made that the accused might be used as State's evidence, his confession is not admissible. *State v. Johnson*, 30 La. Ann. Pt. II. 881; *Thorn's Case*, 4 C. H. R. (N. Y.) 81.

**Inducement—Where Held to Have Ceased.**—Although a confession made under the influence of a promise or threat is inadmissible, there are yet many cases in which it has been held that, notwithstanding such threat or promise may have been made use of, the confession is to be received if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence, upon the mind of the party. *State v. Guild*, 10 N. J. L. 163; s. c., 18 Am. Dec. 404. Thus, if the impression that a confession is likely to benefit him has been removed from the mind of the prisoner, what he says will be evidence against him, although he has been obliged to confess. Where the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but, on his being examined before the committing magistrate on the following day, he was frequently cau-

tioned by the magistrate to say nothing against himself, a confession under these circumstances was held by Mr. Justice Bayley to be clearly admissible. *R. v. Lingate*, 1815; 1 Phill. Ev. (10th Ed.) 414. So where it appeared that a constable told a prisoner he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, on which the magistrate said he would not say it would; the prisoner having afterwards, on his way to prison, made a confession to another constable, and, again in prison, to another magistrate; the judges unanimously held that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. *R. v. Rosier*, East. T. 1821; 1 Phill. Ev. (10th Ed.) 414. A prisoner charged with murder was visited by a magistrate, who told him that, if he was not the man who struck the fatal blow, he would use all his endeavors and influence to prevent any ill consequences from falling on him, if he would disclose what he knew of the murder. The magistrate wrote to the secretary of state, who returned answer that mercy could not be extended to the prisoner; which answer was communicated to the prisoner, who afterwards sent for the coroner, and desired to make a statement to him. The coroner cautioned him, and added that no hopes or promise of pardon could be held out to him. Littledale, J., ruled that a confession subsequently made by the prisoner to the coroner was admissible; for that the caution given by the latter must be taken to have completely put an end to all the hopes that had been held out. *R. v. Clewes*, 4 C. & P. 224. See also *R. v. Howes*, 6 C. & P. 404. A girl charged with poisoning was told by her mistress that if she did not tell all about it that night, the constable would be sent for next morning to take her to S. (meaning before the magistrate there); upon which the prisoner made a statement. The next morning a constable was sent for, who took the prisoner into custody, and on the way to the magistrate, without any inducement from the constable, she confessed to him. Bosanquet, J., said: "I think this statement receivable. The inducement was, that if she confessed that night the constable would not be sent for, and she would not be taken before the magistrates. Now she must have known when she made this statement that the constable was taking her to the

magistrates. The inducement there was at an end." *R. v. Richards*, 5 C. & P. 318.

Where a prisoner, when before a magistrate, stated that he had confessed to two constables, who were then present, and did not deny what the prisoner said in consequence of their having told him that two others had split, and that he might as well, and that if he told all he would be acquitted; and the magistrate told him that he need not say anything before him unless he pleased, and that his confession would do him no good, but that he would be committed to prison to take his trial,—it was held that the confession made before the magistrate was admissible, as it could not be said to result from the same influence as the confession to the constables. *R. v. Howes*, 6 C. & P. 404 (25 E. C. R.), Lord Denman, C. J. A prisoner when in custody, said to a magistrate that he wished to see his priest. The priest stated that, observing the prisoner appeared greatly agitated, he said to him, "The evidence at the quest was so clear against you, there can be no doubt you are the guilty man." The prisoner then stated something to the priest, who thereupon asked the prisoner whether he had any objection to state to the magistrate what he had said to him? The prisoner said he had, and the magistrate being called in, the prisoner repeated in his presence what he had stated to the priest. It was objected that this could not be admitted, whereupon the magistrate was recalled and stated that, on the evening of the day on which he had the said interview with the prisoner, he cautioned him not to say anything to him or to the police to exonerate himself. The magistrate was allowed to state what the prisoner said to him on this occasion, which appeared to be in every respect the same as what he had stated in the previous interview. The prisoner was convicted, and the decision of the judges of Ireland held the confession right. *Bryan's Case*, Joy, 73; 1 C. & P. C. 157.

Where a prosecutrix said to her servant girl, who was in custody of a prisoner in her house at night, on a charge of administering poison, "Jane, now see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge, to the magistrate, and not return again;" on which the girl said: "Sooner than I will go from here or anywhere else, I will tell the truth to which the prosecutrix answered, "

all I want." A statement then made as held inadmissible. On the following morning a constable came to the house, and while there, without giving her any warning, said to the girl, "My dear girl, where did you get the stuff from that you put in the tea and coffee?" It was held that what was then said must be considered as being under the influence of what was said the night before, because she was still in the house, and still in the hopes that she might not be taken before the magistrates. The constable afterwards took her to Stourbridge, and while on the way thither she made a statement, without any caution having been given, any inducement having been held out to her, and this was held admissible, because the only hope was that she should not be taken away from the house, and this must have been at an end when she was taken away by the constable. *Rex v. Jane Griffiths*, MSS.; s. c., but not so reported, *Rex v. Richards*, 5 C. & J. 313.

Prisoners were taken into custody on the 1st of October, and on that day the prosecutor frequently told them it would be better for them to confess. They were taken before a magistrate on the 3d, when they were told that they were not bound to say anything, but what they did say would be taken down, and read against them on their trials. They then made a statement. It was considered that, as the prosecutor did not tell them it would be better to confess to him, generally, that it would be better to confess, the confessions to the magistrate might be produced by that inducement. *Bedale, J.*: "It appears to me that examinations may be read. If I could see that the influence was continuing, I should not allow them to be read, two days elapsed between the promise and the confession. If the prisoners were gone before the magistrate the same day, I should have thought that the influence was continuing. I think that it would make no difference that the promise was made by one person, but the confession to another." *R. v. Nicholls*, Monmouth Spr. Ass. 1830; s. c., 3 Russ. on 9th Am. Ed. 385. And where the prisoner had been induced by promises of favor to make a confession, which was for that cause excluded, but about six months afterwards, and after having been solemnly warned by two magistrates that he must expect death, and prepare to meet it, he again made a full confession, this latter confession was admitted in evidence. *State v. Guild*, 10 N. J. L. 1; s. c., 18 Am. Dec. 404.

In this case, upon much consideration, the rule was stated to be that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. *State v. Guild*, 10 N. J. L. 163; s. c., 18 Am. Dec. 404. In the absence of any such circumstances, the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected. *State v. Roberts*, 1 Dev. (N. Car.) 259.

**Inducement—Where Held Not to Have Ceased.**—It is said by Mr. Justice Buller that there must be very strong evidence of an explicit warning not to rely on any expected favor, and that it ought most clearly to appear that the prisoner thoroughly understood such warning before his subsequent confession can be given in evidence. 2 East P. C. 658. In the following case the warning was not considered sufficient. A confession having been improperly obtained by giving the prisoner two glasses of gin, the officer to whom it had been made read it over to the prisoner before a magistrate, who told the prisoner that the offence imputed to him affected his life, and that a confession might do him harm. The prisoner said that what had been read to him was the truth, and signed the papers. *Best, J.*, considered the second confession, as well as the first, inadmissible; and said that had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said could not be given in evidence against him; and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would have been evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate. *R. v. Sexton*, Chetw. Burn. Just. tit. Confessions. So where the committing magistrate told the prisoner that if he would make a confession he would do all he could for him, and no confession was then made, but after his

committal the prisoner made a statement to the turnkey, who held out no inducement and gave no caution, Parke, J., said he thought the evidence ought not to be received after what the committing magistrate had said to the prisoner, more especially as the turnkey had not given any caution. *R. v. Cooper*, 5 C. & P. 525.

A prisoner had made a confession to one of the prosecutors in a charge of larceny, which, it was admitted, could not be received in evidence on account of what had passed between the prisoner and a constable who had her in charge. In the afternoon of the same day another of the prosecutors went to the prisoner's house and entered into conversation with her about the stolen property, when she repeated the confession she had made in the morning, but no promise or menace was on this occasion held out to her. Taunton, J., said that the second confession was not receivable, it being impossible to say that it was not induced by the promise which the constable made to the prisoner in the morning. *R. v. Meynell*, 2 Lewin C. C. 122.

The prisoner, who was indicted for murder, worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister which were inconsistent with his own, and added that there was no doubt he would be found guilty; it would be better for him if he would confess. A constable then came in and said to the overlooker, in a tone loud enough for the prisoner to hear, "Robert, do not make him any promises." The prisoner then made a confession. Patteson, J., on the evidence being tendered, said, "That will not do. The constable ought to have done something to remove the impression from the prisoner's mind." It was then further proved that the overlooker, in about ten minutes after the above confession, delivered the prisoner to another constable, and that, when the latter received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. This constable took the prisoner to his house, and there said, "I believe Sherrington has murdered a man in a brutal manner." The wife and brother of the prisoner were there, and they said to the prisoner, "What made thee go near the cabin?" The prisoner in answer made a state-

ment similar in effect to the one he made before. The constable used no promise nor threat to induce the prisoner to say anything, but did not caution him, and it was not more than five minutes after he received the prisoner into charge that the prisoner made the statement. The constable was not aware the overlooker had held out any inducement, and the overlooker was not present when the statement was made. Patteson, J., rejected the second confession, saying, "There ought to be strong evidence to show that the impression which the first confession was made under afterwards removed before the second confession can be received. I am of opinion in this case that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval being too short to allow of the position that it was the result of reflection and voluntary determination." *R. v. Sherrington*, 2 Lewin C. C. 122. A female servant being suspected of taking money, her mistress, on a Monday told her that she would forgive her if she told her the truth. On the Tuesday she was taken before a magistrate, and one appearing against her, was charged. On the Wednesday, again apprehended, the superintendent of police went with her mistress to Bridewell, and told her, in the presence of her mistress, that she "was not to say anything unless she liked; that if she had anything to say, her mistress would hear her;" but (not knowing that her mistress had promised to forgive her) he did not tell her that if she made a statement it might be given in evidence against her. The prisoner then made a statement. Patteson, J., held that the statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement; but that if the mistress had not been then present it might have been otherwise. *R. v. Hewitt*, 1 Car. 534. See also *R. v. Rue*, 13 Cox 209; *Moore v. Commonwealth*, 2 (Va.), 701.

Where inducements were held out by a police officer, and upon the next day the accused confessed to another officer, it was held, that a refusal to charge the accused by a jury should give no weight to the confession if they thought it was made as a result of such inducement, was an error. *Com. v. Cullen*, 111 Mass. 574. See *Hopt v. U. S.*, 110 U. S. 574.



**5. Confessions Obtained by Artifice or Deception.**—A confession procured by artifice is not for that reason inadmissible, unless the artifice used was calculated to produce an untrue confession.<sup>1</sup>

**6. Facts Ascertained in Consequence of Inadmissible Confessions.**—Although a confession may have been made under the influence of threats or promises, yet evidence of any facts which were ascertained in consequence of such confession is competent.<sup>2</sup>

1. *State v. Fredericks*, 85 Mo. 145; *State v. Hopkirk*, 84 Mo. 278; *Whar. Cr. v. § 670*; *State v. Phelps*, 74 Mo. 128; *State v. Jones*, 54 Mo. 478; *State v. Haley*, 14 Minn. 105; *Price v. State*, 18 Mo. St. 418; *People v. McMahon*, 15 N. Y. 391; *Balbo v. People*, 80 N. Y. 484; *Com. v. Hanlon*, 3 Brews. (Pa.) 461; *Ing v. State*, 40 Ala. 314.

In cases of this sort, "The real question (as said by Keating, J., in *Reg. v. Reason*, 12 Cox Cr. Cases, 228) is, whether there has been any threat or promise of such a nature that the prisoner could be likely to tell an untruth from fear of the threat, or hope of profit from the promise."

Where a confession has been obtained by artifice or deception, but without the use of promises or threats, it is admissible. Thus it has been held that it is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody, and even though some artifice has been used to draw him into that position. *R. v. Burley*, East. T. 1818; *Phill. Ev.* (10th Ed.) 413. Where a prisoner asked the turnkey if he would put a letter in the post, and on receiving promise that he would do so, gave him the letter, which was detained by the turnkey and given in evidence as a confession at the trial, *Garrow. B.*, received the evidence. *R. v. Derrington*, 2 C. & 418. So where a person took an oath that he would not mention what the prisoner told him. *R. v. Shaw*, 6 C. & 373. And where a witness promised that what the prisoner said should go no further. *R. v. Thomas*, 7 C. & P. 345. It appeared that one of the prisoners had made a statement to a constable in whose custody he was, but that he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so. On its being objected that what a prisoner said under such circumstances was not receivable in evidence, *Coleridge, J.*, said, "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible; it must either be obtained by hope or fear. This is matter of

observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." *R. v. Spilsbury*, 7 C. & P. 187.

A confession made under the influence of the promise of some collateral boon or benefit is admissible, where no hope or fear is induced in respect to the particular criminal charge. *State v. Hopkirk*, 84 Mo. 278.

A confession not induced by promises or threats is admissible in evidence, notwithstanding it was obtained by artifice practised upon the prisoner by the officer having him in charge, and when properly corroborated will sustain a conviction. *State v. Phelps*, 74 Mo. 128.

Confidential communications made by a prisoner in reliance upon the supposed relation of attorney and client are not admissible in evidence; but such communications are admissible if made in the presence of others. *People v. Barker*, 27 N. Westn. Rep. (Mich.) 539.

Where a fellow prisoner was placed in the cell with the accused for the purpose of obtaining a confession, *held*, that such confession was admissible. *Com. v. Hanlon*, 3 Brews. (Pa.) 461.

2. 3 Russ. on Cr. (9th Am. Ed.) 421; *Duffy v. People*, 26 N. Y. 588; *Jackson's Case*, 1 C. H. R. (N. Y.) 28; *Stage's Case*, 5 C. H. R. (N. Y.) 177; *Teachout v. People*, 41 N. Y. 7; *Com. v. Knapp*, 9 Pick. (Mass.) 496; *s. c.*, 20 Am. Dec. 491; *Frederick v. State*, 3 W. Va. 695; *Gates v. People*, 14 Ill. 433; *State v. Garrett*, 71 N. Car. 85; *State v. Graham*, 74 N. Car. 646; *s. c.*, 1 Am. Cr. Rep. 182; *State v. Cowan*, 7 Ired. (N. Car.) 239; *State v. Vaigneur*, 5 Rich. (S. Car.) 391; *State v. Motley*, 7 Rich. (S. Car.) 327; *State v. Crank*, 2 Bailey (S. Car.) 67; *Jordan v. State*, 32 Miss. 382; *Sarah v. State*, 28 Ga. 576; *Murphy v. State*, 63 Ala. 1; *Mountain v. State*, 40 Ala. 344; *Jane v. Commonwealth*, 2 Metc (Ky.) 30; *Deathridge v. State*, 1 Sneed (Tenn.), 75; *White v. State*, 3 Heisk. (Tenn.) 338; *Elizabeth v. State*, 27 Tex. 329; *Selvidge v. State*, 30 Tex. 60; *Greer v. State*, 31 Tex. 129; *People v. Kelly*, 47 Cal. 125; *People v. Jones*, 32 Cal. 80; *People v. Ah Ki*, 20 Cal. 177; *People v. Hoy Yen*,



**7. Subsequent Confessions.**—Although an original confession may have been obtained by improper means, subsequent confession of the same or of like facts may be admitted, if the court believe from the length of time intervening, from proper warning of consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained were entirely dispelled.<sup>1</sup>

**8. Evidence Only Against the Parties Making Them.**—A confession is only evidence against the party making it, and cannot be used against others. If an inducement be held out to one prisoner to make a statement which implicates another prisoner, such statement is inadmissible; for it can only be used as evidence against the prisoner who made it, and then it is evidence obtained by inducement.<sup>2</sup>

34 Cal. 176; *R. v. Gould*, 9 C. & P. 364; *R. v. Griffin*, Russ. & Ry. 151.

When a confession in itself inadmissible leads to the ascertainment of a fact admissible and material in the case, so much of such confession as relates strictly to the fact may be received. *State v. Vaigneur*, 5 Rich. (S. Car.) 391; *State v. Motley*, 7 Rich. (S. Car.) 327; *Duffy v. People*, 26 N. Y. 588; *Com. v. Knapp*, 9 Pick. (Mass.) 496; s. c., 20 Am. Dec. 491; *Laros v. State*, 84 Pa. St. 200; *Frederick v. State*, 3 W. Va. 695; *State v. Garrett*, 71 N. Car. 85; *Murphy v. State*, 63 Ala. 1; *Belote v. State*, 36 Miss. 96; *Massey v. State*, 10 Tex. App. 645; *Clemons v. State*, 4 Lea (Tenn.), 23; *People v. Hoy Yen*, 34 Cal. 176; *Beery v. U. S.*, 2 Colo. 186; *U. S. v. Richard*, 2 Cranch C. C. 439.

The prisoner was charged with stealing a guinea and two promissory notes, one of which was a Bank of England note for five pounds, and the other a Reading bank-note for the like sum. The prosecutor had told the prisoner that he had better confess. *Chambre, J.*, held that, although the prosecutor could not be allowed to prove a confession made after this admonition, he might be permitted to give evidence that the prisoner brought to him a guinea and a five pound Reading bank-note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him. The note thus produced the prosecutor could not identify otherwise than by its corresponding with the stolen note in the sum for which it was given, and in being a note of the same bank. Upon a case reserved, the majority of the judges agreed with *Chambre, J.*, in thinking the conviction right and the evidence admissible. *R. v. Griffin*, Russ. & Ry. 115.

1. *State v. Guild*, 10 N. J. L. 163; s.

c., 18 Am. Dec. 404; *Peter v. State & M. (Miss.)* 31; *Simon v. State*, 36 Miss. 636; *State v. Clarissa*, 11 Ala. 58; *State v. State*, 32 Ala. 560; *Joe v. State*, 38 Ala. 422; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *State v. Carr*, 37 Vt. 191; *Wa. People*, 3 Hill (N. Y.), 395; *State v. C.* 10 N. J. L. 163; s. c., 18 Am. Dec. 404; *Com. v. Harman*, 4 Pa. St. 269; *State v. Commonwealth*, 2 Leigh (Va.), 338; *State v. Lowhorne*, 66 N. Car. 538; *State v. Gregory*, 5 Jones (N. Car.), 315; *State v. Roberts*, 1 Dev. (N. Car.) 259; *State v. State*, 22 Ark. 336; *State v. Jones*, 54 Ark. 478; *Walker v. State*, 7 Tex. App. 645; *State v. Hash*, 12 La. Ann. 895; *State v. Jim Ti*, 32 Cal. 60; *Beery v. U. S.* Colo. 186; *U. S. v. Charles*, 2 Cranch C. 76; *U. S. v. Kurtz*, 4 Cranch C. 682. Compare *State v. Frazier*, 6 Tenn. 539; *McAdory v. State*, 62 Ala. 154.

The presumption is that the influence of the threats or promises continues until such presumptions must be overcome. *Com. v. Knapp*, 10 Pick. (Mass.) 477; *Com. v. Taylor*, 5 Cush. (Mass.) 31; *Brownhas's Case*, 4 C. H. R. (N. Y.) 31; *Stage's Case*, 5 C. H. R. (N. Y.) 31; *Milligan's Case*, 6 C. H. R. (N. Y.) 31; *State v. Guild*, 10 N. J. L. 163; s. c., 18 Am. Dec. 404; *Com. v. Harman*, 4 Pa. St. 269; *Thompson v. Commonwealth*, 20 Gratt. (Va.) 724; *State v. Fish*, 10 Jones (N. Car.), 478; *State v. Roberts*, 1 Dev. (N. Car.) 259; *State v. Dral*, 1 N. Car. 592; *Whaley v. State*, 11 Ga. 31; *Simon v. State*, 36 Miss. 636; *Peter v. State*, 4 S. & M. (Miss.) 31; *Van* v. State, 24 Miss. 512; *State v. Ha*, 12 La. Ann. 895; *State v. Chamber*, 179; *State v. Jones*, 54 Mo. 2. 3 Russ. on Cr. (9th Am. Ed.) 421; *Roscoe's Cr. Ev.* (10th Ed.) 53; *People v. Whipple*, 9 Cow. (N. Y.) 707;

*v. Knapp*, 9 Pick. (Mass.) 496; *Com. v. Thompson*, 99 Mass. 444; *Fife v. Commonwealth*, 29 Pa. St. 429; *State v. Fuller*, 39 Vt. 74; *State v. Dodson*, 16 S. Car. 453; *Blackman v. State*, 36 Ala. 295; *Gore v. State*, 58 Ala. 391; *Smith v. State*, 9 Ala. 990; *Morrison v. State*, 5 Ohio, 438; *Lowe v. Boteler*, 4 H. & McH. (Md.) 346; s. c., 1 Am. Dec. 410; *State v. Weasel*, 30 La. Ann. Pt. II. 919; *Ake v. State*, 30 Tex. 466; *Spencer v. State*, 31 Tex. 64; *Priest v. State*, 10 Neb. 393; *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207; *U. S. v. White*, 5 Cranch C. C. 38; *U. S. v. Miller*, 4 Cranch C. C. 104; *U. S. v. McMahon*, 4 Cranch C. C. 573.

It is quite settled, generally, that a confession is only evidence against the party making it, and cannot be used against others. With respect to conspiracy, there is some obscurity on this subject, which will be found discussed in the article relating to that offence, *post*. In general, where the conspiracy is proved, the admissions concerning the common object are admissible. *Lee v. Lamprey*, 43 N. H. 13. *State v. Thibeau*, 6 Vt. 100; *Com. v. Waterman*, 122 Mass. 3; *Com. v. Brown*, 14 Gray (Mass.) 419; *Kelley v. People*, 55 N. Y. 565; s. c., 14 Am. Rep. 342; *Adams v. Davidson*, 10 N. Y. 309; *Benham v. Cary*, 11 Wend. (N. Y.) 83; *Crary v. Sprague*, 12 Wend. (N. Y.) 41; s. c., 27 Am. Dec. 110; *Hmsby v. People*, 53 N. Y. 472; *Kehoe v. Commonwealth*, 85 Pa. St. 127; *Kimbell v. Geeting*, 2 Grant (Pa.), 125; *Price v. Junkin*, 4 Watts (Pa.), 85; s. c., 28 Am. Dec. 685; *Helser v. McGrath*, 58 Pa. St. 458; *McDowell v. Rissel*, 37 Pa. St. 164; *Peterson v. Speer*, 29 Pa. St. 479; *Frans v. Matson*, 56 Pa. St. 54; *Reitenbach v. Reitenbach*, 1 Rawle (Pa.) 362; s. c., 18 Am. Dec. 638; *Clawson v. State*, 4 Ohio St. 234; *Preston v. Bowers*, 13 Ohio St. 1; *Williams v. State*, 47 Ind. 568; *Hamilton v. People*, 29 Mich. 195; *State v. Ash*, 7 Iowa, 347; *State v. Ross*, 29 Mo. 2; *State v. Danbert*, 42 Mo. 239; *People v. Geiger*, 49 Cal. 643; *Clinton v. State*, 20 Ark. 216; *Loggins v. State*, Tex. App. 434; *State v. Jackson*, 29 Ala. Ann. 354; *Smith v. State*, 52 Ala. 97; *Garrard v. State*, 50 Miss. 147; *Lincoln v. Claflin*, 7 Wall. (U. S.) 132; *U. S. v. McKee*, 3 Dill. (U. S.) 546. But a difficulty occurs where a confession by one prisoner is given in evidence, which implicates the other prisoners by name, as to the propriety of suffering those names to be mentioned to the jury. Several cases are collected in 1 Lewin C. C. 107, which show that Littledale, J., Alderson, J., and Denman, C. J., considered that

the whole of the confession, whether verbal or written, ought to be presented to the jury, not omitting the names. Parke, B., thought otherwise. See *R. v. Fletcher*, 4 C. & P. 250, and *R. v. Clewes*, 4 C. & P. 221, where Littledale, J., says that he had formed his opinion after much consideration.

The confession of the principal is not admissible in evidence to prove his guilt, upon an indictment against the accessory. One Turner was indicted for receiving sixty sovereigns, etc., by one Sarah Rich, then lately before feloniously stolen. To establish the larceny by Rich, the counsel for the prosecution proposed to prove a confession by her, made before a magistrate in the presence of the prisoner, in which she stated various facts, implicating herself and others, as well as the prisoner. Patteson, J., refused to receive as evidence anything which was said by Sarah Rich respecting the prisoner, but admitted what she had said respecting herself. The prisoner was convicted. Having afterwards learned that a case had occurred before Mr. Baron Wood, at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty, to establish the fact of the stealing by the principal, as against the receiver, Patteson, J., thought it proper to refer to the judges the question, "Whether he was right in admitting the confession of Sarah Rich in the present case?" All the judges having met (except Lord Lyndhurst, C. B., and Taunton, J.), they were unanimously of opinion that Sarah Rich's confession was no evidence against the prisoner, and the conviction was held wrong. *R. v. Turner*, Moody C. C. 347. In *R. v. Cox*, 1 F. & F. 90, Crowder, J., admitted, on the trial of the receiver, the confession of the thief made in the receiver's presence as evidence of the fact of stealing. *See qu.* Where the counsel for the prosecution opened no case against one of two prisoners, and was about to detail to the jury certain statements made by that prisoner, Pollock, C. B., interposed, saying that those statements ought not to be repeated merely because the prisoners were jointly charged, and that the proper course would be to take an acquittal, and examine such prisoner as a witness. *R. v. Gardner*, 9 Cox C. C. 332.

Upon an indictment for murder, against a man and woman, it appeared that a woman who was placed by the constable with

**9. Confessions Obtained by Questioning Admissible.**—A confession is admissible in evidence where it has been elicited by questions put by a person in authority. At common law no examination of the accused was permitted, but such examination was permitted by the statutes of Philip and Mary. The main features of these statutes have been adopted in many of the States.<sup>1</sup>

the female prisoner, whilst he went to the inquest, to prevent her laying violent hands upon herself, and to prevent her from going away, told her "o the effect that "she had better tell the truth, or it would lie upon her, and the man would go free." Parke, J. (after consulting Taunton, J.), said: "As this declaration of the female prisoner can only legitimately be received in evidence to affect her and no one else, we think that it is not receivable, as it was made after an inducement held out by a person who had her in custody. If it were to be used at all, it could only be used to criminate her; and then it would be evidence obtained to criminate her by means of an inducement." *R. v. Enock*, 5 C. & P. 539.

The confession of one of the defendants implicating himself and others, is competent evidence against himself, and should be proved as made, including the names of his confederates as stated by him, the jury being instructed that it is evidence only against the party who made the confession. *State v. Dodson*, 16 S. Car. 453; *State v. Fuller*, 39 Vt. 74; *State v. Workman*, 15 S. Car. 541.

If, by agreement with proper authority, a *particeps criminis* not in custody made a confession to secure his own immunity on condition that he would testify against his accomplices, and he afterwards refused to testify, the confession is evidence against himself if it be shown that it was made freely and without compulsion. If, however, he was in custody when he made the confession, there must not only be a showing that it was made freely and without compulsion or persuasion, but also that it was made voluntarily after he was cautioned that it might be used against him in case he should refuse to testify. *Lopez v. State*, 12 Tex. App. 27; *Hamilton v. People*, 29 Mich. 173; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *Bowden v. State*, 1 Tex. App. 137.

**Admission or Confession by Third Person.**—The admission or confession of a third person, that he committed the offence with which the accused is charged, not made under oath, though on his death-bed, is mere hearsay, and is not admissible as evidence for the accused.

*West v. State*, 76 Ala. 98; *Snow v. State*, 58 Ala. 372.

Confessions of an accomplice, made in the presence of the accused and assented to by him, are admissible against him. *Com. v. Call*, 21 Pick. (Mass.) 515.

1. 1 Greenl. on Ev. (14th Ed.) § 224; *Whar. Cr. Ev.* (9th Ed.) §666; *People v. Restell*, 3 Hill (N. Y.), 289; *People v. Smith*, 1 Wheel. C. C. (N. Y.) 54; *State v. Cowan*, 7 Ired. (N. Car.) 239; *State v. Kirby*, 1 Strob. (S. Car.) 378; *Carroll v. State*, 23 Ala. 28; *State v. McLaughlin*, 44 Iowa, 82; *Wolf v. Commonwealth*, 30 Gratt. (Va.) 833.

Unless a prisoner comprehends his rights fully, and is informed by the court that his refusal to answer the questions propounded could not prejudice his case, or be construed as an evidence of guilt, any responsive confessions, implicating him in the crime charged, must be regarded as involuntary. *Whar. Cr. Ev.* §§ 668-9; *State v. Rorie*, 74 N. C. 148; 1 Greenl. Ev. § 215, note 4; *Rex v. Greene*, 5 C. & P. 312; *Murphy v. State*, 63 Ala. 1; *Kelly v. State*, 72 Ala. 244. See *State v. Matthews*, 66 N. Car. 106; *Peter v. State*, 4 S. & M. (Miss.) 31; *Van Buren v. State*, 24 Miss. 512; *Dick v. State*, 30 Miss. 593.

It was formerly held that if a prisoner were told that what he said would be used for him or against him at his trial, his statement was inadmissible. A prisoner, when before a magistrate, was told by the magistrate's clerk not to say anything to prejudice himself, "as what he said would be taken down, and would be used for him or against him at his trial." *Coleridge, J.*: "This is an inducement, and it was held out by a person in authority. I am of opinion that the prisoner's statement cannot be given in evidence. I cannot conceive a more direct inducement to a man to make a confession than telling him that what he says may be used in his favor at the trial." *R. v. Drew*, 8 C. & P. 140. So where the constable who apprehended the prisoner said to him, "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else that may tend to injure you, but anything you can-

say in your defence we shall be ready to hear, and send to assist you," a statement thereon made was rejected. *R. v. Morton*, 2 M. & Rob. 514. So where the constable told the prisoner, "You are apprehended on a serious charge; take care that you do not say anything to injure yourself; but if you can say anything in your defence, we are willing to hear it, and to send to any person to assist you," a statement thereon made was rejected. *R. v. Hornbrook*, 1 Cox C. C. 54. So where a policeman told a prisoner that whatever she told him would be used against her on her trial, a statement thereon made was rejected. *R. v. Furley*, 1 Cox C. C. 76. So where the magistrate's clerk, when the prisoner was being examined, told him that he was at liberty to make any statement, but that "whatever he said would be taken down and used against him;" a statement thereon made was rejected. *R. v. Harris*, 1 Cox C. C. 196.

On the other hand, where a police officer had told a prisoner that whatever he said would be used against him, it was held that a statement thereon made was admissible. *R. v. Chambers*, 3 Cox C. C. 92. So where a police officer told the prisoner before he made a statement, "to be careful: it would be used against him on his trial if committed by the magistrates," it was held that the statement was admissible. *R. v. Atwood*, 5 Cox C. C. 322.

These cases were reviewed in the following case, which may be taken to have settled the law on this point. Where, on an indictment for murder, a police constable said, "I went to the prisoner's house. I saw the prisoner. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him." Objection was made that what the prisoner then said was inadmissible. Lord Campbell, C. J., thought that although the caution of the constable differed from that directed by the 11 and 12 Vict. c. 42, s. 18, to be given by the justice to the prisoner in the word "will" instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; it could have no tendency to induce him to say anything untrue; and that in spite of it, if he did afterwards confess, the confession must be considered voluntary. His lordship therefore allowed the witness to give evidence of what the prisoner

then said, which amounted to a confession of his guilt; and upon a case reserved, after argument, on behalf of the prisoner, the judges were unanimously of opinion that the confession was properly received. Lord Campbell, C. J.: "I adhere to the opinion which I formed at the trial. The rule is, that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made a confession under a bias, and that therefore it would be better not to submit it to the jury." Pollock, C. B.: "A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the statement made being given in evidence. *R. v. Court*, 6 C. & P. 486; *R. v. Holmes*, 1 C. & K. 248. And although it may be put that where a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything, let it be true. But where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. *R. v. Garner*, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner as a matter of perfect indifference whether he should open his mouth or not." *R. v. Baldry*, 2 Den. C. C. 430.

But where an inspector of police said to a woman in custody on the charge of having attempted to set fire to a workhouse, "You are accused of a very serious offence; have you any explanation to give? You are not bound to say anything, but anything you say will be given in evidence against you" The inspector then asked her, "Was it she that set fire to the buildings?" It was held that the statement of the prisoner in answer to this question was not admissible. *R. v. Toole*, 7 Cox C. C. 244.

The prisoner, who was indicted with several others for burglary, sent for a magistrate to tell him he had something to communicate to him. The magistrate acted at the interview with great caution, and warned the prisoner not to say anything that would criminate himself, as what he said would be taken down in

writing, and made use of against him on his trial. The prisoner replied he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person, charged with the same crime, who had confessed and been admitted queen's evidence; the prisoner was aware of this, and it was to that he alluded when he said that he knew the witness knew all, and that it was from the statement made by the person who had been admitted queen's evidence that the prisoner was examined, and his confession taken down. It was insisted that, under these circumstances, the confession was not admissible, as the caution given by the magistrate did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to believe that if he made a confession he would be put in the same situation with the other person who had done so. *Crompton, J.*, received the confession, observing that the magistrate stated that, as far as he knew, the prisoner came forward voluntarily; that a mere formal caution from a magistrate would not be sufficient to set up a confession, if it appeared that such confession was made under the distinct impression of a previous promise or threat, but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate was sufficient to obviate them. It was in effect telling the prisoner that he would get no benefit from his confession, and that he should consequently dismiss from his mind all expectation of getting any, if any such he had. *Berigan's Case*, *Joy on Conf.* 27.

On an indictment for forgery a statement by the prisoner before the magistrate was offered in evidence. Appended to the statement was a declaration by the magistrate that he had, previously to the prisoner's being called upon for his defence, repeated the form contained in schedule (N); but there was nothing to show that the caution contained in the latter part of sec. 18 of the 11 and 12 Vict. c. 42, had been used. For the prisoner it was urged that proof must be given of a strict compliance with the terms of the proviso. For the crown it was answered that the form given by the statute had been scrupulously adhered to, and that the rest was merely a direction

to the magistrate, which it was to be presumed he had complied with. *Coleridge, J.*, after consulting *Cresswell, J.*, said that they were both inclined to think that the proviso was a condition precedent, and that in the absence of any proof that it had been acted upon, the statement was not receivable in evidence; but he added that, as it was desirable so important a point should be settled, they would receive the evidence, and reserve the question, if it should become necessary. *R. v. Kimber*, 3 Cox C. C. 223.

Upon an indictment for attempting to procure abortion the statement of the prisoner before the magistrate was tendered in evidence. The magistrate's clerk, who was called to prove it, stated that when the prisoner was before the magistrate, the witnesses for the prosecution having been examined in presence, the magistrate thus addressed him: "Having heard the evidence, you wish to say anything in answer to the charge? you are not obliged to say anything, unless you desire to do so; whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" that the magistrate added nothing more. The prisoner then made the statement, which was taken down, read over to him, signed by him and by the magistrate. The statement was in the form in schedule to the 11 and 12 Vict. c. 42, contained the words so proved to have been addressed to the prisoner by the magistrate. It was objected that the statement was not admissible, as the magistrate had not given the caution against any promise or threat required by the proviso in sec. 18 of the statute; but Lord Campbell, C. J., overruled the objection; and, upon a case reserved after argument, Lord Campbell, C. J., thus pronounced judgment: "The objection to the admissibility of this statement of the prisoner is unfounded. The signature of the magistrate, and that of the prisoner, were proved. It would have been admissible at common law, and is so still unless excluded by statute. It is argued that the objection to the caution in the first proviso is to take away with the effect of a previous inducement; but as there was no previous inducement here, it is not necessary in this case to decide whether, if a previous threat or inducement had been held out to the prisoner, the caution prescribed in the first proviso is to be regarded as a condition precedent or merely directory. The 28th sec. of the statute declares that the forms given in the schedule are to

deemed good, valid, and sufficient in law, and the form in the schedule does not contain the second caution. It would therefore seem that both at common law and under the statute the statement in this case was admissible in evidence against the prisoner." *R. v. Sansome*, 1 Den. C. C. 545.

A prisoner was taken before the magistrate on the 20th of October, and charged with stealing £70 in money from his employers, and remanded after some witnesses had been examined. He was brought up a second time on the 24th of October, and then further evidence was given, and that which had been given on the former occasion was read over. The magistrate then addressed him in the language prescribed by the 11 and 12 Vict. c. 42, s. 18; but did not tell him, as required by the proviso, that he had nothing to hope from any promise of favor or to fear from any threat. The prisoner's answer was taken down. It was, "I shall say nothing here; I had rather say it at my trial." The solicitor for the prosecution then asked for another remand. The prisoner objected, and assigned a reason; and being asked whether he wished that to be taken down as part of his statement, he said that he did, and it was written down; it was,

"It is my intention to plead guilty to the charge." This statement was not signed by the prisoner or the magistrate. The prisoner was then remanded, and brought again before the magistrate on the 31st of October. No new witnesses were examined, nor any questions put for the prosecution, but an attorney for the prisoner put a few questions to one of the witnesses, who had been before examined. The evidence was then read over and the witnesses were re-sworn. The statement made by the prisoner at the former examination was then read to him. His attorney objected to its being taken as his statement, because an addition had been made to the evidence in answer to his questions. The magistrate then again asked the prisoner in the terms prescribed by the statute whether he wished to make any statement, and he declined doing so. The prisoner's counsel objected to the former statement being received; but it was admitted; and, upon a case reserved, it was contended that the statement was inadmissible: 1st, because it was not returned with the depositions; 2dly, that the statement was made after an insufficient caution. But the judges were unanimously of opinion that the statement was properly received in evidence. It was read over to the prisoner at the

second examination, and the proper caution mentioned in the act of Parliament given to him before it was taken. It is true that on the last examination some other questions (apparently for no other purpose than to try to raise this point) were put to one of the witnesses by the prisoner's attorney; but this made no real difference. If it was receivable, as undoubtedly it was, before they were put, it was properly received at the trial. *R. v. Bond*, 1 Den. C. C. 517.

The declarations or confessions of a prisoner, either at the time when he is arrested or when he is charged with the crime, are admissible either for or against him when they are voluntarily made; and it is only necessary that the prisoner should be cautioned that he is at liberty to refuse to answer, and that such refusal will not prejudice him when the confession is made upon an examination before a magistrate. *State v. Howard*, 92 N. Car. 772.

Where evidence of a confession is excluded because induced by promises made by an officer having custody of the prisoner, but the prisoner, on a subsequent day, voluntarily goes on the stand and is sworn and examined as a witness in his own behalf, under the statute, on his examination before a magistrate on such charge, and he is cautioned by the magistrate, before testifying, that he need not say anything to criminate himself, and that what he may say may be used against him, a confession made in such testimony may be proved by the State on the subsequent trial of such person charged with the crime. *Jackson v. State*, 39 Ohio St. 37.

Upon the trial of an indictment for murder, a statement or confession made and signed by the prisoner was offered in evidence on the part of the prosecution. It appeared that when the prisoner was arrested the officer making the arrest, an inspector of police in the city of New York, informed him of the crime for which he was arrested, and that he (the officer) was an inspector of police, and had been watching him (the prisoner) since the shooting, and saw him, in company with a man named Healey, try to steal a barrel of whiskey the night before; also told him about his pledging a pistol with which the murder was supposed to have been committed; the prisoner thereupon said he would make a statement; a coroner was sent for, who came to police headquarters where the prisoner was in custody, and the confession in question was then made, the coroner not acting in an official capacity, but simply as a clerk

But where the accused is compelled to answer under oath questions put by the committing magistrate, the admissions made by him during such examination are not admissible as evidence.<sup>1</sup>

to take down and prove the confession. *Held*, that the evidence did not disclose any threats, and did not authorize an inference that the confession was made under the influence of fear; that assuming the paper was sworn to by the accused, it was in no respect a compulsory statement, and it was properly received in evidence under the Code of Cr. Proc. (§ 395). *People v. McGloin*, 91 N. Y. 241.

Where the magistrate, before whom a prisoner charged with a crime was brought, but before the warrant was returned, or any of the witnesses had been sworn, and before the prisoner was informed of the charge against him, asked the prisoner if he was ready to proceed, and the latter replied that he was not, because of the absence of certain witnesses, by whom he expected to prove a state of facts relied upon as a defence; *held*, that the "examination" contemplated by the Code had not then commenced, and any declaration pertinent to the charge, then made by the prisoner, was competent evidence against him, though he was not "cautioned." *State v. Conrad*, 95 N. Car. 666.

1. *Whar. Cr. Ev.* (9th Ed.) § 668; *Com. v. Harman*, 4 Pa. St. 269; *Hendrickson v. People*, 10 N. Y. 12; *Schoeffler v. State*, 3 Wis. 717; *State v. Marshall*, 36 Mo. 400; *State v. Gilman*, 51 Me. 206; *State v. Matthews*, 66 N. Car. 106; *State v. Broughton*, 7 Ired. (N. Car.) 96; *State v. Young Wins.* (N. Car.) 126; *Nelson v. State*, 2 Swan (Tenn.), 237; *State v. Vandergraff*, 23 La. Ann. 96; *State v. Garvey*, 25 La. Ann. 191; *People v. Soto*, 49 Cal. 69; *U. S. v. Duffy*, 1 Cranch C. C. 164; *U. S. v. Bascadore*, 2 Cranch C. C. 30; *U. S. v. Williams*, 1 Cliff (U. S.), 5. Compare *Clough v. State*, 7 Neb. 320.

In *People v. McMahon*, 15 N. Y. 384, the court laid down the following rule: 1. The statement or confession will not be rejected on account of its having been made under oath, unless that oath was administered in the course of some judicial inquiry in regard to the crime itself for which the prisoner is on trial; 2. The statement, although made under oath, and upon a judicial examination as to the crime, may still be admitted, if, at the time it was made, the prisoner was not himself resting under any charge or suspicion of having committed the crime.

A judicial oath administered when the mind is agitated and disturbed by a crim-

inal charge may prevent free and voluntary mental action, and this is the reason for excluding evidence thus given. *People v. McMahon*, 15 N. Y. 384.

Upon a trial for murder, statements made by the prisoner, as a witness at the coroner's inquest upon the body of the deceased, before the witness had been charged with the murder, and before it was ascertained that a murder had been committed, are admissible in evidence against him. *Hendrickson v. People*, 10 N. Y. 12; *State v. Vaigneur*, 1 Rich. (S. Car.) 391; *Clough v. State*, 7 Neb. 340. See *Com. v. Bradford*, 126 Mass. 42.

Statements made by the prisoner, under oath, at a coroner's inquest are admissible against him upon his trial for murder, although he knew at the time he was sworn that it was suspected the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumors implicated him; that he had a right to refuse to testify. *Teachout v. People*, 41 N. Y. 7. See *People v. Kelly*, 47 Cal. 125.

Upon an information charging the accused, in separate counts, with murder, and with being an accessory thereto, there was no error in admitting in evidence against him testimony given by him as a witness for the State, while under arrest upon suspicion of having committed said crimes, upon the examination of another person accused of the same murder; there being no reason for believing that such testimony was not entirely voluntary. *Dickerson v. State*, 48 Wis. 288.

On the trial of an indictment for murder it appeared that the prisoner, who was an ignorant Italian laborer, unfamiliar with the English language, was arrested, without warrant, as the suspected murderer, and while under arrest, was taken by the officer having him in charge before a coroner's inquest, and after proof had been given of the homicide, was examined, on oath, by the district attorney and the coroner as to circumstances tending to connect him with the crime. It did not appear that he was informed that he was not bound to answer questions tending to criminate himself. The prosecution was permitted to prove, under objections and exceptions, the statements so made by the prisoner. *Held*, error; and that the evidence was not rendered

**10. Confessions Obtained in the Course of Legal Proceedings.**—There is much contradiction in the older cases on the point whether confessions made in the course of legal proceedings, not having reference to the charge upon the prosecution of which they are sought to be used, are admissible;<sup>1</sup> but evidence given in a former trial may afterwards be used as a confession.<sup>2</sup>

**11. By Children.**—Where a child has such sufficient mental capacity as to render him amenable to the law for the commission of crime, he has sufficient mental capacity to make a confession of his guilt.<sup>3</sup> (See also AGE, Vol. I., p. 327.)

competent by the provision of the Code of Cr. Proc. (§ 395) specifying the cases where the confession of a defendant in a criminal action may be given in evidence against him. *People v. Mondon*, 103 N. Y. 211.

Verified and inculpatory disclosures voluntarily made by an uncautioned prisoner are evidence against him; but his other statements, though voluntary and parts of the same confession, are not. *Walker v. State*, 9 Tex. App. 38; *Davis v. State*, 8 Tex. App. 510; *Strait v. State*, 43 Tex. 486; *Selvidge v. State*, 30 Tex. 59; *Warren v. State*, 29 Tex. 370.

Where the confessions of a prisoner made to a trial justice at the preliminary examination are reduced to writing and signed by the prisoner, and such written statement is within reach of the court, it is error to admit parol testimony of the confession. *State v. Branham*, 13 S. Car. 389.

When it was shown that a defendant's confession, made before an examining court, and after he had been duly cautioned that it might be used against him, was reduced to writing, but that the writing was not so authenticated as to render it competent evidence, it was not error to allow the State, after laying the proper predicate, to adduce parol proof of the statements made by the defendant in his confession before the examining court. *Guy v. State*, 9 Tex. App. 161; *State v. Simien*, 30 La. Ann. pt. i., 296.

1. The subject was fully considered in *R. v. Scott*, 25 L. J. M. C. 128; 7 Cox C. C. 164; *Dears. & B. C. C.* 47; and the distinction pointed out. That was a case in which the prisoner had been examined in the court of bankruptcy, touching his trade, dealings, and estate, under the provisions of the 12 & 13 Vict. c. 106, s. 117 (repealed); and this examination was given in evidence on a criminal charge against the bankrupt of mutilating his trade books. The question whether such evidence was admissible was argued be-

fore the court of criminal appeal; and it was admitted on all hands that, in ordinary cases, what is stated by a person in a lawful examination may be used in evidence against him. The main contention was, that inasmuch as by the act it was compulsory upon the bankrupt to answer the questions put to him, whether they tended to criminate him or no, he ought not to be criminally prejudiced by such answers, otherwise the fundamental maxim, *nemo tenetur seipsum accusare*, would be violated. In this view *Colebridge, J.*, concurred; but all the other judges, *Lord Campbell, C. J.*, *Willes, J.*, *Alderson* and *Bramwell, BB.*, thought that the evidence was admissible, and that the maxim relied on had been overruled by the legislature. And the same view of the law has been taken with respect to the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71. See *R. v. Hallam*, 12 Cox C. C. 174; *R. v. Widdop*, L. R. 2 C. C. R. 3; 42 L. J. M. C. 9; *Ex parte Schofield*, 6 Ch. D. 230; 46 L. J. Bkcy. 112.

2. *Com. v. Reynolds*, 122 Mass. 454; *State v. Gilman*, 51 Me. 206; *Teachout v. People*, 41 N. Y. 7; *Hendrickson v. People*, 10 N. Y. 12; s. c., 61 Am. Dec. 721; *People v. McMahon*, 15 N. Y. 384; *Williams v. Commonwealth*, 29 Pa. St. 102; *Snyder v. State*, 59 Ind. 105; *Anderson v. State*, 26 Ind. 89; *Dickerson v. State*, 48 Wis. 288; *Alston v. State*, 41 Tex. 39; *State v. Broughton*, 7 Ired. (N. Car.) 96; *People v. Kelly*, 47 Cal. 125. Compare *Jackson v. State*, 56 Miss. 311; *Josephine v. State*, 39 Miss. 613; *People v. Garvey*, 25 La. Ann. 191.

3. *State v. Bostick*, 4 Harr. (Del.) 563, *Earp v. State*, 55 Ga. 136; s. c., 1 Am. Cr. Rep. 171; *State v. Guild*, 10 N. J. L. 163; s. c., 18 Am. Dec. 404; *State v. Aaron*, 1 South. (N. J.) 231; *McCoon v. Smith*, 3 Hill (N. Y.) 117; *Stage's Case*, 5 City H. R. (N. Y.) 177; *Com. v. Smith*, 119 Mass. 305; *Studstill v. State*, 7 Ga. 2; *Mather v. Clark*, 2 Atk. 209; *R. v. Thornton*, R. & M. C. C. 27.



**12. By Agents.**—An admission by an agent is never evidence in criminal as it is sometimes in civil cases, in the sense in which an admission by a party himself is evidence. An admission by the party himself is in all cases the best evidence which can be produced, and supersedes the necessity of all further proof; and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases.<sup>1</sup>

**13. Admissions by the Prosecutor.**—It would seem doubtful whether in any case a prosecutor in an indictment is a party to the inquiry in such a sense as that an admission by him could be received in evidence to prove facts for the defence. Of course this does not refer to the admission of facts which would go to his reputation for credibility as a witness in the case; these may always and under all circumstances be proved by the admission of the witness himself. But any other fact necessary to the defence would have to be proved by the best available evidence, independently of any admission by the prosecutor.<sup>2</sup>

**1. Roscoe's Cr. Ev. (10th Ed.) 53.**

Thus, in order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to show that such letter was written in consequence of an interview, but it must be shown that it was written in pursuance of instructions of the client. *R. v. Downer*, 14 Cox C. C. R. 486. Where a party is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the acts of the agent; and, in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus, on the impeachment of Lord Melville by the House of Lords, it was decided that a receipt given in the regular and official form by Mr. Douglas, who was proved to have been appointed by Lord Melville to be his attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same, and who was dead, was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster did receive from the exchequer a certain sum of money in the ordinary course of business. 29 How. St. Tr. 746. Had, however, Mr. Douglas been alive at the time, there can be no doubt that he must have been called; and that he might have been called to prove the receipt of the money, would probably not have been questioned.

This case does not, therefore, as sometimes appears to have been thought, in any way touch upon the rules that the admission of an agent does not bind his principal in criminal cases, but merely shows that, where the acts of the agent have to be proved, those acts may be proved in the usual way. *Roscoe's Cr. Ev. (10th Ed.) 54.*

Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil case, in all respects as if the principal were the actor or speaker. *Cliquot v. U. S.*, 3 Wall. (U.S.) 114.

**2. Roscoe's Cr. Ev. (10th Ed.) 54.**

*The Queen's Case*, 2 Brod. & Bing. 297, is sometimes quoted as bearing on this point. There the question asked of the judges, in abstract form, was, whether the admission of an agent of the prosecutor that he had offered a bribe to a witness who was not called could be given in evidence by the prisoner, for the purpose of discrediting generally those witnesses who were called; and the judges answered that it could not. No question of admission or agency was discussed, but the judges grounded their opinion on this, that no inference against the general credibility of the witnesses could be drawn from the evidence tendered, and that it was not, therefore, relevant to the issue. *Roscoe's Cr. Ev. (10th Ed.) 54.*

**14. The Whole of a Confession Must be Taken Together.**—In criminal as well as in civil cases the whole of an admission made by a party is to be given in evidence.<sup>1</sup>

1. Roscoe's Cr. Ev. (10th Ed.) 54; Conner v. State, 34 Tex. 659; State v. Hollenscheit, 61 Mo. 302; State v. Marten, 28 Mo. 530; Griswold v. State, 24 Wis. 144; State v. Elliott, 15 Iowa, 72; Peterson v. State, 47 Ga. 524; Long v. State, 22 Ga. 40; Alfred v. State, 37 Miss. 296; Green v. State, 13 Mo. 382; Bower v. State, 5 Mo. 364; William v. State, 39 Ala. 532; Corbett v. State, 31 Ala. 429; Chambers v. State, 26 Ala. 59; Frank v. State, 27 Ala. 37; State v. Mahon, 32 Vt. 241; State v. M'Donnell, 32 Vt. 491; Kelsey v. Bush, 2 Hill (N. Y.), 440; People v. Johnson, 2 Wheel. C. C. (N. Y.) 377; Com. v. Keyes, 11 Gray (Mass.), 323; Com. v. Brown, 9 Leigh (Va.), 633; State v. Worthington, 64 N. Car. 594; Crawford v. State, 4 Coldw. (Tenn.) 190; Tipton v. State, Peck (Tenn.), 308; State v. Isaac, 3 La. Ann. 359; People v. Navis, 3 Cal. 106; People v. Murphy, 39 Cal. 52; People v. Gelabert, 39 Cal. 663; Republica v. McCarty, 2 Dall. (U. S.) 86; U. S. v. Prior, 5 Cranch C. C. 37; U. S. v. Wilson, 1 Bald. (U. S.) 78. Compare Com. v. Pitsinger, 110 Mass. 101; McCulloch v. State, 48 Ind. 109; Levison v. State, 54 Ala. 520.

The rule is thus laid down by Abbott, C. J., in *The Queen's Case*, 2 Brod. & Bing. 297: If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with the witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in that conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. "There is no doubt," says Mr. Justice Bosanquet, "that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the

prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." *R. v. Jones*, 2 C. & P. 629. Where a prisoner was indicted for larceny, and, in addition to evidence of the possession of the goods the counsel for the prosecution put in the prisoner's statement before the magistrate in which he asserted that he had bought the goods, Garrow, B., is reported to have directed an acquittal, saying, that if a prosecutor used a prisoner's statement he must take the whole of it together. But there is not the least doubt that a jury may believe that part which charges the prisoner, and reject that which is in his favor if they see sufficient grounds for so doing. Thus where, in addition to evidence of the stolen goods being found in the possession of the prisoner, the prosecutor put in the prisoner's examination, which merely stated that the "cloth was honestly bought and paid for," Mr. Justice J. Park told the jury "If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty." *R. v. Higgins*, 3 C. & P. 603. So where a prisoner, charged with murder, stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it, Littledale, J., left the confession to the jury, saying, "It must be taken all together, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it and disbelieve another." *R. v. Clewes*, 4 C. & P. 221. See also *R. v. Steptoe*, 4 C. & P. 397; *Blackburn v. State*, 23 Ohio St. 146; *People v. Wyman*, 15 Cal. 70; *Griswold v. State*, 24 Wis. 144; *Kelsey v. Bush*, 2 Hill (N. Y.), 441; *Roberts v. Gee*, 15 Barb. (N. Y.) 449; *Fox v. Lambson*, 3 Halst. (N. J.) 275; *Eiland v. State*, 52 Ala. 322; *State v. Hollenscheit*, 61 Mo. 302; *State v. West*, 1 Houst. C. C. (Del.) 371; *Young v. State*, 2 Verg. (Tenn.) 292; *Com. v. Brown*, 9 Leigh (Va.), 633;

**15. Confessions of Matters Void in Point of Law, or False in Fact.**—An admission on the part of a prisoner is not conclusive, and if it afterwards appear in evidence that the fact was otherwise, the admission will be of no weight. Thus, upon an indictment for bigamy, where the prisoner had admitted the first marriage, and it appeared at the trial that such marriage was void, for want of consent of the guardian of the woman, the prisoner was acquitted.<sup>1</sup>

**16. Confessions Inferred from Silence or Demeanor.**—Besides the proof of direct confessions, the conduct or demeanor of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him.<sup>2</sup>

*State v. Mahon*, 32 Vt. 241. In a trial for murder, the counsel for the prosecution said he would treat the statements of the prisoners before the magistrates as their defence, and show by evidence that they were not consistent with truth. *R. v. Greenacre*, 8 C. & P. 36. And this course is frequently adopted in practice.

Although the confession may be incompetent as an entirety, yet so much of it may be received as relates strictly to the fact discovered by it. *Garrard v. State*, 50 Miss. 147.

Where but a portion only of the confession was overheard, it is admissible. *State v. Covington*, 2 Bailey (S. Car.), 569. But where the accused was interrupted, and was unable to say all he wanted to, the confession is not admissible. *Miller v. State*, 40 Ala. 54; *Crawford v. State*, 4 Coldw. (Tenn.) 90.

Where a witness testified that he did not understand all the accused said to him, the confession is not admissible. *People v. Gelabert*, 39 Cal. 663.

Where the prosecution have proved declarations of the prisoner by a witness who states that he did hear all that the prisoner said at the time, the prisoner has a right to prove by other witnesses who were present all that he said at the time tending to exonerate himself. *Coffman v. Commonwealth*, 10 Bush (Ky.), 495; s. c., 1 Am. Cr. Rep. 293. See *Burns v. State*, 49 Ala. 370; s. c., 1 Am. Cr. Rep. 326.

A confession cannot be proved by a witness who does not remember the substance of all that was said in the same conversation. *Berry v. Commonwealth*, 10 Bush (Ky.), 15; s. c., 1 Am. Cr. Rep. 272.

Where the prosecution prove declarations and conversations of the accused, he has a right on cross-examination to question the witnesses as to all he said at the time, and has also a right to call on his defence witnesses to prove all that was said at the time. *People v. Strong*, 30

Cal. 151. See *Conner v. State*, 34 Tex. 659; *State v. Worthington*, 64 N. Car. 594.

1. 3 Stark. Ev. (3d Ed.) 894; *Roscoe's Cr. Ev.* (10th Ed.) 55; *Alton v. Gilman*, 2 N. H. 521; *State v. Welch*, 7 Port. (Ala.) 463.

On an indictment for setting fire to a ship, with intent to injure two part-owners, it was held that the prosecutor could not make use of an admission by the prisoner that these persons were owners, if it appeared that the requisites of the shipping acts had not been complied with. *R. v. Philp*, 1 Moody C. C. 271.

2. *Roscoe's Cr. Ev.* (10th Ed.) 56; *Slatery v. People*, 76 Ill. 217; s. c., 1 Am. Cr. Rep. 29, and note; *State v. Pratt*, 20 Iowa, 267; *Murphy v. State*, 36 Ohio St. 628; *Broyles v. State*, 47 Ind. 251; *State v. Johnson*, 35 La. Ann. 842; *Donnelly v. State*, 2 Dutch. (N. J.) 463, 601; *Ettlinger v. Commonwealth*, 98 Pa. St. 338; *People v. Green*, 1 Park. C. C. (N. Y.) 11; *Kelley v. People*, 55 N. Y. 565; s. c., 14 Am. Rep. 342; *McKee v. People*, 36 N. Y. 113; *Com. v. Call*, 21 Pick. (Mass.) 515; *McDonough v. McNeil*, 113 Mass. 96; *Com. v. Brown*, 121 Mass. 69; *Com. v. Kenney*, 12 Metc. (Mass.) 235; *Com. v. Harvey*, 1 Gray (Mass.), 487; *Robinson v. Blen*, 20 Me. 109; *State v. Reed*, 62 Me. 129; *Batturs v. Sellers*, 5 H. & J. (Md.) 117; *Frost v. Commonwealth*, 9 B. Mon. (Ky.) 362; *State v. Bowman*, 80 N. Car. 432; *State v. Swink*, 2 Dev. & B. (N. Car.) 9; *State v. Perkins*, 3 Hawkes (N. Car.), 377; *Lawson v. State*, 20 Ala. 65; *State v. Welch*, 7 Port. (Ala.) 463; *Drumright v. State*, 29 Ga. 430; *People v. Estrado*, 49 Cal. 171; *People v. Stanley*, 47 Cal. 113; *Noftsinger v. State*, 7 Tex. App. 301; *Bowden v. Johnson*, 107 U. S. 262. Compare *Com. v. Kenny*, 12 Metc. (Mass.) 235.

During a trial before a justice of the peace, one who was testifying as a witness left the stand to engage, with others, in violence against J. B. This breach of

the peace put an end to the trial. The witness then resumed his place and said to an attorney: "We are ready to go on with the trial." To which the attorney answered: "You and your crowd have nearly killed J. B., and we cannot go on with the trial. You have disabled him so that we can't try the case now." To which no response was made. *Held*, that this was proper evidence in a suit for the injury by J. B. against his assailants, as the failure to deny the accusation was a tacit admission. *Puett v. Beard*, 86 Ind. 104.

Where one is accused of crime and is silent, it may go to the jury as a tacit but weak admission of guilt. Such silence is worth but little as a tacit admission, and should be received with great caution. *Williams v. State*, 42 Ark. 380.

The statement of the justice of the peace before whom the preliminary examination of the defendant was had, testifying as a witness on the trial, "that he explained the charge to the defendant, and asked him if he desired to make a statement; that, after defendant made his statement, witness told him his own statement would convict him, and defendant made no reply," is not a confession, or admission implied from silence, and is not competent evidence against the defendant. *Weaver v. State*, 77 Ala. 26.

Although neither the evidence nor the declaration of a wife is admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer or an evasive reply, are receivable in evidence as an implied admission on his part. *R. v. Smithers*, 5 C. & P. 332; *R. v. Bartlett*, 7 C. & P. 832. So evidence of a prisoner's demeanor on a former occasion is admissible to prove guilty knowledge. *R. v. Tatershall*, and *R. v. Phillips*, 1 Lew. C. C. 105. Mr. Phillipps, after remarking that a confession may in some cases be collected or inferred from the conduct and demeanor of a prisoner, on hearing a statement affecting himself adds, "As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution." 1 Ph. & Arn. (10th Ed.) 405.

A deposition of a witness, or the examination of another prisoner taken before the committing magistrate, is not admissible in evidence merely because the party affected by it was present, and

might have had an opportunity of cross-examining or commenting on the evidence; neither can any inference be drawn, as in other cases, from his silence. *R. v. Appleby*, 3 Stark. N. P. 33; *Melen v. Andrews*, M. & M. 336; *R. v. Turner*, 1 Moody C. C. 347; *R. v. Swinnerton*, 1 Carr. & M. 593.

If the evidence is sufficient to establish a concert of action on the part of two persons in the commission of an offence, the confessions of the other party, made in the presence of the accused on trial, who said nothing, is competent evidence for the State, on the principle of acquiescence. *Robins v. State*, 9 Tex. App. 671. Compare *Com. v. McDermott*, 123 Mass. 440.

Where two persons charged with a larceny, having the stolen property in their possession, were taken into custody by a police officer, the declarations of one of them, assuming to speak for and implicating both, made to the officer in the presence and hearing of the other person charged, who remained silent, are competent evidence for the State on the separate trial of the latter. *Murphy v. State*, 36 Ohio St. 628.

The judge charged the jury that if a party hears a criminal charge against himself made in his presence, and says nothing, it is an admission on his part, and in the eye of the law the party accepts that charge as his confession. *Held*, that the charge was erroneous. *State v. Edwards*, 13 S. Car. 30; *Campbell v. State*, 55 Ala. 80.

The mere fact that the accused does not contradict the evidence against him does not warrant the implication that he thereby confesses the truth of their statements. *State v. Smith*, 30 La. Ann. pt. i. 457.

If the accused was intoxicated at the time, it is for the jury to consider if he understood the declarations. *State v. Perkins*, 3 Hawkes (N. Car.). 377.

The defendant on the trial made a statement "that all the allegations of the prosecution are false and untrue, etc." *Held*, that it was error to charge the jury that "the statement of defendant does not, however, deny the assault. This silence would go far to confirm the testimony of the plaintiff." His assertion that "all her allegations" were false and untrue was a direct denial of the assault. *De Foe v. People*, 22 Mich. 224.

A statement made in the presence of the prisoner will be presumed to have been in his hearing. *Hochreiter v. People*, 2 Abb. App. Dec. (N. Y.) 363.

When a party, against whom material

The rule allowing the silence of a person to be taken as an implied admission of the truth of allegations spoken or uttered

facts within his own knowledge are charged in the pleading and in the testimony, fails to testify in his own behalf, this is a suspicious circumstance against him. *Felton v. Leigh*, 48 Ark. 198.

**Misnomer.**—Issue being joined on the plea of misnomer in a criminal case, it is competent for the prosecution to prove, as an implied admission by the defendant, that he was arraigned and tried in the mayor's court by the same name alleged in the indictment, without interposing any objection on the ground of misnomer. *White v. State*, 72 Ala. 195.

Statements of third persons, made in presence of the defendant, are admissible against him only to the extent they are admitted by him to be correct, either by his words or conduct; and the conduct of the defendant is the gist of the inquiry, and the only matter to be considered by the jury. Such statements are therefore inadmissible, unless accompanied with proof of defendant's statements or conduct in response thereto. *People v. Ab Yute*, 54 Cal. 89.

Before the acquiescence of a defendant on trial, in the language or the conduct of others, can be assumed as the concession of the truth of any particular statement, or of the existence of any particular fact, it must clearly appear that the language was heard, or the conduct understood, by the defendant at the time. *Long v. State*, 13 Tex. App. 211; *Com. v. Harvey*, 1 Gray (Mass.), 487; *Com. v. Sliney*, 126 Mass. 49.

Whether the defendant could hear and appeared to be listening depended on his position and attitude, and might be estimated and testified to by any one who was present at the time and saw them. *Com. v. Galavan*, 9 Allen (Mass.), 271.

In *Com. v. Brown*, 121 Mass. 69, the court said: "The rule is that a statement made in the presence of the defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply unless he intends to admit it. But if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence." In this case two women stated that the defendant had performed an operation on them; he did not remain

silent, but asked them in reply whether they had been previously operated upon by another person. *Held*, that the jury might infer from this an admission by him of the truth of their statement. The fact that the defendant was arrested, and was taken by the officer in the presence of the women, did not destroy the competency of the evidence.

At the trial of an indictment for murder the defendant's son testified that, after the fire or soon after, he asked the defendant, "What did you want to set the fire for?" and that the defendant made no reply. The judge instructed the jury that, if the defendant did not hear the question, he was not bound to answer; if he did, the jury would consider whether or not, under the circumstances, he was bound to answer, and how far any inference was to be drawn against him from his answering. *Held*, that the defendant's silence was no ground of exception. *Com. v. E. B. 134 Mass. 527*. In this case the court said: "Declarations made in the presence of a party, to which he makes no reply, are sometimes competent evidence equivalent to a tacit admission by him. This depends on whether he heard the statements, whether he is at liberty to reply, whether he is in custody under any restraint or duress, and whether the statements are made to him or to other persons, and under such circumstances as naturally to call for a reply." *Com. v. Kenney*, 12 Metc. (Mass.) 235; *Com. v. Harvey*, 1 Gray (Mass.), 487; *Com. v. Galavan*, 9 Allen (Mass.), 271.

Where inculpatory statements were made by a brother of the defendant in his presence and under circumstances which would warrant the inference that he heard them, but did not deny them, they were admissible in evidence. The question whether they were so admissible being left to the jury under proper instructions. *Moye v. State*, 66 Cal. 271. See *Com. v. Harvey*, 1 Gray (Mass.), 487.

Silence under accusations is not to be considered as an admission of guilt. Thus where one had promised to go on his good behavior at a family interview to which he had induced a friend by means of such promise, to go with him, it was held that his silence at the interview under harsh accusations should be construed as an admission of the truth. *Slattery v. People*, 76 Ill. 235. See *Com. v. Kenney*, 12 Metc. 235; *Mattocks v. Lyman*, 16 Vt. 135.

presence does not apply to silence at a judicial proceeding or hearing.<sup>1</sup>

17. **To the Clergy.**—Admission made to a clergyman may be received in evidence in a criminal case if not made to him in his professional character in the course of discipline enjoined by his church.<sup>2</sup>

18. **Must be of the Crime Charged.**—A confession to be given in evidence must be of the offence charged in the indictment. It is not competence to give in evidence any confession or declaration of the prisoner of his having committed similar crimes upon other occasions, or of his general disposition to commit them.<sup>3</sup>

19. **The Mode of Introducing Confessions.**—For the purpose of introducing a confession, it is unnecessary in general to negative any promise or inducement, unless there is good reason to suspect that something of the kind has taken place.<sup>4</sup>

1. *People v. Willett*, 92 N. Y. 29; *Boyles v. State*, 47 Ind. 251; *Comstock v. State*, 14 Neb. 205; *R. v. Turner*, 1 Moody C. C. 347; *Melen v. Andrews*, 1 L. & M. 336; *Child v. Grace*, 2 C. & P. 93.

2. Upon the trial of an indictment for murder, evidence was received on the part of the prosecution, under objection and exception, to the effect, that upon a coroner's inquest a witness testified that shortly after the murder a stranger called at her house and asked the way to Sandy Hill, and also for a drink of water; that the prisoner with a number of others was placed around a room and the witness pointed out the prisoner as the one who was called; also, that a number of persons, including the prisoner, passed behind her, each one repeating the question asked her by the stranger, and that she identified the prisoner by his voice, and that the prisoner on that occasion did not deny that he was such stranger. *Held*, that the examination before the coroner was of a judicial character; that the examinations so made were part of the proceedings; that the prisoner was not bound to speak, and his silence could not be regarded as an evidence of guilt; and therefore that the evidence was improperly received. *People v. Willett*, 92 N. Y. 29.

3. *People v. Gates*, 13 Wend. (N. Y.) 11. See *R. v. Gilham*, 1 Moo. C. C. 16; *Com. v. Drake*, 15 Mass. 161.

4. 2 Arch. Cr. Pr. & Pl. (8th Ed.) 385; *Com. v. Call*, 21 Pick. (Mass.) 515; *Sutton v. Johnson*, 62 Ill. 209; *Kinchelow v. State*, 5 Humph. (Tenn.) 9.

A statement of the defendant to the district attorney, at the time of the preliminary examination, that he wanted the prosecution stopped; that he "didn't

hurt the girl much;" that he would give the attorney \$8 or \$10; and that the girl would "get over it again,"—does not amount to a confession of the crime of rape, or of anything more than an assault. *Hardtke v. State*, 67 Wis. 552.

4. Roscoe's Cr. Ev. (10th Ed.) 56.

In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison, to a coroner for whom the prisoner had sent. It, however, appeared that previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner, and it was suggested on behalf of the prisoner that he might have told the prisoner that it would be better to confess, and that therefore the counsel for the prosecution were bound to call him. *Littledale, J.*: "As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses." *R. v. Clewes*, 4 C. & P. 221. So where a prisoner being in the custody of two constables on a charge of arson, one B. went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess, and *R. v. Swatkins*, *in/ra*, was relied upon. *Taunton, J.*: "A confession is presumed to be voluntary, unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed." Having consulted *Littledale, J.*, his lordship added, "We do not think,

according to the usual practice, that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement, otherwise he must in all cases call the magistrates and constables before whom or in whose custody the prisoner has been." *R. v. Williams*, Glouc. Spr. Ass. 1832; 3 Russ. on Crimes (5th Ed.), 497.

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed in the first instance by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room the prisoner said he wished to speak to him, and motioned the other constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended that the other constable must be called to show that he had used no inducement to make the prisoner confess. *Patteson, J.*: "I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables." *R. v. Swatkins*, 4 C. & P. 548. In order to induce the court to call another officer in whose custody the prisoner has been, it must appear either that some inducement has been used by, or some express reference made to, such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession which he had previously made to Williams, a constable. It was submitted that Williams ought to be called to prove that he had not used any inducement. *Littledale, J.*: "Although I do not think it necessary that a constable in whose custody a prisoner has been should be called in every case, yet, as in this case there is a reference to the constable, I think he ought to be called." *Williams*

was then called, and proved he did not use any undue means to obtain a confession; but he had received the prisoner from Marsh, another constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called. *Littledale, J.*: "I do not think it is necessary that a constable should be called, unless it appear that some promise was given or some express reference was made to the constable. There was a distinct reference made to Williams, and therefore I thought he must be called, but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made that might either be a confession, a denial, or an exculpation." *R. v. Warner*, Glouc. Spr. Ass. 1832, 3 Russ. on Crimes (5th Ed.), 498.

If evidence of a confession be received, and it afterwards appear from other evidence that an inducement was held out, which, had it been known at the time, would have rendered the evidence inadmissible, the proper course for the judge to take is to strike the evidence of confession out of his notes, and to tell the jury to pay no attention to it. *R. v. Garner*, 1 Den. C. C. 329; 2 C. & K. 920.

**Confessions Taken Down in Writing.**—If the confession is taken down in writing and signed by the prisoner, or its truth acknowledged by parol, or if it be written by him, then it is put in as an ordinary document and read by the officer of the court. *R. v. Swatkins*, 4 C. & P. 550. But if it be taken down by a person who is present when the confession is made, and is not signed or acknowledged by the prisoner, the document is not itself evidence, but may be used by the person who made it to refresh his memory. 4 C. & P. 550, note b. According to general principles, if the confession were contained in a document, which was in existence and admissible in evidence, parol evidence could not be given of it. See *R. v. Gay*, 7 C. & P. 230.

**Burden of Proof.**—The burden of showing that a confession was obtained by improper inducements rests with the defendant. *Rufers v. State*, 25 Ohio St. 464. Compare *State v. Garvey*, 28 La. Ann. 925.

Where confessions offered in evidence are objected to upon the ground that they were improperly obtained; if the person who obtained the confession denies holding out any inducements, the defendant has a right before the confessions are received to give evidence that the confessions were obtained by improper induce-

## CONFIDENCE—CONFINEMENT.

**20. Furnishing Copy of.**—A district attorney was under no obligation to furnish the defence with a copy of a confession.<sup>1</sup>

**CONFIDENCE.**—The word "confidence" is a word peculiarly appropriate to create a trust. It is, as applicable to the subject of a trust, as nearly a synonym as the English language allows. Trust is a confidence which one man reposes in another, and confidence is a trust.<sup>2</sup>

**CONFIDENTIAL COMMUNICATIONS.** See PRIVILEGED COMMUNICATIONS.

**CONFINEMENT**, within the meaning of an act prohibiting confinement of the master of a ship, may be by a moral or physical restraint; by threats of violence with a present force, which restrains the master from his freedom of movement or command in his ship; or by physical restraint of his person.<sup>3</sup> But assault and battery does not amount to a confinement.<sup>4</sup>

As to its meaning in statutes relating to prisoners, see note 5.

ments. *Com. v. Culver*, 126 Mass. 464.

It is for the prosecution to show that the confession was voluntary. *Barnes v. State*, 36 Tex. 356; *People v. Barric*, 49 Cal. 342; s. c., 1 Am. Cr. Rep. 178; *Nicholson v. State*, 28 Md. 140.

1. *Santry v. State*, 67 Wis. 65.

**Authorities for Confession.**—Roscoe's Criminal Evidence; Wharton's Criminal Evidence; Russell on Crimes; Desty's Criminal Law; Bishop's Criminal Procedure; Archbold's Criminal Practice and Pleading; Greenleaf on Evidence.

2. *Coates' Appeal*, 2 Pa. St. 133.

**Confidence Game**, in a statutory prohibition, is the obtaining or attempting to obtain from any person money or property by means of the use of any false or bogus check, or by any other means, instrument, or device. *Morton v. People*, 47 Ill. 474.

3. *U. S. v. Thompson*, 1 Sumn. (U. S.) 171.

And it matters not whether such seizure or restraint is principally or wholly for the purpose of inflicting personal chastisement upon the master, and not to deprive him of his authority or command on board the ship. "The law looks to the act, and not merely to the intent. If the seizure is unlawful, it is a confinement." *U. S. v. Savage*, 5 Mas. (U. S.) 461. See also *U. S. v. Sharp*, Pet. (U. S. C. C.) 118.

4. *U. S. v. Lawrence*, 1 Cranch (U. S.), 94.

5. The words "in confinement," in a 3 C. of L.—32

statute authorizing the judge to order an inquiry as to the sanity of prisoners, and to direct their removal to an insane asylum, "are used to import those who are imprisoned in the county jail, awaiting a final trial, or in the actual custody of the officers of the law, as distinguished from those not having been arrested, or who, having been arrested, have been discharged from arrest on bail." *Ex parte Trice*, 53 Ala. 548.

**Actual Confinement**, in a statute relating to insolvent debtors, means either an actual imprisonment or "being upon the limits," the limits being simply by a fiction of law an extension of the prison walls. *In re Moschberger*, 10 N. J. L. J. 121, citing *Smick v. Opycke*, 7 Hal. (N. J.) 438.

**Confine a Woman.**—A New Jersey statute provided that "it should not be lawful to confine the person of any female for debt." The plaintiff appeared before a justice and made oath that he would be in danger of losing his debt if process issued against the defendant, a woman, by summons. A warrant was accordingly issued and judgment given against her, overruling her plea that she was not liable to arrest by warrant. The case was appealed to the common pleas and the judgment sustained. On appeal to the supreme court it was held that an arrest was an imprisonment and came within the meaning of the act, and therefore the issuing of a warrant against a woman was improper. *Blight v. Meeker*, 7 N. J. L. 97.



**CONFIRMATION** is the approbation or consent to an estate already created, which, as far as it is in the confirming power, makes it good and valid. So that the confirmation does not regularly create the estate, yet such words may be mingled in the confirmation as may create or enlarge an estate; but that is by the force of such words as are foreign to the business of confirmation, and by their own force and power tend to create the estate.<sup>1</sup> The conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or a particular estate is increased.<sup>2</sup> (See also CONVEYANCE.)

**CONFISCATION ACTS.** See WAR.

1. *People v. Law*, 34 Barb. (N. Y.) 511, quoting Gilb. (Tenn.) 69.

Injunction prayed for against street passenger railway company entering on a street, on ground that the common council was incapable of giving a valid consent to, or conferring a legal authority on, the defendants for the construction of this road. The court said that the defendant's authority depended on the construction to be placed upon the act of April 14, 1860. "In the first place, I think it was intended to confirm and make valid the grant or permission conferred by the resolution and action of the common council, whether regular or irregular,—whether valid or invalid,—whether the consent was sufficiently or imperfectly given. It has been said that the consent of the common council was never given according to the forms of law, and that, therefore, it is not proper to assume that its consent was ever intended to be given. But I think this is a fallacy, and that the effect of the act in question was a legislative declaration and adjudication that such consent was intended to be given; and that their confirmation was based upon that assumption, and the action of the common council intended to be validated. This the legislature had power to do; and I think they have effectually ratified the action of the common council, if the legislative proceedings are free from other valid or constitutional objections.

"Some criticism is made upon the effect of confirmation in a legal point of view; and it is said that 'a confirmation may make a voidable or defeasible estate good, but it cannot strengthen a void estate.' Viner's Abr. Con. Y. pl. 5; Co. Lit. 295, b. This is true, but it must be considered in reference to the subject-matter. If the common council of New York had no authority to give their consent in any way to the construction of

the Ninth Avenue Railroad, a mere confirmation of an act thus entirely void and unauthorized, because of want of power over the subject-matter, would probably be of no avail. But if the common council had authority over the subject matter to express their consent, provided it be done according to established forms, I think the supreme power would have a right to waive or correct a mere irregularity, and by confirmation give effect to an act in other respects legally done. I am inclined to think also that there is something of substance in another distinction, which may be mentioned. If a resolution of the common council, in order to be legally effective, must be passed in a particular way,—as by the action of separate boards thereon in the same year,—it may be that the resolution as such is still defective, notwithstanding its confirmation by the legislature; but if the grant or permission which is the subject of the resolution be such as the common council is authorized to confer, and such grant or permission, though irregularly given, be confirmed by the legislature, it strikes me such confirmation would reach back of and beyond the mere instrument by which the grant or permission was conveyed, to the substance of the grant or permission itself, and make it effective if the exertion of such a power would be within the scope of the powers of the confirming body."

**Confirmation of Assessment.**—Where the act provided that no *certiorari* to remove an assessment should be allowed after thirty days have elapsed from the confirmation of the assessment, the limitation will not begin to run if the confirmation has no legal existence for the want of notice of filing of the report, and of the convening of the township committee to consider objections touching the assessment. *State v. North Bergen*, 39 N. J. 456.

2. 2 Bl. Com. 325.

## CONFLICT OF LAWS.

### CONFLICT OF LAWS.

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**§ General Principles. — 1. SOVEREIGNTY AND JURISDICTION OF NATIONS.** — Every nation possesses exclusive sovereignty and jurisdiction within its own territory; and the laws of every State affect and bind directly all property, whether personal or real, within its territory, whether belonging to citizens or aliens, and all persons residing therein, whether native-born subjects or alien sojourners, as well as all contracts made, and acts done, within the territory of such State or sovereignty.<sup>3</sup> Sovereignty, united with domain, establishes the exclusive jurisdiction of a nation within its own territories as to all controversies, crimes, and rights arising therein.<sup>4</sup>

It has been laid down by Huberus, and the doctrine has been sanctioned both in England<sup>5</sup> and the United States,<sup>6</sup> —

(1) That the laws of every empire have force only within the limits of its own government, and bind all who are subject thereof, but not beyond; (2) That all persons who are found

**1 Transfer of Property.** — The power of a State to regulate the transfer of all property within its territory is well established. *Steele v. Goodwin* (Pa.), 4 Cent. Rep. 461; *Milne v. Moreton*, 6 Binn. (Pa.) 361; *Green v. Van Buskirk*, 7 Wall (U. S.), 151; 74 U. S. bk. 19, L. Ed. 113; *Warner's App.* 13 Weekly Notes of Cases, 505.

A transfer of title to property, whether personalty or realty, can only be effected within the limits of the territory where the law prevails; and as the laws of a State have no extra-territorial force, it follows that the title to property located in one State cannot be passed by force of the laws of another, except by virtue of the comity or courtesy which prevails among different nations and States by force of international law. *State Bank Receiver v. Plainfield Bank*, 34 N.J. Eq. 450.

<sup>3</sup> See *Lawrence's Wheaton*, 160, 161; *Henry, For. Law*, pt. I. ch. 1, § 1; *Huberus, lib. I. tit. 3, § 2*; *Minor v. Cardwell*, 37 Mo. 354; *Campbell v. Hall*, Cowp. 208; *Davis v. Jarquin*, 5 Harr. & J. (Md.) 100; *Ruding v. Smith*, 2 Hagg. Con. 383; *Hunter v. Potts*, 4 T. R. 182, 192; *Phillips v. Hunter*, 2 H. Black, 402, 405; *Sill v. Worswick*, 1 H. Black, 672, 690, 691.

In discussing this question, *Fœlix* lays down the broad principle that "every State possesses the power of regulating the conditions on which the real or personal property within its territory may be held or transmitted; and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them; and, finally, of prescribing the conditions on which suits at law may be commenced and carried on in its territory," also, "that no State can, by its laws, directly affect, bind,

or regulate property beyond its territory, or control persons who do not reside within it, whether they be native-born subjects or not." See *Fœlix, Droit Intern. Privé*, § 1.

*Story* says, that each State may by statute regulate the manner and circumstances under which property, whether personal or real, or mere *chores in action*, within its territory, shall be held, transferred, transmitted, bequeathed, or enforced; the condition, capacity, and state of all persons within it; the validity of contracts made, and acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases, calling for the interposition of its tribunals to protect and vindicate and secure the wholesome operation of its own laws within its own domain. See *Story, Conf. L.* 19, § 18. To the same effect *Vattel*, pt. 2, ch. 7, §§ 84, 85, and *Boullenois, Traité des Statutes*, pp. 2, 3.

<sup>4</sup> *Vattel*, b. 2, ch. 7, §§ 84, 85.  
<sup>5</sup> See *Robinson v. Bland*, 2 Burr, 1010; *Holman v. Johnson*, Cowp. 341; *Lit. 794*, *Hargrave's note* 44.

<sup>6</sup> See *Pearsall v. Dwight*, 2 Mass. 90; *Desobats v. Berquier*, 1 Binn. (Pa.) 336; *Holmes v. Remsen*, 4 Johns. (N. Y.) 469; *Andrews v. Herriot*, 4 C. (N. Y.) 510, and n.; *Saul v. His Creditors*, 17 Martin (La.), 569, 596, 597, 598; *Greenwood v. Curtis*, 6 Mass. 358; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 588-591. See also *Shanks v. Dupont*, 1 Pet. (U. S.) 242, 247; *Inglis v. Sail Snug Harbor*, 3 Pet. (U. S.) 99, 125; *Santissima Trinidad*, 7 Wheat. (U. S.), 237; *U. S. v. Gillies*, 1 Pet. C. C. 159, 160; *Murray v. Schooner Charming Betsy*, 2 U. S. 64, 119; *United States v. Williams*, 2 Cr. (U. S.) 82, and note; *Talbot v. Jenson*, 3 Dall. (U. S.) 133.

within the limits of a government, whether their residence is permanent or only temporary, are to be deemed subjects thereof; and (3) That the rulers of every empire, from comity, admit that the laws of every people in force within its limits ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments or of their subjects.<sup>1</sup>

Whatever force and obligation the laws of one country have in another, depend entirely upon the laws and municipal regulations of such other country; in other words, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.<sup>2</sup>

A State may prohibit the operation of all foreign laws and the rights growing out of them, within its own territories; it may permit some, and prohibit others; it may recognize and modify and qualify some, and give universal effect to others. When the nation's own code speaks positively on any subject, it must be obeyed by all persons who are within reach of its sovereignty. When the nation's customary, unwritten, or common law speaks directly on any subject, it is equally to be obeyed, being of equal obligation with the positive code. Where both are silent, then only can the question properly arise as to which law shall govern.<sup>3</sup>

2. COMITY OF NATIONS. — But it is said, that, by the universal practice of civilized countries, by what is known as "the comity"<sup>4</sup>

<sup>1</sup> Huberus, lib. 1, tit. 3; De Conflictu Legum, § 38, § 2.

<sup>2</sup> Huberus, lib. 1, tit. 3, § 2.

<sup>3</sup> Wheaton says, that, "All the effect which foreign laws can have in the territory of a State depends absolutely upon the express or tacit consent of that State. A State is not obliged to allow the application of foreign laws within its territory, but may absolutely refuse to give any effect to them. It may pronounce this prohibition with regard to some of them only, and permit others to be operative, in whole or in part. If the legislation of the State is positive either way, the tribunals must necessarily conform to it. In the event

the courts may as, how far to to apply their sent of a State n laws within passed by its treaties con- i tacit consent of its judicial es, as well as icists." Law-

that the term expressive of give effect to not prejudicial

to their own rights and interests, or those of their subjects. Some regard it not so much a matter of comity or courtesy as a matter of paramount moral duty. See Liverm. Dessert, 26-30. Story says, that, "Assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded. And certainly there can be no pretence to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights and interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust. See *Saul v. His Creditors*, 17 Martin (La.), 569, 596-599. Even in other cases it is difficult to perceive a clear foundation in morals, or in natural law, for declaring that any nation has a right (all other things being equal in sovereignty) to insist that its own positive laws shall be of superior obligation in a foreign realm to the domestic laws of the latter, of an equally positive character. What intrinsic right has one nation to declare that no contract shall be binding which is made by any of its sub-

of nations," the laws of one nation or State will be recognized and executed in another, where the rights of individuals are concerned.<sup>1</sup>

jects in a foreign country, unless they are twenty-five years of age, any more than another nation, where the contract is made, has a right to declare that such a contract shall be binding, if made by any person twenty-one years of age? One would suppose, that, if there be any thing clearly within the scope of national sovereignty, it is the right to fix what shall be the rule to govern contracts made within its own territories." Story, Conf. L. 29, 30.

<sup>1</sup> Minor v. Cardwell, 37 Mo. 350, 354; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 539.

**Laws of a Foreign Country.**—The laws of a foreign State, where the parties in interest are domiciled, will be respected in another jurisdiction, unless they be in conflict with the rights of its own citizens, or are in opposition to its policy. Sherwood v. Judd, 3 Brad. 419. Thus the law of a foreign country, which protects the party to a contract from execution, will, in our courts, protect him from arrest on the same contract. Camfranque v. Burnell, 1 Wash. C. C. 340.

**Laws of a Sister State.**—The laws of other States will be presumed to be the common law. Carpenter v. Grand Trunk Ry. Co., 72 Me. 388; s. c., 39 Am. Rep. 340; but judicial notice will not be taken of such laws. Crane v. Dawson (Mo.), 1 West. Rep. 689.

A statute law of another State will be enforced, if not against public policy, when such law has entered into a contract. Bancher v. Gregory, 9 Mo. App. 102. Thus, under the Illinois statute, a tax title cannot be questioned by one not owning the land at the time of the tax sale; and this rule was enforced by a Missouri court in an action to recover for sand taken from land in Illinois. Cobb v. Griffith & Adams Sand, etc. Co. 12 Mo. App. 130.

It has been held that a State statute, making railroad companies liable for the value of animals killed because of a failure to fence, remains operative in territory not ceded by the State, but purchased by the United States. Chicago, etc., Ry. Co. v. McGlinn, 114 U. S. 543.

And the State legislation, concerning military settlements, governs questions between towns, notwithstanding the general provisions of the U. S. Act of July 4, 1864, that recruits are to be credited to the *quota* of the "town, ward, district, or State in which they respectively reside." Brockton v. Uxbridge, 138 Mass. 292.

An Ohio statute makes it a misdemeanor for a citizen of that State to assign, trans-

fer, or send out of the State for collection a claim against another citizen of the State which cannot be there collected, because of the Ohio exemption law. Where such law was set up as a defence, it was held that the principles of inter-state comity do not preclude the courts of West Virginia from awarding judgment where an attempt is made to collect such a claim by process of garnishment against a party in West Virginia owing such debtor. Stever v. Brown, 20 W. Va. 450.

Under the settled law of New York, the grantee of an equity of redemption assumes an outstanding mortgage on land, by accepting a deed containing a covenant that he shall pay it, the mortgagee may maintain an action against him; in New York, the statute of limitations applicable to simple contracts, does not apply to such an action. Yet in an action on such a New-York contract, brought in the District of Columbia, it was held that while the liability must be governed by New-York law, the court would hold that the form of the action must be *assumpsit* and that, therefore, the statute of limitations applicable to actions of *assumpsit* governed the case. Willard v. Wood Mackey (D. C.), 538.

The statutes of a foreign State cannot, in any case, have any force or effect in any other State *ex proprio vigore*; hence it has been held in New York that the statutory provisions of foreign assignees in bankruptcy have no recognition solely by virtue of a foreign statute. But the comity of nations allows effect to such titles when they can be recognized and enforced without prejudice to the rights of creditors pursuing their rights under the State statutes, when they are not in conflict with the public policy of the State. *In re Wood*, 99 N. Y. 433.

**Decisions of Courts, and Construction of Statutes.**—The decree of a foreign court with respect to the distribution of American assets would be void for want of jurisdiction. Aspden v. Nixon, 4 How. (U. S.) 467; Stacey v. Thrasher, 6 How. (U. S.) 467. The decisions of State courts in construing the statutes of their own State, should be binding upon courts of other States. American Print Works v. Lawrence, 3 Zab. (Ill.) 590. Thus, in an action against personal copartners, though assuming to be incorporated under the laws of another State, the decisions of the courts of that other State must control, in determining whether there was such an incorporation, and the extent of its powers. Bank of Kentucky v. Schuyler, 10 Ky. 104.

This comity is the purely voluntary act of the nation or State, and is totally inadmissible when the laws of the foreign State

Bank, 1 Pars. 180. But if the law thus ascertained has been changed by decisions rendered since the making of the contract sued on, such later decisions will not be regarded. *Jessup v. Carnegie*, 44 N. Y. Super. Ct. 260. And the decree of a Virginia Court of Chancery, transferring property of a corporation to trustees, was recognized by Supreme Court of the District of Columbia, under doctrine of comity, in *Glenn v. Dodge* (D. C.), 3 Cent. Rep. 283.

A State within whose territory personal property is situated, has entire domain over it; but the decisions of its courts in that respect have no extra-territorial force. *Rice v. Harbeson*, 2 T. & C. (N. Y.) 4.

It has been said that, as a general rule, the courts of New York will follow the construction placed upon a statute by the courts of the State enacting it, and that, where obligations have been entered into on the faith of the decisions of such other State, a subsequent and contrary decision will not control. *Jessup v. Carnegie*, 80 N. Y. 441; s. c. 36 Am. Rep. 643.

The courts of Pennsylvania give effect to the construction put upon the statute of another State by its own courts. *Case v. Cushman*, 3 W. & S. (Pa.) 544, s. c. 1 Pa. St. 241.

But one State cannot dictate to another how to construe a contract sought to be enforced within its limits. A reasonable limitation of the rule of comity is, that no community shall suffer prejudice by its comity. *Lewis v. Woodfolk*, 58 Tenn. (2 Bart.) 25.

The United States courts follow the decisions of the State courts in matters relating to land, etc., and the construction of the statutes of such State. *Foster v. Joice*, 3 Wash. C. C. 498, 500; *Harrison v. Rowan*, 3 Wash. C. C. 580, 582.

**Corporations.**—If, by the law of a State under which a corporation is organized, the corporation has a lien on the stock of any shareholder for a debt due from him to the corporation, such lien is a good defence to an action in another State against the corporation by a person to whom the shareholder has transferred the stock. *Bishop v. Globe Co.* 135 Mass. 132.

A New-York statute provided that the stockholders in corporations organized hereunder should be severally liable to creditors of the corporation until the whole of the capital stock should be paid in. In a suit brought under this statute in a Florida court against a stockholder, it was held that the liability rested in contract, and was not in the nature of a penalty which could only be enforced in New York,

and that therefore the suit could be maintained in a Florida court; and that a decision, to the same effect, of the New-York Court of Appeals, in the construction of the statute, was entitled to great weight in determining the question at issue, and to none the less weight because of the suit having been brought in Florida. *Flash v. Conn*, 109 U. S. 371.

An Oregon corporation ceased to do business, and a creditor thereupon obtained a judgment against it in Oregon, and brought an action at law in Illinois against a shareholder there to apply the amount of his unpaid subscription: the court held that the action could not be maintained. *Patterson v. Lynde*, 112 Ill. 196.

When an action was brought in Pennsylvania by an English subject against an English corporation, which action could not have been brought in England, because the company was in the hands of a liquidator, on motion to stay proceedings on the ground that, by comity, the court would administer the same law in Pennsylvania, it was held that, *prima facie*, the English statute was not intended to apply to a foreign jurisdiction, even as between English subjects. *Henry v. Stuart*, 14 Phila. (Pa.) 110.

In an action brought in New York to enforce the liability of certain stockholders under the Iowa Code, sect. 1166, it appeared that, after the commencement of the action, a decision had been rendered by a majority of the Supreme Court of Iowa (*First Nat. Bank v. Davies*, 43 Iowa, 424), declaring that an omission to file articles of incorporation in the office of the Secretary of State did not render the private property of the stockholders liable for the corporation debts, the company being a railroad company within the meaning of the exception in sect. 1338, the court held that the decision of the Iowa court was authoritative. *Jessup v. Carnegie*, 80 N. Y. 441; s. c. 36 Am. Rep. 643.

**Railroads: Actions against.**—In Texas a master cannot be held liable for the consequences of the negligence of a fellow-servant of plaintiff, the master's servant, but in Kansas he can. In a suit brought in Kansas against a railroad corporation by a brakeman, to recover damages for injuries caused in Texas by the negligence of the employees of the corporation, whose duty it was to give notice of a fall of gravel on the track, the judge presiding at the trial failed to make clear to the jury the distinction between the rule prevailing in Texas and that prevailing in Kansas, and a verdict was rendered for plaintiff. It was

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1. **Definition.**—By the phrase conflict of law (*conflictus legum*) is meant the doctrine which treats of the proper application of the differing laws of various States or nations to matters claimed to be subject to both; and of the application of foreign laws to foreign contracts and rights where there is no law of the *forum* governing in the case.<sup>1</sup>

1. **IN INTERNATIONAL LAW.**—In international law it relates to the doctrine which treats of the opposition between the municipal laws of different countries, where the subjects of one country may have acquired rights, and become subject to duties, within the jurisdiction of another country.<sup>2</sup>

2. **IN INTER-STATE JURISPRUDENCE.**—In inter-state jurisprudence, the phrase, conflict of laws, relates to the doctrine which treats of the opposition or inconsistency of the laws of the different States of the Union, or the domestic laws of any particular State, upon the same subject.<sup>3</sup>

<sup>1</sup> Abb. Law Dict. 264.

<sup>2</sup> Burrill's Law Dict. (2d ed.) 346; 2 Kent, Comm. 110.

<sup>3</sup> As a term of art it also includes the decision as to which law is, in such cases, to have superiority. It also includes many cases where there is no opposition between two systems of law, but where the ques-

tion is, how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case." 1 Bouvier, Law Dict. (14th ed.) 320. See Rorer, Inter-State Law, *passim*.

There are certain cases where the municipal laws of a nation or State, both civil and criminal, operate beyond its territorial jurisdiction.<sup>1</sup>

2. LAWS RELATING TO THE STATE AND CAPACITY OF PERSONS.—It has been said that the sovereign power of municipal legislation extends to the regulation of the personal rights of the citizens of the State, and to every thing affecting their civil status and condition; that it extends to the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same.<sup>2</sup>

Personal capacity, as the term is generally used, contains two very distinct elements; to wit, (1) a capacity for rights; and (2) a capacity for business, which are subject to very different considerations. Laws extinguishing the capacity for rights affect the status, but have no extra-territorial force. With regard to capacity for business, there is a subordinate distinction: special incapacities have no extra-territorial force; but general incapacities based on condition of tutelage, have.<sup>3</sup>

as the royal power and protection of the King *et à comesso*," that the maxim was, *protectio trahit subjectionem et subjectio protectionem*; and that "power and protection draweth legiance, and it followeth that seeing the King's power, command, and protection extendeth out of England, that legiance cannot be local or confined within the bounds thereof," and held it to be due at all times and in all countries. See 1 Broom, Com. 445; Fosters, C. L. 183. The same principle was applied in the case of *Aeneas Macdonald*, Foster, Cr. Cas. 59; s. c., 18 State Trials, 858, who was tried for high treason in the King's Bench, for having borne arms in the rebellion of 1745. It was held in *Fitch v. Weber*, 6 Hare, 63, decided in 1847, that a British subject could not by his own act throw off his allegiance to his native country. This doctrine was re-affirmed in England as recently as 1867. See Cockb. Nat. 50. See also Clark's Col. Law, 4 *et seq.*; Leith's Black (2d ed.), 33; *Campbell v. Hall*, Cowp. 204; *The Mayor of Lyons v. The East India Co.* 1 Moore, P. C. 175; *Le Noir v. Ritchie*, 3 L. C. R. 575; *Donegani v. Donegani*, 3 Knapp, P. C. C. 85; *Anderson v. Todd*, 2 U. C. (Q. B.) R. 82; *Hay v. Hunt*, 11 U. C. (Q. B.) R. 381; *Reg. v. McMahon*, 26 U. C. (Q. B.) R. 195; *Reg. v. Lynch*, 26 U. C. (Q. B.) R. 208.

**The Doctrine in the United States.**—The doctrine of perpetual allegiance was recognized in the United States as well as in Europe until recently. Kent says, "In the United States the inclination has been to follow the rule of the English common law, and to hold that neither a native nor a naturalized citizen can throw off his allegiance without consent of the State." 2 Kent, Com.

49. See Story, Const. 3, n. 1; *Wheaton v. State Trials*, 654; 8 Ops. Atty.-Gen. 157; 9 Ops. Atty.-Gen. (U. S.) 356; *Gillies*, 1 Pet. C. C. 159; *Talbot v. Talbot*, 3 Dall. (U. S.) 154; *Shanks v. Duane*, 1 Pet. (U. S.) 242; *The Santissima Trinidad*, 1 Brock. C. C. 478.

By an act of Congress passed in 1868, the right of expatriation is declared to be a natural and inherent right of every people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness. Since that time treaties of naturalization have been concluded with England and the leading nations of the world, which do away altogether with the doctrine of "inalienable allegiance."

The State courts have ever manifested a greater disposition to concede the right of expatriation than has been manifested by the Federal tribunals. 8 Ops. Atty.-Gen. (U. S.) 157; *Lawrence's Wheaton v. Lawrence*, 10 U. S. 250. And the legislature of Virginia authorized the treaty action of Congress, authorizing the President to announce this important principle. In 1792 the legislature of the State of New York passed a law expressly authorizing expatriation, providing that, "Whenever any person of this Commonwealth shall . . . that he relinquishes the character of citizen, and shall depart out of this Commonwealth, . . . he shall be considered as having exercised the right of expatriation, and shall thenceforth be deemed no longer a citizen of this State." See *Howell on Naturalization*, 34; *States v. Gillies*, 1 Pet. C. C. 159.

<sup>1</sup> *Lawrence's Wheaton*, 171.

<sup>2</sup> *Lawrence's Wheaton*, 171; *Hunt v. Hunt*, tom. ii. lib. i. tit. 3, de Conf. Legu.

<sup>3</sup> Barr, Pri. Intern. L. IV. p. 250. application of the *lex loci actus* is

It is a general rule, that those laws of a State which are applicable to the civil condition and personal capacity of its citizens attach to them wherever they may go, travel with them into foreign countries, and there operate upon and bind them.<sup>1</sup>

There are those universal personal qualities which affect either (1) from birth, such as citizenship, legitimacy, or illegitimacy; (2) at a fixed time after birth, as minority and majority; and (3) at an intermediate time after birth, as idiocy, lunacy, bankruptcy, marriage, divorce.

This general rule is subject to exceptions.

*a. Rights of Expatriation and Naturalisation.*—Every subject of a country has a right to change his allegiance; and conversely, every independent sovereignty has the right to naturalize foreigners, and confer upon them the privileges and protection of their acquired domicile.<sup>2</sup>

*b. Rights to regulate Property.*—Another exception to the general rule laid down is the right of every sovereign State to regulate the property within its own territory.<sup>3</sup>

*c. Lex Loci Contractus.*—And the general rule yields in some instances to the *lex loci contractus*.<sup>4</sup>

cally preferable to that of the *lex domicilii*, when the question relates, not to business capacity, in its general sense, but to what are called the special business capacities. The application of the law of domicile to the latter would impose an intolerable burden. It would require that the inhabitants of every land, when entering into a contract, should observe the formalities required by the domicile of any foreigners who may be parties,—formalities which may not only be extraordinary, but, to those unused to them, absurd. It would require the maintenance of special rules for special classes of foreigners,—classes of which at home there is no conception, because at home they do not exist. It is otherwise with business capacity, in the sense in which that term is used. The law on this topic, because it rests on the natural properties of the persons concerned, exists in one or another form, in every land. A person of this class, when travelling in a foreign land, notifies, by his very condition, the inhabitants of such foreign land, that at home he labors under disabilities. In addition to this, persons of this class, from the very fact that they have no power over their estate, have no means to carry on permanent business abroad. A prudent man of business will not be readily induced to engage with them in important undertakings. And he who gives credit to unknown persons deserves no greater legal protection in those cases where his money is lost through the want of the capacity of the parties whom he trusts, than in those cases

where it is lost through their insolvency." Whart., Conf. L. § 98.

<sup>1</sup> Lawrence's Wheaton, 172; Huberus, tom. ii. lib. i. tit. 3, de Conflict. Leg. § 12; Foelix, Droit Inter. Privé, liv. i. tit. 1, § 31.

<sup>2</sup> See 2 Kent Com. 49; Woolsey, Introd. § 66; Westlake, Priv. Intern. L.; 1 Phillimore, Intern. L. 1, 350-354; Twiss, Law of Nations, ch. 9; 1 Foelix, Droit Intern. Privé, 80-100; 2 Foelix, Revue Française et Etrangère, 328; Marten's Nouv. Recueil, ii.; De Beudant, de la Naturalisation; Heffter, Europ. Völkerr. liv. i. ch. 1, § 4.

<sup>3</sup> The personal capacity to contract marriage, for instance, as to age, consent of parents or guardians, and the like, is regulated by the law of the State of which the party is a citizen; but the effect of such marriage upon real property in another State is to be determined by the *lex loci rei sitæ*. Lawrence's Wheaton, 174, 175.

<sup>4</sup> Thus the insolvent laws of one State do not have any force beyond the territorial limits of that State. Woodhull v. Wagner, Baldw. C. C. 296; Harrison v. Sterry, 5 Cr. (U. S.) 289; Ogden v. Saunders, 12 Wheat. (U. S.) 213; Hale v. Baldwin, 1 Cliff. C. C. 511; s. c., 1 Wall. (U. S.) 223; *Ex parte Eames*, 2 Story, 322; Davidson v. Smith, 9 Am. L. R. 217; s. c., 2 West. L. Mo. 566, Dundas v. Bowler, 3 McL. C. C. 397; except such as is given them by comity. Cook v. Moffat, 5 How. (U. S.) 295; Davidson v. Smith, 1 Biss. C. C. 346; s. c., 9 Am. L. Reg. 217.

"A bankrupt's certificate, under the laws



3. MUNICIPAL LAWS. — The municipal laws of a State operate beyond its territorial jurisdiction, when a contract within such State's territory comes in question, either directly or incidentally, in the judicial tribunals of another State or nation.

1. *Exceptions.* — This rule does not apply (1) where the subject-matter is properly governed by the *lex loci rei sitæ*, or the law of another State relating to the personal status and capacity of its citizens; (2) where it would injuriously conflict with the law of another State relating to the police, public health, commerce, or the general sovereign authority of such other State and the rights and interests of its citizens; (3) where from the nature of the contract itself, or the law of the place where it is made, or the expressed intention of the parties, the contract is to be executed in another country; then every thing which concerns its execution is to be determined by the laws of the country where it is performed; (4) the *lex loci contractus* cannot apply in cases where the *lex fori* properly governs. Thus where the contract is brought in question in the judicial tribunals of another State, the *lex loci* governs.<sup>4</sup>

4. SUPREMACY OF DOMICILE. — With regard to personal property, the law of the domicile of its owner prevails over the law

of his own country, cannot operate in another State to discharge him from his debts contracted with foreigners in a foreign country. And though the personal capacity to enter into the nuptial contract as to age, consent of parents, and prohibited degree of affinity, etc., is generally to be governed by the law of the State in which a party is a subject, the marriage ceremony is always regulated by the law of the place where it is celebrated; and, if valid there, it is considered as valid everywhere else, unless in fraud of the laws of the country of which the parties are domiciled subjects." Lawrence's Wheaton, 178.

1 Lawrence's Wheaton, 179.

2 Lawrence's Wheaton, 179.

Where goods sold in a place where such sale is not prohibited, to be delivered in a place where such sale is prohibited, the price cannot be recovered in the State where the goods are to be delivered, because to enforce such a contract would be to sanction a breach of its own commercial laws. Lawrence's Wheaton, 179. *Vide infra*, § 4, a.

The tribunals of one country will not take notice of or enforce, either directly or indirectly, the laws of trade or revenue of another State; and contracts made in violation of such laws of one State may be enforced in the tribunals of any other State than that where they are prohibited, such as the insurance of a prohibited trade. Lawrence's Wheaton, 180; Story, Conf. L. § 257; Westlake, Pri. Inter. L. § 199;

3 Kent, Com. 266-268; Marshall, 59-61; Chitty, Com. 83; Park on Ins. ed.) 341; Pardessus, Droit Com. pt. VI. tit. 7, ch. 2, § 3; Emérigon d'Assurance, tom. i. 212-215.

But this principle is severely corrected by modern jurists. See Story, Conf. L. § 257; Westlake, Pri. Inter. L. § 199; Heffter, Droit Intern. pub. par Bergström, § 83; Pand. de Droit Intern. 144.

3 It is said that what relates to the validity and interpretation of a contract, the usage of nations, is to be determined by the *lex loci contractus* where it is executed in one place, and to be performed in another; and that which relates to the execution is to be governed by the law of the place where it is to be carried into effect. Story, Conf. L. §§ 242, 260, 263-265, 280-283, 309, 314; Lawrence's Wheaton, 179; Fœlix, Droit Inter. Privé, § 7.

4 Where a contract made in one country is sought to be enforced, or comes incidentally in question, in the judicial tribunals of another, every thing relating to the mode of proceeding, the rules of evidence, and the limitations, is to be determined by the law of the State where the suit is pending, not that of the State where the contract was made. Don v. Lippmann, 5 C. Fin. 1; 2 Kent, Com. 459; Story, Conf. L. §§ 557-576; Woolsey's Introd. § 73; Droit Int. Privé, § 76; Savigny, 27 Boullenois, obs. 33, 46; Rodenburg, stat. tit. 2.

country where such property is situated, as regards the rule of inheritance, — *mobilia ossibus inhærent personam sequuntur*; <sup>1</sup> and where an instrument relating to or affecting personal property is executed by a party domiciled in a different country from that in which the property is situated, the laws of that domicile govern as to the form and interpretation and effect of that instrument. <sup>2</sup>

An act valid when done by a person in his own country, is to be regarded as valid in foreign countries, even though in such foreign countries he is treated as incapable of performing such act. <sup>3</sup>

§. STATUTES DESTROYING CAPACITY. — To statutes which destroy capacity, no extra-territorial force is to be allowed; and the subject of a State in which such statutes obtain is relieved from

<sup>1</sup> Lawrence's Wheaton, 168, 169; Henry's Foreign Law, Appx. 169; Huberus, Praelect. tom. ii. lib. i. tit. 3, de Confl. Legu. §§ 14, 15; Fœlix, Droit Intern. Privé, § 37; Merlin, Répertoire, tit. Loi, § 6, No. 3; Bynkershoek, Quaest. Jur. Pub. lib. i. cap. 16.

This rule was once doubted in England, — see *Curling v. Thornton*, 2 Addams, Eccl. Rep. 17, — but it is now settled that the foreign domicile of a British subject is to govern in respect to his testamentary disposition of personal property, the same as it does in the case of a mere foreigner. *Stanley v. Bernes*, 3 Hagg. Eccl. Rep. 393-465; *Moore v. Darell*, 4 Hagg. Eccl. Rep. 346, 354.

<sup>2</sup> See *Trotter v. Trotter*, 3 Wils. & S. 407-414; 2 C., 4 Bligh, N. R. 502.

It is said in the case of *Polydore v. Prince*, 1 Ware (U. S.), D. C. 413, that no nation ever gave the maxim of the ubiquity of domiciliary statutes effect in its practical jurisprudence, in its whole extent; that "among these personal statutes, for which this ubiquity is claimed, are those which formerly, over the whole of Europe, and still over a large part of it, divided the people into different castes, as nobles and plebeians, priests and laity. The favored classes were entitled to many privileges and immunities, particularly beneficial and honorable to themselves. It cannot be supposed that these immunities would be

entry which admitted of no such disabilities in its domestic policy. In

disqualifications and incapacities persons may be affected by the laws and institutions of their own

country, and not be recognized against them in countries by whose laws no such disqualifications are acknowledged." And in applying these principles the court held that a person who, by the laws of Guadeloupe, could not bring suit upon an account

for servitude, labored under no such incapacity in Boston. See *Whart., Conf. L. § 5-10*.

The doctrine that the *status* of foreigners is determined by the law of their domicile, has been at least nominally accepted by the majority of publicists. Lawrence's Wheaton, 168; Eichhorn, § 35; Heffter, i. § 38; Schäffner, § 33; Savigny, VIII. 134; Boullenois, i. 48; Wächter, ii. 172; Huber, de Conflict. lib. i. tit. 3; Boubier, ch. 24, Nos. 1, 9; Mittermaier, § 31; Rodenburg, i. 3, §§ 4-6; Merlin, Rép. Testament, lect. 1, § 5, art. i.

Wharton says that "under the general rule, that domicile is the parent of *status*, lie masked the most contradictory conclusions. By some it is held that where a statute of domicile confers, abridges, or destroys capacity, whether this capacity be generally for the possession of rights, or specially for the exercise of business, then such statute attaches to the subject wherever he may stay, and is to be regarded as conclusive by all foreign courts." *Whart., Conf. L. § 91*.

Story declares that "the truth seems to be that there are, properly speaking, no universal rules by which nations are, or ought to be, morally or politically, bound to each other on this subject. Each nation may well adopt for itself such modifications of the general doctrine as it deems most convenient and most in harmony with its own institutions and interests and policy." *Story, Conf. L. § 102*.

<sup>3</sup> Thus, if a person in his own country has arrived at his majority, his acts will be regarded as valid in another country, although in that other country he would yet be a minor. See *Polydore v. Prince*, 1 Ware (U. S.), D. C. 413; *Males v. Roberts*, 3 Esp. 163; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 189; Boullenois, 6; Barr, Private Int. L. § 45.

the disabilities so imposed, when he touches the soil of a foreign State.<sup>1</sup>

*a. Disabilities of Slaves.*—When a slave goes into a country where slavery is not recognized, he becomes free.<sup>2</sup> If he acquires a domicile in such free country, on returning to his former country he cannot be resubjected to slavery by his former master;<sup>3</sup> if he fails to acquire a domicile on his return, he can be subjected to servitude by his former master.<sup>4</sup>

*b. Disabilities of Civil Death.*—Statutes respecting civil death will not be given extra-territorial force.<sup>5</sup>

*c. Disabilities of Infamy and Attainder.*—Disabilities produced by attainder and infamy have no extra-territorial force.<sup>6</sup> How-

<sup>1</sup> Among the statutes which destroy capacity are those establishing serfdom and slavery, those which decree to individuals civil death (whether as a penalty for crime, or as a consequence of entrance into ecclesiastical orders), and those which prohibit certain persons, who are of full age and free from tutelage, from exercising specific business rights and the like. Whart., Conf. L. §§ 101-105.

<sup>2</sup> *Polydore v. Prince*, 1 Ware (U. S.), D. C. 413; *Commonwealth v. Aves*, 18 Pick. (Mass.) 198; *Commonwealth v. Holloway*, 6 Binn. (Pa.) 213; *Butler v. Delaplaine*, 7 Serg. & R. (Pa.) 378; *Butler v. Hopper*, 1 Wash. C. C. 499; *The Slave Grace*, 2 Hagg. Adm. 94; *The Amedie*, 1 Dodson, 84 Note; *Forbes v. Cochrane*, 2 Barn. & C. 448; *Sommersett's case*; 11 Hargrave, St. Tr. 340; s. c., 20 How. St. Tr. 1; Story, Conf. L. 96; Savigny, 37, 46; 2 Wächter, 172; J. Voet, Comment In. Dig. 1, § 3; 3 Puffendorf, de Jure Nat. c. §§ 1, 2; 2 Grotius, de J. B. ch. 22, sect. 11.

<sup>3</sup> Bar, Private Int. L. § 47; Story, Conf. L. § 96.

<sup>4</sup> *Haynes v. Forno*, 8 La. Ann. 35; *Hunter v. Fulcher*, 1 Leigh (Va.), 172; *Hinds v. Brazeale*, 2 How. (Miss.) 841; *The Slave Grace*, 2 Hagg. Adm. 94; Story, Conf. L. § 96.

Wharton says, "It has been largely discussed whether a slave who has acquired freedom lapses again into slavery on returning to the land where he was formerly in slavery. It is certainly clear that, when a slave has acquired a domicile in a free state, an attempt by his former sovereign to reduce him again into slavery, should he return to such sovereign's territory, would be a violation of international law. On the other hand, the doctrine seems to be, that when a person who is under disabilities or servitude in his domicile, and who, after leaving such domicile, and was journeying in a free country without acquiring a domicile in such latter country, voluntarily returns to such original domi-

cile, then such disabilities or servitude survive." Whart., Conf. L. § 105.

<sup>5</sup> 1 Bl. com. 132; 3 *Id.* 101; 4 *Id.* 319; Story, Conf. L. § 92; 4 P. Voet, Stat. 3, § 19; Mittermaier, § 30, n. 1; Wächter, ii. 184.

It has been questioned whether an ecclesiastic, who has made a vow of poverty, which vow the law of his domicile regards as binding and operative, is incapable of inheritance in a foreign land. English and German jurists hold that, when this vow is voluntary, the incapacity is extra-territorial. Savigny, 161 n. 2; Bar, Private Int. L. § 48. But while the courts of his domicile might enjoin him from accepting inheritance, his incapacity in this respect would not be recognized in countries where this form of civil death is not sanctioned. Whart., Conf. L. § 106.

<sup>6</sup> Whart., Conf. L. § 107.

The old jurists (see 3 Burgundus, Bouhier, ch. 24, No. 134; 2 Boullenois, as well as the Continental writers of the present day (see Mittermaier, § 30; Einleitung, § 78; Bar, Priv. Int. L. § 48) accept the doctrine of the international recognition of such disqualifications; the latter add the qualifications that the doctrine will be applied by the domestic tribunals, before whom such a question arises, only where it would apply a similar qualification, in similar cases, to its own subjects. But in England and the United States such disabilities have never been recognized or enforced. Whart., Conf. L. §§ 107, 108.

Judge Story says that an American court would regard such disabilities as purely local, and incapable of being enforced in this country. "Even the conviction of a crime in a foreign country, which renders the party infamous there, and incapable of being a witness in their own courts, has been held not to produce a like effect in this country. The capacity or incapacity of any person to do acts in their own country will, under such circumstances, be judged

it has been held that the conviction of an infamous crime in a foreign country may be proved by the foreign record; but the question whether the infamy was such as to incapacitate him, is a question to be decided by the *lex fori*.<sup>1</sup>

*d. Disabilities of Creed and Caste.*—Distinctions arising from caste or creed have no extra-territorial force, either in England or United States;<sup>2</sup> and on the continent of Europe the same rule is universally applied to incapacities on account of creed,<sup>3</sup> though the distinctions as to class are still retained.<sup>4</sup>

*e. Disabilities of Infants.*—The laws protecting infancy are accorded extra-territorial force, and an infant is entitled to the protection in a foreign land of his domiciliary law.<sup>5</sup>

their own laws, but not their capacity or incapacity to do like acts in any foreign territory where different laws prevail." Story, Conf. L. § 92.

<sup>1</sup> Kirshner v. State, 9 Wis. 140.

<sup>2</sup> Story, Conf. L. §§ 91, 92, 93; Whart., Conf. L. §§ 5-9, 98-103.

<sup>3</sup> Bar, Priv. Int. L. § 50; Savigny, 36, 160.

<sup>4</sup> Whart., Conf. L. § 109; Thöl. § 78; J. Voet, 1, 5, § 3; 2 Duplessis, 456; 1 Boullenois, 67; Bouhier, ch. 24, No. 134.

<sup>5</sup> Whart., in Conf. L. § 112, says, "Two reasons combine to require this: (1) because as a child an infant is a ward of Christendom; that on his face he shows this, and makes this claim; (2) because he is a traveller. If he is with his guardians it is a gross infraction of natural law to deal with him without their privity and consent. If separated from them, the proper office of humanity is to return him to their care, or, at all events, to obtain for him a protection of a proper local court. His age is notice to all parties that the country of his domicile will only hold him or his estate responsible so far as its own laws permit; and, as he is to return to that country, to its laws the question of his responsibility is to be remanded. Hence it is that many eminent jurists have agreed, for various reasons, in holding that the *status* of infants is to be determined by the law of their domicile. Molinæus in L. i. e. de S. Trin.; Huber, § 12; 2 Rodenburg, 1, §§ 1, 2; Bouhier, ch. 25, No. 1; 1 Boullenois, 53, 54; Merlin, Rep. Majorité, § 5; 1 Wheaton, 111; Thöl. §§ 81, 87; Schäffner, 47, 48; Savigny, 134, 135; 1 Föelix, No. 33; 2 Masse, 84; Story, Conf. L. § 46. Indeed, in respect to infancy by natural law, the question does not admit a doubt to its difference when infancy approaches that period as to which particular country, following, climate, and tradition have attached various bounds. Even, however, as to this debatable period, the opinion is expressed that no matter how high a

country may place the era of majority, such law of domicile binds the person in foreign lands." 2 Rodenburg, 1, §§ 1, 2; 1 Boullenois, 53; 4 Phil. 252; Livermore, Dissert. § 17; Savigny, 134, 135.

But it seems the case is different where the infant is residing in a foreign country without his guardian, though not domiciled there. Whart., Conf. L. § 113.

It is said in *Saul v. His Creditors*, 17 Martin, 569, that all writers "agree that the laws or statutes which regulate minority and majority, and those which fix the state or condition of man, are personal statutes, and follow and govern him in every country. Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here placing it at twenty-one: no objection could, perhaps, be made to the rule just stated. And it may be, and we believe would be, true that a contract made here between the two periods already mentioned would bind him. But reverse the facts of the case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country in which he resided, and that at the age of twenty-four he came into this State, and entered into contracts, would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead, as to the protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge? Most assuredly it would not." See also *Baldwin v. Gray*, 16 Martin (La.), 192.

This opinion of the Louisiana court has been severely attacked. See Liverm., Dissert. § 17; Phillimore, IV. 252; Story, Conf. L. § 76. On the other hand, the principle has been approved by Bar, Int. L. 156, § 45, note 5, and has been sustained by a recent decision in England,—see *per Helleman*, L. R. 2 Eq. 362,—and has been incorporated into the Prussian Code,—A.

Regarding the business capacity of infants, it has been said that he who is capable of business at his domicile, is capable of it everywhere;<sup>1</sup> and the personal *status* of each individual is to be determined by the law of the place where he is, as to acts done within the jurisdiction.<sup>2</sup>

*f. Disabilities of Coverture.*—Throughout Christendom the position of a married woman is that of business dependence.<sup>3</sup> This law of disability is a protective law, and as such has extra-territorial force, and is internationally binding.<sup>4</sup>

*g. Disabilities of Idiocy and Lunacy.*—Idiocy and lunacy are notice to all the world of irresponsibility, and those dealing with such persons do so at their peril.<sup>5</sup>

*h. Disabilities of Spendthrifts.*—Some States have laws placing under disabilities spendthrifts, or persons of business profligacy; and these disabilities are said to adhere to such persons wherever they may travel.<sup>6</sup>

L. R. § 35; see Savigny, 145; Whart., Conf. L. § 429, — and may be regarded as the law which now obtains throughout the German Empire, and prevails in both England and the United States. Whart., Conf. L. § 115.

1 Bar maintains that the courts will sustain that construction which most favors capacity; that, foreigners, in case of conflict, when competent at the place of transaction, are to be regarded by all courts, except those of their domicile and of countries with similar codes, as competent to do the particular act. The reason he assigns is, that a government, it is presumed, would not exercise a greater tenderness over foreigners than over its own subjects, and that, if it presumes its subjects to be capable of being relieved from the incapacity of minority at a particular age, it will not grant that protection to foreigners for such a period. Bar, Pri. Int. L. 156, § 45, note 5.

Reinhold Schmid says that, "So far as concerns foreigners whose business capacity comes into question before our courts, on the one side, there is no reason to give them a wider protection than their home laws secure; and on the other side, it would be repugnant to equity if, by extending to them their foreign protection, they should be more favored than our own citizens. This leads to the conclusions (1) that a foreigner who is capable of business at his domicile must be recognized as so capable by our own laws, even though if domiciled among us he would be incapable; and (2) foreigners who are incapable by their own laws must be treated by us as incapable when our laws so regard them. Die Herrschaft der Gesetze, etc., 43. The second proposition is not universally admitted. See Whart., Conf. L. § 114.

2 Petrie v. Voorhees, 3 C. E. Gr. (N. J.) 285; Amerman v. Wills, 9 C. E. Gr. (N. J.)

13; Polydore v. Prince, 1 Ware (U. S.) D. C. 413; Matthews v. Murchison, 17 Fed. Rep. 760; Male v. Roberts, 3 Esp. 163; Westlake, Private Int. L. art. 404.

3 The *status* of a married woman, and her capacity to carry on business in a foreign State, are determined by the law of her domicile. Hill v. Pine River Bank, 45 N. H. 300; Cosio v. De Dernaes, 1 C. & P. 266; s. c., Ry and Wood, 102; Story, Conf. L. § 136; Pothier, Traité des Oblig. par. 2, ch. vi. § 3; Savigny, 137; Boullenois, i. 437-439; Fœlix, i. 188, No. 89. But it is said that the forms of contract she must use, and the manner in which she must sue, are to be determined by the *lex loci actus*. Ilderton v. Ilderton, 2 H. Bl. 145; Bar, Priv. Intr. L. § 53; Wächter, ii. 180, and the forms of conveyance used are to be determined by the *lex rei sitæ*. Sell v. Miller, 11 Ohio St. 331.

4 Whart., Conf. L. § 118.

5 But when a person who has been adjudged a lunatic is apparently sane, and the law of his domicile permits him to travel in a foreign country unattended, it seems the laws of his domicile will be no protection to any one dealing with him in good faith. See Whart., Conf. L. § 122.

6 Bar, Priv. Inter. L. 175, § 54; Fœlix, i. p. 188; Masse, ii. 87; P. Voet, IV. 3, No. 17; D'Aguesseau, Œuvres, IV. 638; Rodenburg, ii. 1, § 4; Argent, No. 7, Burgundus, iii. 2.

It has been said that "a 'spendthrift,' though under interdiction at his domicile, may be a very plausible person, and may carry with him on his travels means to deceive the most cautious. If the law of his domicile permits him to travel without an attendant to notify strangers of his irresponsibility, it is not thought that that law should be his defence in suits against

6. STATUTES PROTECTING CAPACITY. — Restrictions which belong to those statutes which protect capacity are said to be part of the common law of Christendom, and that they will be enforced in every civilized country, wherever they are decreed by the law of the domicile. And where there are conflicting local laws, more or less favorable to capacity, that will be preferred by which the capacity is most enlarged.<sup>1</sup>

4. Jurisdiction of Action. — I. WANT OF JURISDICTION. — The question of jurisdiction is to be determined by the special laws of each particular State.<sup>2</sup> But want of jurisdiction may always be

him by persons on whom he has imposed." Whart., Conf. L. § 122.

1 Whart., Conf. L. §§ 102, 113, 479.

Among the statutes which protect capacity are those restraining infants, those limiting the business rights of married women, and those placing under tutelage lunatics and spendthrifts.

*Privilegia favorabilia.* — Those statutes which, in order to protect from damage persons supposed to be incapable of business, restrain them, either temporarily or permanently, from the exercise of certain business functions. Wharton, Conf. L. § 103.

This form of restraint may be instituted in various ways; as by the judicial appointment of a tutor or guardian, after due examination by a proper court, or it may be by marriage when the law, "to secure her property from her husband's depredations, so as to secure her unharassed attention to the family sphere," deprives the wife of the right to alienate it, except with peculiar solemnities, and relieves her from responsibilities for debts incurred. Or it may be in the protection afforded to infants. And the modes in which the restraint has been applied are various. "The Roman law, where property has been wrong from a person thus protected, gives the *in integrum restitutio*. Savigny, Sayst. vii. p. 100.

The English common law avoids all contracts made by such persons, except for necessities. But however such restraints may be instituted, or by whatever process they may be enforced, their principle is common to all civilized lands. This object is, not to extinguish capacity, but to nurture and protect it. The persons to whom they relate are not a class politically and socially depressed, but a class whom the State regards as the subjects of its tenderest care, and who, in the case of minors or married women, it would so cherish, that they, in their turn, may be the guardians and artificers of its own future greatness and strength. A nation could expect but little for its own future which left its children without parental or tutelary restraint, and exposed married women, when under their

husband's control, to responsibilities by which the wife's private estate would be imperilled, and her capacity for domestic usefulness impaired. Hence it is that protective laws of this order have been held as adhering to the person of the subject in whatever land he may travel. The *status* that he has in this respect at home must be granted to him abroad. Whart., Conf. L. § 103. It has been said that "these personal laws determining the state and condition of individuals which are founded on natural relations and qualities, and such as are universally recognized among civilized communities, as those of parent and child, those resulting from marriage, from intellectual imbecility, and the like, they (sovereigns) may, and in point of fact do, establish distinctions which are not founded in nature, but relate only to the peculiarities of their own social organization, to their own municipal laws, and to the artificial forms of society which are established among themselves;" but that "it is by no means clear that these personal distinctions, which are not founded in nature, and are the result of mere civil institutions, can be allowed to accompany them (the persons), and give them personal immunities, or affect them with personal incapacities, in other countries in which they may be temporarily resident, or transiently passing, whose laws acknowledge no distinction." Polydore v. Prince, 1 Ware (U. S.), D. C. 413.

§ Where the subject-matter of the suit is strictly local, jurisdiction depends upon such locality, and can only be exercised in the State where the subject-matter is located. *Pittsburg & St. L. R. R. Co. v. Rothschild* (Pa.), 4 Cent. Rep. 109. Thus, an action for injuries by a vessel to a bridge, its approaches, and abutments, which rested upon the land, is properly brought under the law of the State in which the bridge is located. *The Queen City*, 17 Ill. App. 203.

And a holder of a mortgage on a horse, valid by the laws of Missouri, may enforce his rights against the horse when removed into Kansas. *Ramsey v. Glenn*, 33 Kan. 271.

If the object of the suit is to directly

deal with and affect the person of the deceased party, and not the subject-matter itself, and the decree when rendered, and the relief when granted, would, in fact, directly affect and operate upon the person of the defendant only, and would not directly operate upon the subject-matter, the suit may be maintained in any State where the court obtains jurisdiction of the person of the defendant, although the subject-matter of the controversy referred to and described in the decree, and ultimately but indirectly affected by the relief granted, may be situated in another State. *Pittsburg & St. L. R. R. Co. v. Rothschild (Pa.)*, 4 Cent. Rep. 109.

A State court has original jurisdiction of a suit on an injunction bond given in a federal court. Recovery in the latter court is not a condition precedent to the action in the bond. *Aiken v. Leathers*, 37 La. An. 482.

And where a question involving the validity of a patent arises incidentally in a suit in a State court, the court may determine it. *Brown v. Texas Cactus Hedge Co.*, 64 Tex. 396.

A thief took a horse stolen in Arkansas to the Indian Territory. The federal court there released him before trial, and it was held that a State court would hear the case. *Elmore v. State*, 45 Ark. 243.

It is said that an action cannot be maintained under a statute of Georgia regulating the compensation of inspectors, for services performed in South Carolina. *Fitz-Simmons v. Guanahani*, 16 S. C. 192.

Contracts made in China by American merchants are, by our treaties and statutes, and the English treaties, governed by the common law, meaning the rules found in the decisions of federal and State courts, as distinguished from our statute law, and can be enforced by the consular courts. But the decisions of the consul are not conclusive upon all other courts. *Forbes v. Scannell*, 13 Cal. 242.

A receiver, on the ground of inter-state comity, may sue in the courts of another State than that in which he was appointed. *Metzner v. Bauer*, 98 Ind. 425. But it is questioned whether a citizen of one State, acting within that State, and under its judicial authority, can be called in question for such act in another State. *Gibbons v. Livingston*, 1 Hals. (N. J.) 236.

It has been held that the Supreme Court of New York can take jurisdiction of foreclosure of a mortgage where a portion of the premises lie in another State, and may order the mortgagor to execute a conveyance thereof in performance of the covenant in the mortgage; and such order, although not originally prayed, can be granted, even after report of sale, by way of amendment. *Union Trust Co. v. Roch-*

*ester & P. R. R. Co. (N. Y.)* 3 Cent. Rep. 840.

But where a mortgage by a railroad company covered its property in New York, Ohio, and Pennsylvania, suits to foreclose were brought in all three States, and the same person appointed receiver in each suit. Upon a motion to amend the complaint and order appointing the receiver, so as to make the action in New York collateral or ancillary to that pending in Ohio, which the mortgagees desired should be the principal suit, the court held that the motion to amend the complaint might be granted, provided the issues already framed and the court's powers to dispose of them effectually were not changed. But the court refused to modify the order appointing the receiver. *Taylor v. Atlantic & G. W. R. R. Co.*, 57 How. Pr. 9. Compare *Matter of U. S. Rolling-Stock Co.*, 55 How. (N. Y.) Pr. 286. On an application to compel such receiver to pay certificates issued by him for the rental by his company of rolling-stock, the court refused to remit the applicant to the courts of Ohio, on the ground that the proceedings in each State were separate and independent as to property within its limits. *In re United States Rolling-Stock Co.*, 57 How. (N. Y.) Pr. 16.

Where by the *lex loci contractus* the legal title to a *chose in action* passes by assignment, the assignee may sue in his own name, in any forum. *Levy v. Levy*, 78 Pa. St. 507.

The State court will not enjoin a licensee from manufacturing, on his refusal to pay the stipulated royalty, where the defendant denies the validity of the patent, since the question raised is exclusively within the jurisdiction of the federal courts; and for the non-payment of royalty, the plaintiff has an adequate remedy at law. *Hat Sweat Mfg. Co. v. Reinoehl* (N. Y.), 102 N. Y. 167; 55 Am. Rep. 793; s. c., 3 Cent. Rep. 54.

**Another Suit Pending.**—The pendency of a suit in one State is no bar to a suit in another State. The States, in a jurisdictional sense, are foreign to one another. *Davis v. Morriss*, 76 Va. 21. Nor is the pendency of an action on a contract in the United States court, a ground for setting aside summons in an action in a State court: the fact that the first action was commenced in a State court and removed to a United States court will not bar the second action in the State court against a joint contractor. *Oneida County Bank v. Otis* (N. Y.), 2 Cent. Rep. 91.

The removal of an action against several will not be a bar to an action in the State court for the same cause against one of the defendants: both causes may continue to judgment. *Oneida County Bank v. Otis* (N. Y.), 2 Cent. Rep. 91.

pleaded in an action on a foreign judgment.<sup>1</sup> A finding or recital of such jurisdiction will not prevent inquiry.<sup>2</sup>

Where the jurisdiction of a court of limited jurisdiction depends on some fact which can be decided without deciding the case on its merits, the jurisdiction may be questioned and disproved collaterally, although the jurisdictional fact is averred of record, and has been, on evidence, actually found by the court. But when the question of jurisdiction is so involved in the subject-matter of the suit that it cannot be separately decided, the judgment rendered is conclusive in collateral proceedings.<sup>3</sup>

*a. Suits for Negligence causing Death.* — No action will lie for the death of a person by negligence, except in the State where the death occurred, and by force of a statute in that State. And when a State statute gives such right of action, it has no operation upon an injury received in another State, where no such law is in force, although received by a citizen of the former State.<sup>4</sup>

<sup>1</sup> *Pittsburg & St. L. R. R. Co. v. Rothschild* (Pa.), 4 Cent. Rep. 109; *Morey v. Morey*, 27 Minn. 265; *Whart., Conf. L. secs.* 704, 811.

<sup>2</sup> *Hoffman v. Hoffman*, 46 N. Y. 30; *Kerr v. Kerr*, 41 N. Y. 272; *Sewall v. Sewall*, 122 Mass. 156; *Pennoyer v. Neff*, 95 U. S. 714; bk. 24, 1. ed. 565; *Thompson v. Whitman*, 18 Wall (U. S.) 457; s. c., 85 U. S. 21; bk. 21, 1. ed. 897.

On the general issue, the jurisdiction of the courts rendering a foreign judgment is put in issue, but not the merits of the judgment. *Crone v. Dawson*, 19 Mo. App. 214; s. c., 1 West. Rep. 689.

Where a foreign judgment is sued on, or is set up in bar, the party supposed to be bound by it may aver and prove, even in contradiction of the record, any jurisdictional fact appearing therein, — as that he was not a resident within the territorial jurisdiction of the court rendering it; that he was not personally served with process within that jurisdiction; and that the attorney who appeared for him had no authority to do so. *Graham v. Spencer*, 14 Fed. Rep. 603. Or he may impeach it for want of jurisdiction apparent on the face of the record. *Morey v. Morey*, 27 Minn. 265. The decree of a foreign court, with respect to the distribution of American assets, would be void for want of jurisdiction. *Aspden v. Nixon*, 4 How. (U. S.) 467; *Stacey v. Thrasher*, 6 How. (U. S.) 44.

The courts of a State have no jurisdiction of a charge of desertion under the poor laws, where the husband's domicile is in another State, and the act of desertion took place in a third one. *Commonwealth v. Bailey* (Pa.), 1 Leg. Gaz. Rep. 87.

<sup>3</sup> *People's Savings Bank v. Wilcox* (R. I.), 1 N. Eng. Rep. 818; *Chew v. Holroyd*,

8 Welsb. Hurl. & Gord. 249; *Bunbury v. Fuller*, 9 Welsb. Hurl. & Gord. 111; *Wanzer v. Howland*, 10 Wis. 8; *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *Jochumsen v. Suffolk Savings Bank*, 3 Allen (Mass.), 87; *Sears v. Terry*, 26 Conn. 273, 285; *Fowle v. Coe*, 63 Me. 245; *Salladay v. Bainhill*, 29 Iowa, 555; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510, 520; *Wilson v. Frazier*, 2 Humph. (Tenn.) 30; *Johnson v. Corpenning*, 4 Ired. (N. C.) Eq. 216; *Moore v. Smith*, 11 Rich. (S. C.) 569, 577. *Burns v. Van Loan*, 29 La. Ann. 560; *Miller v. Jones' Admr.*, 26 Ala. 247; *Brown v. Foster*, 6 R. I. 564; 1 Smith, Lead. Cas. 820.

<sup>4</sup> *Texas, etc., Ry. Co. v. Richards* (Tex.), 4 S. W. Rep. 627; s. c., 25 Cent. L. J. 86. *Willis v. Missouri Pac. Ry. Co.*, 61 Tex. 432; s. c., 48 Am. Rep. 301; *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294; *Crowley v. the Panama R. R. Co.*, 30 Barb. (N. Y.) 99; *Whitford v. The Panama R. R. Co.*, 3 Bosw. (N. Y.) 67; s. c., 23 N. Y. 465; *Beach v. The Bay State Co.*, 30 Barb. (N. Y.) 433; *Richardson v. New York Central R. R. Co.*, 98 Mass. 85; *Woodard v. Michigan, S. & N. I. R. R. Co.*, 10 Ohio St. 121.

Yet it has been held that the rights of a father to maintain an action for the death of his child in Indiana, will be enforced in an Illinois court according to the law of Indiana on the subject, there being nothing therein contrary to public policy. *Shedd v. Moran*, 10 Ill. App. 618.

As the right of recovery for an injury resulting in death exists only by reason of the law of the place of the injury, it has accordingly been held that there can be no recovery in Iowa, under the Iowa statute, for defendant's negligence in Missouri, without showing a like statute in Missouri. *Hyde v. Wabash, St. Louis, etc., Ry. Co.*,



*b. Suits on Foreign Statute.*—The statute of a foreign State, if it seems, will be enforced where there is a similar statute in the State where the suit is brought, founded upon the same public policy.<sup>1</sup>

61 Iowa, 441; s. c., 47 Am. Rep. 820. But where the statutes of the State where the suit is brought, and that of the State where the injury was sustained, both provide the same remedy for the injury in substantially the same form, the action may be maintained. *Morris v. Chicago, Rock Island, etc., Ry. Co.*, 65 Iowa, 727; s. c., 54 Am. Rep. 39; *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250; s. c., 56 Am. Rep. 200; *Boyce v. Wabash Ry. Co.*, 63 Iowa, 70; s. c., 50 Am. Rep. 730.

But, on the other hand, it has been held that a cause of action accruing in Iowa, under a statute rendering railway corporations liable to employees for injuries caused by negligence of co-employees, may be enforced in Minnesota, although there is no corresponding statute in Minnesota. *Herrick v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 11; s. c., 47 Am. Rep. 771.

Damages may be recovered in Missouri courts for the death of plaintiff's decedent, under statutes of sister States founded upon the same general policy as those of Missouri. *Stoeckman v. Terre Haute & Indianapolis R. R. Co.*, 15 Mo. App. 503.

Where a South Carolina railroad company was allowed to extend its road into Georgia on condition that suits on all claims against it might be brought in the Georgia courts, it was held that a South Carolina administrator might bring suit in a Georgia court to recover the penalty provided by the South Carolina statute for the killing of his intestate. *South Carolina R. R. Co. v. Nil*, 68 Ga. 572. And where a Georgia railroad company ran its road into Alabama, and there killed a man, it was held that the Alabama administrator might bring suit in Georgia. *Central R. R. Co. v. Swint*, 73 Ga. 651.

Under the Kansas code, sect. 422, permitting an action by an administrator for injuries resulting in the death of the intestate, it is held that a foreign administrator cannot maintain such an action where the law of the State of his appointment prohibited him from so doing. *Limekiller v. Hannibal & St. Joseph R. R. Co.*, 33 Kan. 83; s. c., 52 Am. Rep. 524. And it was held in *Vawter v. Missouri Pac. Ry. Co.*, 84 Mo. 679; s. c., 54 Am. Rep. 107, that an administrator appointed in Missouri cannot maintain an action there for the death of his intestate in Kansas, such action being allowed by the statute of Kansas, but not by that of Missouri.

An action is maintainable in New York

by the personal representative of one who died as a result of an injury received in another State through the negligence of the defendant. Where it appears that the laws of that State are similar to those of New York, giving to the personal representative a right of action in such cases, it is not essential that the statute be precisely the same. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; s. c., 49 Am. Rep. 491.

Where a railroad passes through the territory of another State, a passenger procures a ticket for his conveyance from one place within this State to another place within the State, though injured by negligence whilst passing over the portion of the road situate within the other State, he is restricted in the amount of his recovery by the statute laws of that State: it is a local contract, and governed by the law of *loci contractus*. *Dyke v. Erie R. Co.*, 45 N. Y. 113.

<sup>1</sup> *Boyce v. Wabash Ry. Co.*, 63 Iowa, 70; s. c., 50 Am. Rep. 730; *Morris v. Chicago, Rock Island, etc., Ry. Co.*, 65 Iowa, 727; s. c., 54 Am. Rep. 39; *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250; s. c., 56 Am. Rep. 200; *Boyce v. Wabash Ry. Co.*, 63 Iowa, 70; s. c., 50 Am. Rep. 730; *Stoeckman v. Terre Haute & Indianapolis Ry. Co.*, 15 Mo. App. 503; *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48; s. c., 38 Am. Rep. 491.

The Supreme Court of Minnesota has said as far as to say that such suit is maintainable, although there be no corresponding statute in Minnesota. *Herrick v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 11; s. c., 47 Am. Rep. 771. But the Minnesota decisions are not relied upon when they go beyond the limits of well-established principles of the adjudicated cases.

A South Carolina statute providing that no special contract shall limit the common law liability of "any railroad company" within this State for, or in respect to, the loss of goods to be carried and conveyed by it, was held to apply to a Virginia corporation lost, in an action for goods that were shipped, and bills of lading issued, in South Carolina. In an action brought in New York against the carrier, it was held that the South Carolina statute did not apply. *Platt v. Richmond, York River, etc., Ry. Co.*, 52 N. Y. Super. Ct. 496.

By the law of the State of New York certain corporations therein named are required to report annually, within

**Wages.** — It seems that a foreign corporation State may be garnished for a debt due to a , contracted outside of that State, and exempt he State where the defendant and garnishee

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1 Burlington & Missouri River R. R. Co. v. Thompson, 31 Kan. 180; s. c., 47 Am. Rep. 497; Broadstreet v. Clark, 65 Iowa, 670. But if wages be exempt from attachment by the law of the place of contract, it would seem that an attachment of them in another jurisdiction will not prevent a recovery in the court of the domicile and of the contract. Gilbert v. Black, 1 Leg. Chron. 132. See Broadstreet v. Clark, 65 Iowa, 670.

However, where the complaint alleged that plaintiff was a resident householder of Indiana, and an employee of a railroad company incorporated in the State, that the defendant was also a resident of the State, and was about to institute proceedings in attachment in Illinois, and garnishee the wages due the plaintiff from his employer, to prevent plaintiff from availing himself of the exemption laws of Indiana, a restraining order was issued forbidding the defendant from the prosecution of such proceedings. Wilson v. Joseph (Ind.), 5 West. Rep. 681. But in Stevens v. Brown, 20 W. Va. 450, where an Ohio statute making it a misdemeanor for a citizen of that State to assign, transfer, or send out of the State for collection, a claim against another citizen of the State, which cannot be there collected because of the Ohio exemption law, which law was set up as a defence, it was held that the principles of inter-state comity do not preclude the courts of West Virginia from awarding judgment where an attempt is made to collect such a claim by process of garnishment against a party in West Virginia owing such debtor. And in Mooney v. Union Pac. R. R. Co., 60 Iowa, 346, the plaintiff and defendant were residents in Nebraska: the plaintiff sued defendant in Iowa, personal service being had in Nebraska; and a railroad corporation, operating its road in both States, being summoned as garnishee. The debt due the defendant from the garnishee was for labor done in Nebraska, in which State defendant was in the habit of receiving his dues from the garnishee. Under the Nebraska law, the debt due from the garnishee was exempt from attachment, and the court held that the suit could be maintained, and the garnishee charged.

But it was recently held by the Supreme Court of Iowa that in garnishment proceedings in that State, the exemption laws of the State where the contract creating the garnishee's debt was made, will protect

2. CONFLICT OF JURISDICTION. — A State legislature cannot suspend process in the federal courts as to its citizens;<sup>1</sup> nor can a State court enjoin an action in the circuit court of the United States.<sup>2</sup> And the circuit court of the United States cannot interfere in any way with the jurisdiction of the courts of a State,<sup>3</sup> except in matters of bankruptcy.<sup>4</sup> Neither can the jurisdiction

neither the defendant nor the garnishee. *Broadstreet v. Clark*, 65 Iowa, 670.

In a case in the United States District Court for the Southern District of New York, on a seaman's libel of a propeller for wages, it appeared that before answer her owner had been garnished in a Massachusetts State court, and under its judgment compelled to pay the same. In the first United States circuit such wages have been held liable to attachment at common law: it has been held otherwise in the second. In this case the court said that in absence of any decision of the United States Supreme Court settling the question, the Massachusetts court's judgment should, by comity (as well as by the admiralty rule to do equity), be recognized, and the amount so paid be allowed as a credit against the libellant's claim. *The City of New Bedford*, 20 Fed. Rep. 57.

<sup>1</sup> *Babcock v. Weston*, 1 Gall. C. C. 168.

The service of process under the United States cannot be interrupted by the arrest of the officer, or person aiding him, or in any other manner, by means of State process. *United States v. Morris*, 2 Am. L. R. 348. And a State court cannot enjoin collection of a tax ordered by a federal court to pay a judgment of that court. *Gaines v. Springer*, 46 Ark. 502.

<sup>2</sup> *Schuyler v. Pelissier*, 3 Edw. Ch. (N. Y.) 191; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364. Nor one in a court of another State. *Mead v. Merritt*, 2 Paige Ch. (N. Y.) 402; *Burgess v. Smith*, 2 Barb. Ch. (N. Y.) 276.

<sup>3</sup> *Ex parte Cabrera*, 1 Wash. C. C. 232.

Where the State statute provides a method of ousting a railroad company from land for which it has not paid damages, the federal court will not direct this to be done by the marshal. *Reed v. Chicago, Milwaukee, etc., Ry. Co.* 25 Fed. Rep. 886. And where the law affords an adequate remedy, the federal court, sitting in equity, will not entertain a case cognizable in the equity courts of the State under a State statute. *Whitehead v. Entwistle*, 27 Fed. Rep. 778.

Federal courts will not enjoin action, under proceedings had in the State court, at the instance of one who was a party to those proceedings, and who might have contested his case there. *Del Valle v. Welsh*, 28 Fed. Rep. 342. And where a State court of competent jurisdiction has possession of the *res*, the federal court can-

not interfere on the ground that the State court was imposed upon. *Attleborough Bank v. North-western Manuf. & Car. Co.*, 28 Fed. Rep. 113. But it was recently held where, pending a sale for A.'s benefit on a marshal's *f. fa.*, of a judgment recovered by B., B. died, and it was held that the federal court, on motion, would suspend the sale, and permit administration by the probate court. *Kio Grande Ry. Co. v. Gomila*, 28 Fed. Rep. 337.

The United States Circuit Court cannot issue an injunction to prevent a police officer of a city from serving warrants of arrest issued by a State court for violation of city ordinances, claimed to be in contravention of the fourteenth amendment of the United States Constitution, and the treaty with China. *Yick Wo v. Crowley*, 26 Fed. Rep. 207.

Where a person, while in attendance upon the federal court as a witness, was served with a writ of garnishment from a State court, it was held that the plaintiff in such writ could not be restrained from proceeding in the State court, nor be punished as for a contempt of the federal court. *Ex parte Schulenberg*, 25 Fed. Rep. 211. And where lands were sold by order of the bankrupt court, the sale confirmed, and the conveyance made by the assignee, it was held that the court was without power to enjoin a sale of the same land under an order of the same court. *Sargent v. Helton*, 115 U. S. 348.

<sup>4</sup> U. S. Rev. Stat. § 720. See *Sargent v. Helton*, 115 U. S. 348.

Pending a suit in a State court to enforce a statutory lien on mortgaged railroad property, foreclosure proceedings were instituted in the federal court, and a receiver there appointed. Without leave of the federal court, the State-court suit was prosecuted to a judgment declaring lien. It was held that the federal court would not entertain a petition to have this lien declared paramount to the lien of the mortgage. *Blair v. St. Louis, Hannibal, etc., R. R. Co.*, 25 Fed. Rep. 2.

Where an Indian convicted of manslaughter, in the United States District Court of Alaska was sentenced, under the Oregon statute, to a more onerous punishment than United States Act of March 3, 1875, defining the punishment in the case of one convicted of manslaughter in any court of the United States warranted, it

of the federal courts over controversies between citizens of different States be impaired by the laws of the States, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power.<sup>1</sup>

3. CONCURRENT JURISDICTION. — Where concurrent jurisdiction may be exercised by the federal and State courts, the court which first takes jurisdiction can be interfered with by no other, whether State or federal.<sup>2</sup>

was held erroneous, that the federal law governed. *Kie v. United States*, 27 Fed. Rep. 351.

*Hyde v. Stone*, 20 How. (U. S.) 170; *Watson v. Tarpley*, 18 How. (U. S.) 517.

Thus a State law, barring all actions against the personal representatives of one judicially declared insolvent, cannot be pleaded in bar to an action by a citizen of another State, in a federal court. *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Union Bank of Tennessee v. Jolly Admrs.* 18 How. (U. S.) 503. And State exemption laws have no application to process out of a federal court. *Lloyd v. Yost*, 4 Phila. (Pa.) 42.

A State law abolishing resulting trusts does not affect the right of one for whom public lands were purchased by an agent to call on the agent to account, as trustee, in a federal court. *Irvine v. Marshall*, 20 How. (U. S.) 558.

**Discharge of Prisoners.** — A State judge has no power to discharge from arrest, under the insolvent law, a prisoner arrested under federal process. *Duncan v. Klinefelter*, 5 Watts (Pa.), 141. And a person in custody under a *capias ad satisfaciendum* issued under the authority of the circuit court cannot legally be discharged from imprisonment by a State officer acting under a State insolvent law. *McNutt v. Blond*, 2 How. (U. S.) 1; *Duncan v. Darst*, 1 How. (U. S.) 301; *Sadlier v. Fallen*, 2 Curt. C. C. 190. And a prisoner held by a United States marshal under federal process for the purpose of extradition cannot be discharged by a State court. *People v. Fiske*, 45 How. (N. Y.) Pr. 294. On the other hand, where a person is in custody under State authority, a federal court has no power to take the accused from such custody. *Norris v. Newton*, 5 McL. C. C. 92; *United States v. Rector*, 2 Am. L. Reg. 174.

A New York corporation insured a house in Michigan for A., a resident of that State. After the loss, and before its adjustment, a creditor of A., a resident of Illinois, there sued A., and garnished the fund, the corporation doing business in Illinois. No service was had on A., but judgment was taken against the corporation. Before the rendition of this judg-

ment, the loss was adjusted. A. assigned the claim to B., a resident of Michigan; B. sued the corporation, and recovered judgment before the rendition of the Illinois judgment. On motion before the district judge to vacate the stay, it was held that the motion should be denied without costs, and without prejudice to the right to renew the motion when the circuit justice should preside. *Connor v. Hanover Ins. Co.*, 20 Fed. Rep. 549.

**Habeas Corpus.** — A State court has not power to remove, by writ of *habeas corpus*, a defendant in custody of a federal court. *Norris v. Newton*, 5 McL. C. C. 92; *United States v. Rector*, 2 Am. L. R. 174; *Ableman v. Booth*, 21 How. (U. S.) 506; *Veremaitre's Case* (N. Y.), 9 N. Y. Leg. obs. 129, *Ex parte Sifford*, 5 Am. L. R. 659. Where an attempt is made to do so, it is the duty of the marshal to make return to such writ, but not to obey it. *Ableman v. Booth*, 21 How. (U. S.) 506; *Veremaitre's Case* (N. Y.), 9 N. Y. Leg. obs. 129; *Ex parte Sifford*, 5 Am. L. R. 659.

Where a homicide is punishable both by the State and federal laws, and the circuit court first acquires jurisdiction, the prisoners will not be discharged on *habeas corpus* from a State prosecution whilst the proceedings in the circuit court are pending and undetermined. *People v. Sheriff of Westchester*, 1 Park. (N. Y.) 659; s. c., 10 N. Y. Leg. obs. 298. Where the State and federal courts have jurisdiction to punish the same act, the prisoner must plead a conviction in one jurisdiction as a bar to a further proceeding in the other. *People v. Sheriff of Westchester*, 1 Park. (N. Y.) 659; s. c., 10 N. Y. Leg. obs. 298.

A federal court has power, on *habeas corpus*, to discharge one of its officers, who has been arrested on State process, for his conduct in executing a writ issued under federal authority; *Ex parte Jenkins*, 2 Wall. Jr. C. C. 521. But a federal court has no power to discharge one of its officers from arrest under State process, unless a purpose to disregard an act of Congress be apparent on the face of the proceedings; it has no right to go behind the return to a *habeas corpus*. *Thomas v. Crossin*, 5 Clark (Pa.), 328.

<sup>2</sup> *Ex parte Robinson*, 6 McL. C. C.

Where the court of admiralty has acquired jurisdiction, and the marshal is in possession, a State court cannot interfere therewith by the appointment of a receiver; but the court may appoint a receiver to represent creditors in the admiralty court as to the surplus;<sup>1</sup> and where a vessel has been seized under State process, it is not subsequently open to attachment, by process from the admiralty, for seamen's wages;<sup>2</sup> but the latter may interfere in the State court for the protection of their interest.<sup>3</sup>

Although it is true that the admiralty has exclusive jurisdiction

355; *Putney v. The Celestine*, 4 Am. L. J. 164.

In cases of concurrent jurisdiction in the State and federal courts, the latter have no discretion to refuse jurisdiction, in order to prevent a collision of authority. *Wadleigh v. Veazie*, 3 Sum. C. C. 165.

Where two suits are commenced in different courts, and the parties and the subject-matter are the same in each, that which first has jurisdiction should dispose of the whole matter. *McCarthy v. Peake*, 18 How. (N. Y.) Pr. 138; s. c., 9 Abb. (N. Y.) Pr. 164. And where a committee has been appointed of the estate of an habitual drunkard, another court will not, by the appointment of a receiver in a creditor's suit, take the property out of the hands of the committee. *Niblo v. Harrison*, 9 Bosw. (N. Y.) 668.

The jurisdiction of the United States courts previously acquired cannot be ousted by proceedings in insolvency under State laws when the parties invoking the jurisdiction have not participated in the insolvency proceedings. *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *McMicken v. Perin*, 18 How. (U. S.) 507; *Green v. Creighton*, 23 How. (U. S.) 90; *Claffin v. Lisso*, 4 Wood, C. C. 252; s. c., 16 Fed. Rep. 897. And whenever the State court acquires possession and control of the insolvent debtor's property, it has the unquestioned power to dispose of it and give a good title. To this extent the State law is a rule of property. *Burt v. Keyes*, 1 Flipp. C. C. 61.

A federal suit will not be stayed until a suit, subsequently commenced between the same parties in the State court, involving some of the same questions, shall have been determined. *Sharon v. Hill*, 26 Fed. Rep. (N. Y.) 337.

The court will not attach a sheriff, who has paid the proceeds of an execution into the court of bankruptcy, in accordance with its order to that effect. *Felton v. Uhlinger*, 1 Weekly Notes of Cases, 37.

Where the Supreme Court reverses the decree of a surrogate, another court of coordinate jurisdiction cannot inquire into the grounds of the reversal: redress for any error therein must be sought in the Su-

preme Court. *Ruthven v. Patten*, 1 Rob. (N. Y.) 416; s. c., 2 Abb. Pr. (N. S.) 121.

Under their constitutions, the courts of Minnesota and Wisconsin have concurrent jurisdiction on the St. Croix River, a common highway. An action, therefore, to recover damages for an injury occurring on the Wisconsin side of the river channel, may be brought in a Minnesota court. *Opsahl v. Judd*, 30 Minn. 126.

The Supreme Court of Missouri has appellate jurisdiction of cases involving questions of concurrent jurisdiction of Missouri and Illinois over the Mississippi River, and of the construction of provisions in the constitution of Missouri. *Sanders v. St. Louis & New Orleans Anchor Line* (Mo. App.), 4 West. Rep. 266.

1 *Thompson v. Van Vechten*, 5 Duer (N. Y.), 618.

Where a vessel, after being attached on process out of the admiralty, is fraudulently removed beyond the jurisdiction, and there attached on State process, the latter will not hold the property against a claim by the marshal. *The Joseph Gorham*, 7 Law Rep. 135.

In trespass against a collector of customs for seizing the plaintiff's vessel, where the proceedings on the libel in the federal court have been unnecessarily delayed, the State court will not grant an indefinite stay of proceedings, until the libel has been disposed of. *Hoyt v. Gelston*, 8 Johns. (N. Y.) 79. See *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246.

2 *Taylor v. Carryl*, 20 How. (U. S.) 583; *The Oliver Jordan*, 2 Curt. C. C. 414; *The Robert Fulton*, 1 Paine, C. C. 620; *Earl v. Raymond*, 4 McL. C. C. 233; *Fisher v. The Plymouth*, 2 Inter. Rev. Rec. 109; *Certain Logs of Mahogany*, 2 Sumn. C. C. 589; *McLelland v. The Robert Morris*, 2 Penn. L. J. 493; *Taylor v. The Royal Saxon*, 1 Wall. Jr. C. C. 311; *Wall v. The Royal Saxon*, 2 Am. L. R. 324; *The Gazelle*, 1 Sprague (U. S.), D. C. 378; *The Julia Ann*, 1 Sprague (U. S.), D. C. 382; *The John Richards*, Newb. Adm. 73.

3 *Taylor v. Carryl*, 24 Pa. St. 259; s. c., 2 Am. L. Reg. 333; affirmed by the Supreme Court of the United States, in 20 How. (U. S.) 583.

of suits on ransom bills, yet an action at common law may be sustained on a bill of exchange given as collateral to a ransom, although the consideration appears on the face of the bill; and in a common-law court the lawfulness of the capture cannot be questioned.<sup>1</sup>

4. **PRIORITY, LEVIES, AND ATTACHMENTS.** — Where executions issue from a State court, and from a court of the United States, if there be no lien by judgment, the one under which the first seizure is made must prevail.<sup>2</sup>

5. **Foreign Judgments.** — Foreign judgments are either *in rem* or *in personam*.<sup>3</sup> In order that a judgment may be valid and entitled to the recognition of foreign tribunals, it is indispensable that the court pronouncing the judgment should have a lawful jurisdiction over the case, over the subject of the action, and over the parties to the action; that the court had such jurisdiction

1 *Maisonnaire v. Keating*, 2 Gall. C. C. 325.

2 *Brown v. Clarke*, 4 How. (U. S.) 4; *Pulliam v. Osborne*, 17 How. (U. S.) 471.

Where a marshal and sheriff have process of execution against the same defendant, the proceeds of his goods will be treated as if but one jurisdiction existed; and, after satisfying the execution under which the sale took place, the surplus will be awarded to the plaintiff in the other writ. *Bayard v. Bayard*, 5 Pa. L. J. 160; *Azcarati v. Fitz-Simmons*, 3 Wash. C. C. 134.

Where personal property is levied on by the marshal, by virtue of mesne process out of a federal court, it cannot be taken out of his possession by a sheriff, under a replevin from a State court. *Freeman v. Howe*, 24 How. (U. S.) 450; *Buck v. Colbath*, 3 Wall. (U. S.) 335. And after action commenced in a federal court, the claim in suit cannot be attached, by process out of a State court. *Wallace v. McConnell*, 13 Pet. (U. S.) 136.

Personal property levied on by a sheriff, under State process, is in the custody of the law, and cannot be again taken in execution by the marshal, under federal process. *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Taylor v. Carryl*, 20 How. (U. S.) 583.

An attachment issued by a justice will not prevail against an execution from a court of record unless an actual levy was previously made under the attachment. *Ray v. Harcourt*, 19 Wend. (N. Y.) 495. And where a sheriff makes a general levy, after the lien of a constable's execution has expired, and sets aside to the defendant, under the exemption law, the goods on which the constable had levied, the issuing of a second execution gives the latter no claim on the proceeds. *Ebert v. Allen*, 1 Leg. Gaz. Rep. 133.

A constable's sale conveys a good title,

notwithstanding a prior levy by the sheriff. The execution creditors must litigate the appropriation of the proceeds. *Duncan v. McCumber*, 2 W. & S. (Pa.) 264.

3 Story, Conf. L. § 584. See also 3 Burge, Comm. on Col. & For. Law, pt. 2, ch. 24, pp. 1014 to 1080; 2 Smith, Lead. Cas. (2d ed.) 436 n.

Some divide judgments into three classes; to wit, (1) *in rem*, (2) *in personam*, and (3) mixed, *in rem* and *in personam*. See *Burgundus*, Tract. 3 n. 1, 2, pp. 84, 85; 1 Boullenois, obs. 25, p. 602.

Vattel says that it is the province of every sovereignty to administer justice in all places within its own territory and under its own jurisdiction, to take cognizance of the crimes committed there, and of the controversies that arise within it, and says that, in consequence of this right of jurisdiction, the decision made by the judge of the place within the extent of his authority ought to be respected and take effect, even in foreign countries. Vattel, b. 2, ch. 7, §§ 84, 85. But this doctrine has not been generally accepted. See Story, Conf. L. § 586.

Lord Karnes, in his work on equity (see 2 Karnes, Eq. 3d ed. 365), makes another distinction as to foreign judgments; namely, "Suits sustaining and suits dismissing a claim." He says, "A foreign suit sustaining the claim is not one of those universal titles which ought to be made effectual everywhere. It is a title that depends on the authority of the court whence it issued, and therefore has no coercive authority *extra territorium*." But this seems to be a refinement of distinctions not warranted by the ancient common law, and not sanctioned by the modern decisions. See *Gelston v. Hoyt*, 13 John. (N. Y.) 561; *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246; the *Bennet*, 1 Dodson, 175, 180; *Starkie*, Ev. pt. 2, § 80.

must be clearly shown;<sup>1</sup> and if the jurisdiction fails in either of these respects, the judgment will be a nullity, without obligation, and not entitled to be respected or enforced beyond the jurisdiction of the court rendering it, whether the judgment be *in rem* or *in personam*.<sup>2</sup>

1. JUDGMENTS IN REM. — Where the matter in controversy is immovable property, or land, the judgment pronounced in the *forum rei sitæ* is of universal obligation as to all matters of right and title which it professes to determine; but a foreign judgment relating thereto will be of no obligation.<sup>3</sup> And the same principle applies to all proceedings *in rem* against movable property within the jurisdiction of the court pronouncing the judgment.<sup>4</sup> But the judgment must be *bona fide*, and without fraud; for if fraud intervenes, it will avoid the force and validity of the judgment, however well founded the jurisdiction.<sup>5</sup> But fraud, practised

1 *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 339; *Ferguson v. Mahon*, 11 Ad. & El. 179, 182, 183; 1 Boullenois, obs. 25, pp. 618-620.

The judgment of a competent Spanish court having jurisdiction of the case, made after the cession of Louisiana but whilst the country, though ceded, was, *de facto*, in the possession of Spain, and subject to Spanish law, is valid so far as it affects the private rights of the parties. *Keene v. McDonough*, 8 Pet. (U. S.) 308.

2 *Rose v. Himley*, 4 Cr. (U. S.) 269, 270; *Andrews v. Herriot*, 4 Cow. (N. Y.) 524 n.; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Noyes v. Butler*, 6 Barb. (N. Y.) 613; *Middlesex Bank v. Butman*, 29 Me. 19; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Woodward v. Tremere*, 6 Pick. (Mass.) 354; *Bissell v. Briggs*, 9 Mass. 462; *Buchanan v. Rucker*, 9 East, 192; *Don v. Lippmann*, 5 Clark & Finn., 1, 20, 21; *Cavan v. Stewart*, 1 Stark. 525; *Thornton v. Jenyns*, 11 Ad. & El. 179, 182, 183, 1 Stark., Ev. pt. 2, p. 214, sec. 68; *Henry on For. Law*, 18, n. 23, 73; *Story, Confli. L. secs.* 539, 546, 547, 586.

But if the judgment of a foreign court contravenes the universal principle in reference to the *lex loci contractus*, it will not be treated as conclusive in the courts of the State or country whose laws have been thus disregarded. *Dias v. Morrell*, 2 U. S. Law Mag. 431; *Loreille v. Dias*, 2 U. S. Law Mag. 433.

3 See *Cammell v. Sewell*, 5 H. & N. 728; *Rafael v. Verelst*, 2 W. Black. 1058; *Story, Confli. L. §§* 362 n. 3, 532, 545, 551, 591; 1 Boullenois, obs. 25, pp. 618, 619, 623; 1 Hertii Opera, debollis, § 4, n. 73, pp. 153, 154; *J. Voet, ad Pand. tom. 1, lib. 42, tit. 1, n. 41, p. 788*.

4 *French v. Hall*, 9 N. H. 137; *Croudson v. Leonard*, 4 Cr. (U. S.) 434; *Gelston*

*v. Hoyt*, 3 Wheat. (U. S.) 246; *Williams v. Armroyd*, 7 Cr. (U. S.) 423; *Rose v. Himley*, 4 Cr. (U. S.) 241; *Hudson v. Guestier*, 4 Cr. (U. S.) 293; *The Mary*, 9 Cr. (U. S.) 126, 142-146; *Bradstreet v. Neptune Ins. Co.* 3 Sumn. C. C. 600; s. c., 2 Law Rep. 262, 264, 265; *Peters v. The Warren Ins. Co.*, 3 Sumn. C. C. 389; s. c., 1 Law Rep. 222; *Magoun v. New England Ins. Co.*, 1 Story, C. C. 157; s. c., 3 Law Rep. 127, 130, 131; *The Mary Anne*, 1 Ware (U. S.), D. C. 104; *Whitney v. Walsh*, 1 Cush. (Mass.) 29; *Barrow v. West*, 23 Pick. (Mass.) 270; *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 179; *Andrews v. Herriot*, 4 Cow. (N. Y.) 520, and n.; *Grant v. McLachlin*, 4 Johns. (N. Y.) 334; *Blad v. Bamfield*, 3 Swanst. 604, 605; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Harmer v. Bell*, 7 Moore, P. C. 267; s. c., 22 Eng. L. & Eq. 62.

5 *Magoun v. The New England Ins. Co.*, 1 Story, C. C. 157; s. c., 3 Law Rep. 127, 130, 131; *Bradstreet v. the Neptune Ins. Co.*, 3 Sumn. C. C. 600; s. c., 2 Law Rep. 262, 264, 265; *Duchess of Kingston's Case*, 11 State Trials, 261, 262; s. c., 20 Howell's State Trials, 355, 538, n.; *Bowles v. Orr*, 1 Younge & C. 464; *Starkie*, Ev. pt. 2, secs. 77, 79, 83; *Harg. Law Tracts*, 449, 479, 483.

It must appear that the proceedings upon which the judgment is founded were regular, and that the parties interested *in rem* had notice of the proceedings, and an opportunity to appear and defend their interests, either personally or by representative, before the judgment was pronounced. *Bradstreet v. the Neptune Ins. Co.*, 3 Sumn. C. C. 600; s. c., 2 Law Rep. 263; *Magoun v. The New England Ins. Co.*, 1 Story, C. C. 157; s. c., 3 Law Rep. 127, 130; *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 180; *Sawyer v. Maine Fire & Marine Ins. Co.*, 12 Mass. 291.

in the recovery of a judgment, cannot be pleaded in an action thereon brought in another State, unless such a defence could be made in the courts of the State where the judgment was rendered.<sup>1</sup>

Proceedings by a creditor, against the personal property of a debtor in the hands of a third person, or against debts due to him by such third person, are treated as in some sense proceedings *in rem*, and are regarded as entitled to the same consideration as proceedings *in rem*.<sup>2</sup> In such cases the existence of the property seized, or the debt garnisheed within the territory, constitutes just grounds of proceeding to enforce the rights of the plaintiff and discharging his debt, — at least, so far as the property or debt will do so.<sup>3</sup> If the defendant does not appear in the suit, the proceedings will be regarded as a proceeding *in rem*, and the judgment will bind the property or debt, but will not be binding upon the debtor as a decree *in personam* would be.<sup>4</sup>

Such judgments are held conclusive in England, not only *in rem*, but also as to all the points and facts which are directly or incidentally decided;<sup>5</sup> but in the United States the rule is not uniform, some of the States holding that they are conclusive only *in rem*, and may be controverted as to all the incidental grounds and facts on which they profess to be founded, while others follow the English courts.<sup>6</sup>

<sup>1</sup> *Barras v. Bidwell*, 3 Wood, C. C. 5.

And a bill in equity for an injunction against the use in New Hampshire of a judgment rendered in another State, cannot be maintained on the ground that the judgment was obtained by false and fraudulent testimony. *Metcalf v. Gilmore*, 59 N. H. 417; s. c., 47 Am. Rep. 217.

<sup>2</sup> These proceedings are processes of foreign attachment, or garnishment, or trustee process. Story says that in this class of cases "we are especially to bear in mind that, to make any judgment effectual, the court must possess and exercise the rightful jurisdiction over the *res*, and also over the person, at least so far as the *res* is concerned; otherwise it will be disregarded. And if the jurisdiction over the *res* be well founded, but not over the person, except as to the *res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be *in rem*." Story, *Confli. L.* sec. 592a.

See *Bissell v. Briggs*, 9 Mass. 468; *Ocean Insur. Co. v. Portsmouth Marine Ry. Co.*, 3 Metc. (Mass.) 420; *Danforth v. Penny*, 3 Metc. (Mass.) 564; 3 Burge, *Comm. on Col. and For. Law*, pt. 2, ch. 24, pp. 1014-1019.

**Garnishment of Wages.** — Respecting the attachment of wages in a foreign State, see *Broadstreet v. Clark*, 65 Iowa, 670; *Burlington & M. R. R. Co. v. Thompson*, 31 Kan. 180; s. c., 47 Am. Rep. 497; *Gil-*

*bert v. Black*, 1 Leg. Chron. 132; *Wilson v. Joseph* (Ind.), 5 West. Rep. 681; *Stevens v. Brown*, 20 W. Va. 450; *Mooney v. Union Pac. R. R. Co.*, 60 Iowa, 346; *The City of New Bedford*, 20 Fed. Rep. 57; also *supra*, 4, 1, c.

<sup>3</sup> Story, *Confli. L.* sec. 549.

<sup>4</sup> See *Ewer v. Coffin*, 1 Cush. (Mass.) 24; *Rangely v. Webster*, 11 N. H. 299; *McVicker v. Beedy*, 31 Me. 317; *Phelps v. Holker*, 1 Dall. (U. S.) 261; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37; *Robinson v. Ward*, 8 Johns. (N. Y.) 86; *Pawling v. Bird's Ex'rs*, 13 Johns. (N. Y.) 192; *Bissell v. Briggs*, 9 Mass. 462; 3 Burge, *Comm. on Col. & For. Law*, pt. 2, ch. 24, pp. 1016-1019. Compare *Taylor v. Phelps*, 1 Harr. & Gill (Md.), 492; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Douglas v. Forrest*, 4 Bing. 686, 702, 703, 1 Boullenois, obs. 25, pp. 609, 610, 619, 620, 622, 623, 624, 625.

<sup>5</sup> *Blad v. Bamfield*, 3 Swanst. 604; *Tarleton v. Tarleton*, 4 M. & S. 20.

<sup>6</sup> See *Maley v. Shattuck*, 3 Cr. (U. S.) 488; *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246; *Peters v. Warren Ins. Co.*, 3 Sumn. C. C. 369; s. c., 1 Law Rep. 281; *Andrews v. Herriot*, 4 Cow. (N. Y.) 522 n.; *Vandenheuev v. U. Insurance Co.*, 2 Cain. Cas. (N. Y.) 217; s. c., 2 Johns. Cas. (N. Y.) 451; *Robinson v. Jones*, 8 Mass. 536; 2 Kent, *Com.* 120, 121.



2. JUDGMENTS IN PERSONAM. — It is said that a sovereign is not bound *jure gentium* to execute any foreign judgment within his dominions; and that, if execution of such an one is sought within his dominions, he is at liberty to examine into the merits of the judgment, and refuse to give it effect where it appears unjust or unfounded.<sup>1</sup> It is otherwise, however, where a foreign judgment is set up as a bar to an action.<sup>2</sup> This distinction has been frequently recognized by the courts, and is regarded "as having a just foundation in international justice."<sup>3</sup>

But, according to the present doctrine in England, where a plaintiff has recovered a judgment in a foreign country upon the original cause of action, he may sue either upon the judgment there obtained, or upon the original cause of action; the court there holding that such cause of action is not merged in the judgment thus obtained.<sup>4</sup>

Whether the effect of a foreign judgment is a merger of the cause of action, so as to defeat a recovery in another State upon the same cause of action, where the suits were commenced simultaneously, will depend upon the effect, force, and validity of the judgment in the State where rendered.<sup>5</sup>

<sup>1</sup> 2 Kent, Com. 119, 120; Story, Conf. L. sec. 598, 611-618; 1 Boullenois, obs. 25, p. 601.

<sup>2</sup> Where a judgment has been pronounced by a competent court, and carried into effect, the matter then becomes *res judicata*, and the losing party has no right to institute a new suit elsewhere for the litigation of the same question. 2 Kent, Com. 119, 120; Story, Conf. L. § 598.

According to the doctrine of the American courts, where a judgment rendered by a foreign court, in favor of the plaintiff, is relied upon as a bar, it seems that if the foreign tribunal had no jurisdiction of the person of the defendant, a judgment there, in favor of the plaintiff, would not merge the original cause of action so as to defeat an action in another State upon the same cause. *Middlesex Bank v. Butman*, 29 Me. 19; *McVicker v. Beedy*, 31 Me. 314; *Rangely v. Webster*, 11 N. H. 299; *Whittier v. Wendell*, 7 N. H. 257; *Kane v. Cook*, 8 Cal. 449; *Barnes v. Gibbs*, 2 Vr. (N. J.) 317; *Rogers v. Odell*, 39 N. H. 457; *North Bank v. Brown*, 50 Me. 214; *Baxley v. Linah*, 16 Pa. St. 241. But if that court had full jurisdiction of the person of the defendant, a judgment for the plaintiff therein is a bar to a suit upon the original cause of action in another State of the Union. See *Bank of North America v. Wheeler*, 28 Conn. 433; *Cleaves v. Lord*, 43 Me. 290; *Baxley v. Linah*, 16 Pa. St. 241; *Child v. The Eureka Power Works*, 45 N. H. 547; *North Bank v. Brown*, 50 Me. 214; *Bank of United States v. Merchants' Bank*, 7 Gill (Md.), 415; *Cutts v. Beardale*, 15 Conn. 523; *McGill v. Avery*, 30 Vt. 538. The English courts, however, apply the rule, even to judgments where the court had full jurisdiction of the parties. Story, Conf. L. sec. 598.

<sup>3</sup> See *Taylor v. Phelps*, 1 Harr. (Md.), 492; *Griswold v. Pitcairn*, 2 N. H. 85; *Rangely v. Webster*, 11 N. H. 299; *Burnham v. Webster*, 1 Wood. & M. 208; *Tarleton v. Tarleton*, 4 M. & S. 208; *Row v. Jemino*, 2 Str. 733; s. c., 1 C. & D. 87; *Boucher v. Lawson*, 2 C. & D. 326, n.; s. c., *Cases T. Hardw.* 85; *Ellis v. Hunter*, 2 H. Black. 410; *Black. Inst.* B. 4, tit. 3, sec. 4; 2 Kent, Com. 120; Story, Conf. L. sec. 598.

<sup>4</sup> *Bank of Australasia v. Hardin*, 1 B. 661; *Bank of Australasia v. Nias*, 1 B. 717; *Smith v. Nicolls*, 5 Bing. 208, 221-224; *Hall v. Odber*, 11 East 208; *Reimers v. Druce*, 23 Beav. 149. It has been aptly remarked by Story, that "if the original cause of action is not merged in a case where the judgment is in favor of the plaintiff, it is difficult to assert that it is merged in the judgment in the foreign court in favor of the defendant." Story, Conf. L. sec. 598.

<sup>5</sup> *McGill v. Avery*, 30 Vt. 538; *Girty v. Bosw.* (N. Y.) 567. There was formerly a disposition in the American courts to regard *ex parte* judgments obtained on attachment of the debtor's property, and publication of notice to a non-wholly void as to the person of the non-appearing defendant. *Mills v. L.*

3. JUDGMENTS IN COURTS OF SISTER STATES. — By the provisions of the Federal Constitution<sup>1</sup> it is required that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and an Act of Congress<sup>2</sup> supplementary to the provisions of the Constitution declares that the judgments of State courts shall have the same faith and credit in other States as they have in the State where they were rendered. It has accordingly been held that the decree or judgment in a court of competent jurisdiction of a sister State has the same credit, validity, and effect in the courts of another State that it has in the State where it was rendered,<sup>3</sup> but that the question of jurisdiction of the court rendering such judgment is always open,<sup>4</sup>

7 Cr. (U. S.) 481; *Hampton v. McConnel*, 3 Wheat. (U. S.) 234; *Lapham v. Briggs*, 27 Vt. 26; *Bank of North America v. Wheeler*, 28 Conn. 433. But the better opinion, and the one that prevails in the federal and State courts, seems to be that foreign judgments, where the defendant did not appear, and where the court had no jurisdiction over his person, are void. *D'Arcy v. Ketchum*, 11 How. (U. S.) 165; *Webster v. Reid*, 11 How. (U. S.) 437; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37; *Bisell v. Briggs*, 9 Mass. 462.

Where A. of Vermont sued B. of Vermont, and C. of Louisiana, in New Hampshire, and service was had by publication, and real estate attached, and defendants were defaulted without appearance, but the property attached did not satisfy the judgment, it was held that the cause of action was not merged in the New Hampshire judgment so as to preclude A. from maintaining a suit in Vermont upon the original cause of action. *St. Johnsbury Bank v. Peabody*, 55 Vt. 492; 2 C., 45 Am. Rep. 632.

<sup>1</sup> Article 3, sec. 4.

<sup>2</sup> Act of Congress of May 26, 1790, ch. 11; Story on Const., ch. 29, secs. 1297-1307.

<sup>3</sup> *Pittsburg & St. L. R. R. Co. v. Rothchild* (Pa.), 4 Cent. Rep. 109. See *Phillips v. Godfrey*, 7 Bosw. (N. Y.) 150; *McFarlane v. White*, 13 La. An. 394; *Barney v. Patterson*, 6 Harr. & J. (Md.) 182.

These provisions put such judgments on the same footing as domestic judgments; otherwise they would be regarded as foreign judgments. See *Dorsey v. Maury*, 10 Smed. & M. (Miss.) 298; *Seever v. Clement*, 28 Md. 426; *Buckner v. Finley*, 2 Pet. (U. S.) 586; *Smith v. Lathrop*, 44 Pa. St. 326.

A judgment of a court of common pleas of a county in another State, in the absence of evidence to the contrary, is to be regarded as a judgment of a court of general jurisdiction, and is entitled to every pre-

sumption in favor of its validity and regularity. *Pringle v. Woolworth*, 90 N. Y. 502.

The validity of a judgment regularly rendered on a confession under the Pennsylvania law will be recognized by the Kansas courts, although judgments by confession are not known to the law of Kansas. *Ritter v. Hoffman*, 35 Kan. 215. But where the charter granted by a foreign government to a corporation reserved the right of revocation, which right was exercised by a subsequent *de facto* government, recognized as such by the United States, it was held that a judgment obtained in New York in an action instituted after the revocation of the charter, would not be recognized in Massachusetts as a foundation for a proceeding against stockholders. *Remington v. Samana Bay Co.*, 140 Mass. 494.

If a *scire facias* would lie upon a judgment in the State in which it was rendered, an action of debt will lie upon it in another jurisdiction. *Simonton v. Barrell*, 21 Wend. (N. Y.) 362.

Under the United States Constitution, Article 4, section 1, and the act of Congress of May 26, 1790, a writ of error, not operating as a supersedeas from the supreme appellate court of Texas to a judgment of a district court of that State, will be regarded as having the same effect in Virginia as in Texas. *Piedmont and Arlington Life Ins. Co. v. Ray*, 75 Va. 821.

<sup>4</sup> *Pittsburg & St. L. R. R. Co. v. Rothchild* (Pa.), 4 Cent. Rep. 109.

The same rule applies to judgments of circuit courts of the United States, when relied upon in a State court, as governs the judgments of courts of sister States. See *Barney v. Patterson*, 6 Harr. & J. (Md.) 182; *Niblett v. Scott*, 4 La. An. 246.

Whether a defendant who is sued upon a foreign judgment may disprove a recital in the record of personal service upon him, or an appearance by an attorney, thereby denying the jurisdiction of the court rendering the judgment, the cases are divided: some hold that he can, — see

as is also the question of vitiating fraud.<sup>1</sup> But where a foreign judgment is sought to be enforced in the courts of a sister State

Starbuck v. Murray, 5 Wend. (N. Y.) 148; Carleton v. Bickford, 13 Gray (Mass.), 591; Rape v. Heaton, 9 Wis. 329; Norwood v. Cobb, 24 Tex. 551; but the better opinion seems to be that the averment in the record of personal service or appearance is conclusive in other States. See Welsh v. Sykes, 3 Gilm. (Ill.) 197; Lawrence v. Jarvis, 32 Ill. 304; Baltzell v. Nozler, 1 Clarke (Iowa), 588; Walker v. Lathrop, 6 Clarke (Iowa), 516, 588; Westcott v. Brown, 13 Ind. 83; Wilcox v. Kassick, 2 Mich. 165; Wilson v. Jackson, 10 Mo. 330; Pritchett v. Clark, 4 Harr. (Del.) 280; Lincoln v. Moer, 2 McL. C. C. 473; Thompson v. Emmert, 4 McL. C. C. 96; Hampton v. McConnell, 3 Wheat. (U. S.) 234. Where the record shows appearance by attorney, only the defendant, although he may not deny the fact of such appearance,—Roberts v. Caldwell, 5 Dana (Ky.), 512; Gilbert v. Lane, 3 Porter (Ala.), 267,—may deny that such attorney had any authority to appear. Aldrich v. Kinney, 4 Conn. 380; Lawrence v. Jarvis, 32 Ill. 304; Harshey v. Blackmarr, 20 Iowa, 161; Kerr v. Kerr, 41 N. Y. 272; Watson v. New England Bank, 4 Metc. (Mass.) 343; Shelton v. Tiffin, 6 How. (U. S.) 163. But where the record contains no averment of service or appearance, it is always open to the defendant to show want of jurisdiction over his person. Nunn v. Sturgess, 22 Ark. 389; Gunn v. Howell, 27 Ala. 663; Dunbar v. Hallowell, 34 Ill. 168; Pollard v. Baldwin, 22 Iowa, 328; Bissell v. Wheelock, 11 Cush. (Mass.) 277; Reid v. Boyd, 13 Tex. 241; D'Arcy v. Ketchum, 11 How. (U. S.) 165.

The presumption that a judgment which has run twenty years has been paid may be rebutted, though it was rendered in another State, by whose statute no action could be brought after six years from its rendition. Fanton v. Middlebrook, 50 Conn. 44.

An action lies in Iowa on a judgment rendered by a court of record in Nebraska, which has become dormant by the laws of Nebraska. David v. Porter, 51 Iowa, 254.

It has been said that a defendant, when sued on a foreign judgment in New Hampshire, is not estopped to set up the invalidity of such judgment by the fact that he had pleaded the judgment in bar in a second suit on the same demand in Louisiana. Wilbur v. Abbott, 60 N. H. 40. And that a joint judgment rendered in Louisiana on notice to only one defendant, though valid there, is invalid in New Hampshire. Wilbur v. Abbott, 60 N. H. 40.

Where the courts of Missouri declared certain bonds to be void, and the United States Circuit Court declared otherwise of

similar bonds in the hands of non-residents, it was held that the State court would not compel a resident holder of such bonds to deliver them up to be cancelled. Dal County v. Merrill, 77 Mo. 573.

**Suits against Corporations.**—In proceedings in a foreign country for winding up the affairs of an insolvent corporation a call on shareholders was ordered, and action was brought in a New York court to compel payment of the call by a resident of New York: the proceedings being summary and in derogation of the common law, was held that the action could not be maintained on the decree. Anderson v. Haddock, 33 Hun (N. Y.), 435.

In New York a judgment *in personam* cannot be rendered against a foreign corporation which has not appeared, therefore in a suit upon a New York judgment against a foreign corporation when the judgment would have been void in New York want of an appearance, it was said to be void in West Virginia. Gilchrist v. West Virginia Oil & Oil Land Co., 21 W. Va. 115; 2 C., 45 Am. Rep. 555.

In a suit brought in the Second United States Circuit, by creditors of a Missouri corporation, who were not judgment creditors elsewhere than in Missouri, to enforce one's liability as holder of unpaid capital stock thereof, it was held that the law would not lie, the remedy at law not being exhausted, and the Missouri judgments having, in that circuit, the force of domestic judgments. Walser v. Seligman, Blatchf. C. C. 130.

1 See Gleason v. Dodd, 4 Metc. (Mass.) 333; Ewer v. Coffin, 1 Cush. (Mass.) 333; Carleton v. Bickford, 13 Gray (Mass.) 591; Folger v. Columbian Ins. Co., 99 Mass. 273; Taylor v. Bryden, 8 Johns. (N. Y.) 173; Cummings v. Banks, 2 Barb. (N. Y.) 602; Davis v. Smith, 5 Ga. 274; D'Arcy v. Ketchum, 11 How. (U. S.) 165; Pease v. Olney, 20 Conn. 544; Rogers v. Gwin, 21 Iowa, 58.

However, there are numerous well-considered cases which deny the right to attack the judgment of a sister State on the ground of fraud. See Sanford v. Sanford, 28 Conn. 6, 28; McRae v. Mattocks, 13 Pick. (Mass.) 53; Bicknell v. Field, Paige Ch. (N. Y.) 440; Christmas v. Field, 5 Wall. (U. S.) 290.

The United States Constitution, requiring full faith and credit to be given in every State to the judicial proceedings of every other State, applies only where the court whose judgment is invoked had jurisdiction and a finding or recital of such jurisdiction will not prevent inquiry. Thompson

the defendant may not show that the judgment was founded on a mistake either of law or of fact;<sup>1</sup> neither will the fact that in the State where a foreign judgment is sought to be enforced, the cause was barred by the statute of limitations when the suit upon which the judgment was obtained was brought, avail as a defence.<sup>2</sup> The judgments of courts of record in one State are entitled to recognition by the courts of sister States as evidence of a debt simply:<sup>3</sup> they have no extra-territorial force as judgments.<sup>4</sup>

Whitman, 18 Wall. (U. S.) 457; 85 U. S. bk. 21, L. ed. 897; Pennoyer v. Neff, 95 U. S. 714; bk. 24, L. ed. 565; Sewall v. Sewall, 122 Mass. 156; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30.

Thus, when the fact of divorce is sought to be proved by the record of a decree in another State, the decree may be questioned for want of jurisdiction apparent on the record. Morey v. Morey, 27 Minn. 265.

And a decree for the removal of a cloud upon a title being a decree *in personam* can only be supported, against one not a citizen or resident of the State in which the decree is rendered, by actual service within the jurisdiction; hence, where such a decree is rendered by a State court against a non-resident upon a constructive service by publication, it is without jurisdiction, and affords no bar to a suit to recover the land brought in the federal court of the district embracing the State. Hart v. Sanson, 110 U. S. 151.

In the case of D'Arcy v. Ketchum, 11 How. (U. S.) 165, it was held that the provision of the United States Constitution and act of Congress do not apply to judgments which are, in fact, rendered without the court having jurisdiction of the case and of the person of the defendant, but that such judgments are still to be regarded as foreign judgments when attempted to be enforced beyond the limits of the State where rendered. Mr. Edmund H. Bennett, in his edition of Story's Conflict of Laws (see sec. 599f), criticises the doctrine of this decision, because, as he alleges, it "might seem to imply that the record when presented was liable to contradiction upon any question affecting the jurisdiction of the court." He adds, "But as no such doctrine has yet been declared by that court, we should hesitate to believe they will ever come to a result which we regard so much at variance with well-established general principles; for, in order to admit evidence to contradict the recitals of the record, we are obliged to adopt a rule of presumption precisely opposite to that which we apply in ordinary judgments; we have to make every possible presumption against their conclusiveness, and virtually treat them all as foreign judgments, until the contrary is established to the

satisfaction of a jury. If this rule is to be generally recognised, there will be no judgment from any of the American States when attempted to be enforced in any other of the States, where it will not be practicable by proper pleas to draw the validity of the whole judgment into controversy before the jury, and thus virtually nullify the provisions of the United States Constitution and the act of Congress in their favor. . . . We perceive no necessity for the adoption of any such rule of construction in regard to this class of judgments. All that is required to protect the rights of debtors or defendants in such cases, is to hold such judgments of no validity, unless acquiesced in by the defendant, until it appears by the record of such judgment that the court had jurisdiction both of the subject-matter and of the parties, and then treat the record as conclusive the same as that of any domestic judgment."

1 Hassell v. Hamilton, 33 Ala. 280; Rocco v. Hackett, 2 Bosw. (N. Y.) 579; Milne v. Van Buskirk, 9 Iowa, 558; Scott v. Pilkington, 2 Best & S. 11; Godard v. Gray, L. R. 6 Q. B. 139; Castrique v. Imrie, L. R. 4, H. L. 445.

Foreign judgments are said to be binding, although proceedings are pending but not decided, in the courts of the State where rendered to annul and set them aside. Gunn v. Howell, 35 Ala. 144; Indiana v. Helmer, 21 Iowa, 370; Barringer v. Hoyd, 27 Miss. 473; Grover v. Grover, 30 Mo. 400; Merchants' Ins. Co. v. De Wolf, 33 Pa. St. 45; Scott v. Pilkington, 2 Best & S. 11.

2 A State statute permitting such a defence has been held unconstitutional and void. Sweet v. Brackley, 53 Me. 346; Christmas v. Russell, 5 Wall. (U. S.) 290.

3 Elizabethtown Savings Inst. v. Gerber, 34 N. J. Eq. 130.

As the original debt is not merged in a judgment rendered in a foreign court, such judgment may be used as evidence by either party in a suit on the original cause of action, without a formal allegation in the proceedings; and, if it settles the whole controversy between the parties, it is conclusive. N. Y., L. E. & W. Ry. Co. v. McHenry, 17 Fed. Rep. 414.

4 Elizabethtown Savings Institution v. Gerber, 34 N. J. Eq. 130.

The Constitution does not confer any new power upon States, but simply regulates the effect of their acknowledged jurisdiction over persons and things within their own territory. It does not make the judgment of the courts of sister States domestic judgments to all intents and purposes,<sup>3</sup> but simply gives a general validity, faith, and credit to them as evidence; and execution can issue upon them until after a new suit and judgment in the courts of the other States.<sup>4</sup>

The tendency of recent decisions is to restrict the force of foreign judgments, when they are relied upon as a cause of action in another State.<sup>5</sup> The doctrine of the American courts in relation to foreign judgment seems now to be that they are only *prima facie* evidence of the facts therein recited regarding the jurisdiction of the court,<sup>6</sup> but are conclusive upon the merits, and only be impeached for want of jurisdiction or fraud.<sup>6</sup>

Thus, a judgment of a foreign probate court, that certain persons were heirs-at-law of one A., deceased, and entitled by the laws of that State to inherit his real estate, was held not to be admissible in ejectment in Minnesota as proof of the death of A., or of inheritance under Minnesota laws. *Morin v. St. Paul, Minneapolis, etc., Ry. Co.*, 33 Minn. 176.

<sup>1</sup> *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Harrod v. Barrett*, 1 Hall (N. Y.), 155; *s. c.*, 2 Hall (N. Y.), 302; *Wilson v. Niles*, 2 Hall (N. Y.), 358; *Hall v. Williams*, 6 Pick. (Mass.) 237; *Bissell v. Briggs*, 9 Mass. 462; *Evans v. Tatem*, 9 Serg. & R. (Pa.) 260; *Benton v. Burgot*, 10 Serg. & R. (Pa.) 240; *Hoxie v. Wright*, 2 Vt. 263; *Bellows v. Ingham*, 2 Vt. 575; *Aldrich v. Kinney*, 4 Conn. 380.

<sup>2</sup> See *D'Arcy v. Ketchum*, 11 How. (U. S.) 165.

<sup>3</sup> See *Dimick v. Brooks*, 21 Vt. 569.

Foreign judgments carry with them none of the privileges or priorities that belong to them, in the courts of the State where they are rendered, but only those which the *lex fori* gives to them as foreign judgments. *Wood v. Watkinson*, 17 Conn. 500; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312, 328, 329; Story, Conf. L. secs. 582, 609.

Where by the laws and practice of one State, a discharge in bankruptcy is a good defence to a judgment recovered subsequent to such discharge, but founded on a claim existing prior to the commencement of such bankruptcy proceedings, such discharge will be a good defence to an action on such judgment in another State, although the rule in the latter State regarding such judgments might be different. *Haggerty v. Amory*, 7 Allen (Mass.), 458. But such discharge will not be a defence where the rule in both States is that such discharge is no bar. *Bradford v. Rice*, 102 Mass. 472.

<sup>4</sup> See *Arndt v. Arndt*, 15 Ohio, 13; *Vicker v. Beedy*, 31 Me. 316; *Price v. Hickok*, 39 Vt. 292; *Moulin v. Insurance Co.*, 4 Zab. (N. J.) 222; *Gillett v. C.*, 23 Mo. 375; *Trimble v. Longworth*, 17 Ohio St. 439; *Smith v. Smith*, 17 Ill. 109; *Pollard v. Wegener*, 13 Wis. 569; *J. v. Spencer*, 15 Wis. 583; *Ewer v. Coffin*, 23 Cush. (Mass.) 23; *Foster v. Glazener*, 1 Ala. 396.

<sup>5</sup> See *Carleton v. Bickford*, 13 Vt. 100 (Mass.), 591; *Bodurtha v. Goodrich*, 13 Gray (Mass.), 508; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Indiana v. Heister*, 21 Iowa, 370; *Lewis v. Wilder*, 4 La. 574; *Bissell v. Briggs*, 9 Mass. 462; *Boyd v. Fitch*, 15 Johns. (N. Y.) 131; *Greene v. Sarmiento*, 1 Pet. C. C. 74; *Field v. G.*, 1 Pet. C. C. 155; *Aldrich v. Kinney*, 4 Conn. 380; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Hall v. Williams*, 6 Pick. (Mass.) 237; *Starbuck v. Murray*, 5 W. 148 (N. Y.) 148; *Davis v. Packard*, 6 W. 327 (N. Y.) 327; *Buttrick v. Allen*, 8 Mass. 273; *Pawling v. Bird's Ex'rs*, 13 N. Y. 192; *Rathbone v. Terry*, 1 Vt. 73; *Hitchcock v. Aicken*, 1 Cain. (N. Y.) 460; *Hoxie v. Wright*, 2 Vt. 263; *Bellows v. Ingham*, 2 Vt. 575; *Barney v. Parsons*, 6 Har. & J. (Md.) 182, 2 Kent, 118, and *Bank of Chenango v. Hyatt*, 1 Cow. (N. Y.) 570, n.

But this note does not seem to have been adapted by the supreme court of the United States. See *Landes v. Brant*, 10 U. S. 348.

<sup>6</sup> See *Cummings v. Banks*, 2 N. Y. 602; *Noyes v. Butler*, 6 N. Y. 613; *Lazier v. Westcott*, 26 N. Y. 152; *Monroe v. Douglas*, 4 Sandf. (N. Y.) 126. Compare *Rankin v. Goddard*, 54 Me. 28; *Wood v. Watkinson*, 17 Conn. 500; *Wesch v. Sykes*, 3 Gilm. (Ill.) 19.

Such judgments are to be deemed

4. PENDENCY OF SUIT IN FOREIGN STATE. — It seems that the pendency of a suit in a foreign court cannot be set up as a defence in a subsequent suit;<sup>1</sup> and each State in the Union being foreign to every other, except as united for national purposes under the Constitution,<sup>2</sup> in this respect they are foreign countries, so that the mere pendency of a suit in the courts of another State cannot be pleaded in abatement.<sup>3</sup>

until the contrary is established. *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 126; *Ripple v. Ripple*, 1 Rawle (Pa.), 386; *Hall v. Odber*, 11 East, 118; *Alivon v. Furnival*, 1 Crompt. M. & R. 277; *Price v. Dewhurst*, 8 Sim. 279; *Houlditch v. Donegal*, 2 Clark & Finn. 470; *Arnott v. Redfern*, 3 Bing. 353; *Sinclair v. Fraser*, Doug. 4, 52, 4 & 5, note 6; *Walker v. Witter*, Doug. 1. If they are founded on fraud, or pronounced by a court that has not acquired jurisdiction of the cause, they may be avoided. See *Don v. Lippmann*, 5 Clark & Finn. 1, 19, 20, 21; *Ferguson v. Mahon*, 11 Ad. & E. 179, 182; *Price v. Dewhurst*, 8 Sim. 279, 302; *Ferguson v. Mahon*, 3 Per. & Dav. 143; *Bowles v. Orr*, 1 Younge & C. 464; *Story, Conf. L. sec. 544, 545-550, 602*.

The question whether foreign judgments are to be deemed conclusive, whether the defendant is at liberty to go at large into the original merits, to show that the judgment ought to have been different upon the merits, although obtained *bona fide*, has been much discussed in England. See *Kennedy v. Earl of Casillis*, 2 Swanst. 325, 327, note; *Boucher v. Lawson*, Cas. T. Hard. 89; *Reoch v. Gavvan*, 1 Ves. 17; *Walker v. Witter*, Doug. 1, 6, n. 3; *Herbert v. Cook*, Willes 36, n.; *Hall v. Odber*, 11 East, 118; *Bayley v. Edwards*, 3 Swanst. 703, 711, 712; *Phillips v. Hunter*, 1 H. Black. 410; *Galbraith v. Neville*, Doug. 6, n. 3; *Sinclair v. Fraser*, Doug. 4, 5, n. 1; *Alivon v. Furnival*, 1 Crompt. M. & R. 277; *Guianens v. Carroll*, 1 Barn. & Ad. 499; *Becquet v. McCarthy*, 2 Barn. & Ad. 951; *Tarleton v. Tarleton*, 4 Maule & S. 21; *Martin v. Nicolla*, 3 Sim. 458; *Bank of Australasia v. Harding*, 19 Law Jour., C. P. 345; s. c., 9 C. B. 661; *Houlditch v. Donegal*, 8 Bligh, 301, 337-340; *Henderson v. Henderson*, 3 Hare, 100, 113, 115. But the doctrine may be said to be now well established there, that a foreign judgment is only *prima-facie* evidence upon the question whether the foreign court had jurisdiction of the subject-matter or the person of the defendant, or whether the judgment was regularly obtained, but that it is so far conclusive upon the defendant as to prevent him from denying that the promises upon which it was founded were ever made, or alleging that they were obtained by fraud of the plaintiff. It is also

said that pleas which might have been filed to the original action cannot be pleaded to an action upon the judgment. See *Bank of Australasia v. Nias*, 16 Q. B. 717; s. c., 4 Eng. L. & Eq. 252; *Henderson v. Henderson*, 6 Q. B. 288; *Reimers v. Druce*, 23 Beav. 149; *De Coase Brissac v. Rathbone*, 6 H. & N. 301; *Vanquelin v. Bouard*, 15 C. B. (N. S.) 341; *Ricardo v. Garcias*, 12 Clark & Finn. 368; *Scott v. Pilkington*, 2 Best & S. 11; *Crawley v. Isaacs*, 16 L. T. (N. S.) 529; *Vallee v. Dumerque*, 4 Emch. 290; *Cowan v. Braidwood*, 2 Scott, N. R. 138; *Dogliani v. Crispin*, L. R. 1 H. L. 301.

It is said that the rule that the judgment is to be *prima facie* evidence, would be a mere delusion if the defendant were permitted to question it by opening all or any of the original merits on his side, which, under such circumstances, would be equivalent to granting a new trial, that the defendant may impeach the original judgment, by showing that the court had no jurisdiction, that he never had notice of suit, that the judgment was procured by fraud, that upon its face it is founded upon mistake, or that it is irregular and bad by the local law, but that beyond this he cannot impugn the judgment. See *Ferguson v. Mahon*, 11 Ad. & E. 179, 182; *Arnott v. Redfern*, 2 Carr. & P. 88; s. c., 3 Bing. 353; *Novelli v. Rossi*, 2 Barn. & Ad. 757; *Douglas v. Forrest*, 4 Bing. 686; *Obicini v. Bligh*, 8 Bing. 335; *Martin v. Nicolla*, 3 Sim. 458; *Alivon v. Furnival*, 1 Crompt. M. & R. 277; *Stark. Ev.*; pt. 2, sec. 67; *Herbeus*, tom. 2, lib. 1, tit. 3, de Conflictu, sec. 6.

1 *Scott v. Seymour*, 1 Hurl. & C. 219; *Cox v. Mitchell*, 7 C. B. (N. S.) 55; *Ostell v. Lepage*, 5 DeGex & S. 95; s. c., 10 Eng. L. & Eq. 255; *Bayley v. Edwards*, 3 Swanst. 703; *Maule v. Murray*, 7 T. R. 470; *Russell v. Field*, *Stuart's Canada*, 558.

2 *Buckner v. Finley & Van Lear*, 2 Pet. U. S. 586.

3 *Bowne v. Joy*, 9 Johns. (N. Y.) 221; *Salmon v. Wootton*, 9 Dana (Ky.), 423; *McJilton v. Love*, 13 Ill. 486; *Drake v. Brander*, 8 Tex. 352; *Seever v. Clement*, 28 Md. 434; *Smith v. Lathrop*, 44 Pa. St. 326; *Hatch v. Spofford*, 22 Conn. 485; *Goodall v. Marshall*, 11 N. H. 99; *Cook v. Litchfield*, 5 Sandf. (N. Y.) 342.

But it seems that where a debtor has been sued by his creditor in one State, such suit will be a bar to a suit in another State by a person having a claim against such creditor, seeking to hold the debtor as a trustee.<sup>1</sup>

**6. Penal Laws and Offences. — 1. TERRITORIAL LIMITATIONS IN CRIMINAL LAWS AND SENTENCES.**—One nation cannot extend the penal laws of another,<sup>2</sup> such laws being strictly local and having no operation beyond the jurisdiction of the country in which they were enacted,<sup>3</sup> and crimes under them are cognizable and punishable exclusively in the country where they are committed. One nation neither has a right to punish crimes committed under the laws of another, nor is under any obligation to give notice of them, or to enforce any judgment rendered in such cases by the tribunals having authority over such crimes.<sup>4</sup>

The same rule applies to a suit pending in a United States court for a different district than the one in which the State in which the second action is instituted is situated. *Walsh v. Durkin*, 12 Johns. (N. Y.) 99; *Cook v. Lothfield*, 5 Sandf. (N. Y.) 330; and *vice versa* *White v. Whitman*, 1 Curt. C. C. 494; *Lyman v. Brown*, 2 Curt. C. C. 559. Otherwise, however, where the first action is pending in the United States Circuit Court in which the State in which the second action is brought is situated, provided the circuit court has jurisdiction of the cause. *Smith v. Atlantic Mut. Fire Ins. Co.*, 2 Foster (N. H.), 21.

But when one of the actions is at law, and the other is in equity, neither will be cause for abatement. *Hatch v. Spofford*, 22 Conn. 485; *Colt v. Partridge*, 7 Metc. (Mass.) 570. And the same is true where both actions are at law, if the parties be reversed. *Wadleigh v. Veazie*, 3 Sumn. C. C. 165.

<sup>1</sup> See *Merrill v. New England Ins. Co.*, 103 Mass. 249; *Whipple v. Robbins*, 97 Mass. 107; *American Bank v. Rollins*, 99 Mass. 313.

The same rule applies to actions in the federal and State courts. *Freeman v. Howe*, 24 How. (U. S.) 450.

<sup>2</sup> *The Antelope*, 10 Wheat. (U. S.) 66. American courts will not recognize as binding the convictions of other lands. Whart., Conf. L. sec. 108; Story, Conf. L. sec. 91.

<sup>3</sup> *Scoville v. Canfield*, 14 Johns. (N. Y.) 338; *Peterson v. Walsh*, 1 Daly (N. Y.), 182. See *Rafael v. Verelst.*, 2 W. Bl. 1058; *Folliott v. Ogden*, 1 H. Bl. 135.

<sup>4</sup> *The Antelope*, 10 Wheat. (U. S.) 66, 123; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338, 340; *State v. Knight*, Taylor's (N. C.) Rep. 65; *Commonwealth v. Green*, 17 Mass. 515, 545, 546-548; *Ogden v. Folliott*, 3 T. R. 733, 734; *Wolffe v. Oxholme*, 6 M. & S. 99; *Warrender v. Warrender*, 9 Bligh, 119, 120; *King of Two Sicilies v.*

*Willcox*, 1 Sim. (N. S.) 310; Story, L. sec. 620; Kames, Eq., b. 3, ch. 1; Ersk. Inst. B. 1, tit. 2, p. 23; *Pa. Droit Comm.* 5, art. 1467; *Bouhier de Bourg.* ch. 34, p. 588; *Matthæi, ad Pand. Lib.* 48, tit. 20, secs. 17, 18. Compare *Hertii Opera, de Collis.* l. 4, Nos. 18-21, pp. 130-132 (ed. 1715); *Voet, de Statut.* sec. 4, ch. 2, n. 6, p. 1715; *Rutherf. Inst.*, B. 2, ch. 9, § 1; *Marten's Law of Nations*, B. 3, ch. 22-25; *Merlin, Répertoire, Somme* sec. 5, nos. 5, 6, pp. 379-382.

Wharton criticises this doctrine, saying, "Plausible as is this theory of exclusive jurisdiction of courts of *delicti*, it is incompatible, it may at first be noticed, with the maintenance of that territorial supremacy which nations profess to protect. An Austrian, if pushed to its logical results, crossing over to Switzerland, for impunity Austrian papers, or organizing conspiracies against the Austrian crown, then, when the evil was done, could securely to his home, protected by territoriality, that the offence could only be punished in the place of its commission. The boundary lines between the United States, Canada, and the United States and those which separate the great European powers, would, in this view, be a cascade against which subjects could organize triumphant crime. Not only would particular sovereigns find their municipal laws in this way successfully but neighboring nations would be to cherish, within their borders, cold desperate criminals whom the sovereignty of the *locus delicti* could not reach, but after the commission of the crime leave the soil, and whom the sovereignty of their place of refuge could not touch, cause the sovereign of the *locus delicti* to lose its exclusive jurisdiction. Nor is it



*a. Attainder and Infamy.* — The disabilities which attach to a sentence of attainder in one country do not follow the individual into another State.<sup>1</sup> And it has been held that a person convicted of an infamous crime in one State is not thereby rendered incompetent as a witness in another State.<sup>2</sup>

A law of one State, imposing a liability in the nature of a penalty, will not be enforced in the courts of another.<sup>3</sup>

**2. WHEN CRIMES COMMITTED IN ONE COUNTRY WILL BE PUNISHED IN ANOTHER.** — Notwithstanding the fact that penal laws are local, yet an offence may be committed in one sovereignty or State in violation of the laws of another. In such case, if the offender is afterwards found in the State against whose laws the offence was committed, he may be there punished according to the laws which he has violated.<sup>4</sup>

might be punished, on the fiction that a ship is a part of the territory to which it belongs; but pirates, who own no country, could rove the seas with impunity, and blockade, in secure arrogance, every port in Christendom. In barbarous or semi-barbarous lands, also, in which there is no operative organization for the punishment of crime, no mercantile enterprise could be pursued; for each adventurer might prey upon his associates, even to the extent of murder or robbery, and return home prosperously to defy the law whose forms were so rigid that it could only punish offences committed on the home soil. So far, therefore, as concerns infra-territorial practice, the rule that the *locus delicti* has exclusive jurisdiction of the offence, is, no doubt, wise. But it is obvious that, as a principle of international law, it cannot be maintained without impairing that very territorial sovereignty which it is its vowed object to secure.<sup>5</sup>

<sup>1</sup> Story, *Conf. L.* sec. 620.

Continental jurists maintain a contrary doctrine, contending that the *status* of a person in his domicile follows him wherever he goes. See 1 Boullenois, obs. 4, pp. 64, 65; Hentii Opera, de Collis. Leg. sec. 4, n. 8, p. 124.

<sup>2</sup> *Commonwealth v. Green*, 17 Mass. 515, 540, 541, 546, 547. Compare *State v. Candler*, 3 Hawks. (N. C.) 393; *Chase v. Blodgett*, 10 N. H. 22.

<sup>3</sup> *Winter v. Baker*, 50 Barb. (N. Y.) 432; 34 How. (N. Y.) Pr. 183; *Paterson v. Baker*, 34 How. (N. Y.) Pr. 180; *Scott v. Roberts*, 34 How. (N. Y.) Pr. 185.

Thus where the law of one State imposes a personal liability upon the stockholders of a corporation, by way of penalty, for the omission of duty enjoined by their charter, it cannot be enforced in the courts of another State. *Bird v. Hayden*, 1 Robt. (N. Y.) 383; s. c., 2 Abb. (N. Y.) Pr. (N. S.)

The liability of a stockholder resident in Tennessee for the debts of a foreign corporation, based upon the failure of the directors to make a certificate of the fact of payment of the capital stock, being highly penal in its nature, will not be enforced by the courts of Tennessee. *Woods v. Wicks*, 7 Lea (Tenn.), 40.

And it has been held that an Indiana statute giving a right to recover a penalty to one injured by an incorrect transmission of a telegraph message, has no application to a contract made in another State to send a message from that State into Indiana. *Carnahan v. Western Union Tel. Co.*, 89 Ind., 526; s. c., 46 Am. Rep. 175.

<sup>4</sup> See *Adams v. People*, 1 N. Y. 173; s. c., 3 Denio (N. Y.), 190; *State v. Wyckoff*, 2 Vr. (N. J.) 65; *Commonwealth v. Gillespie*, 7 Serg. & R. (Pa.) 469; *Reg. v. Garrett*, 6 Cox, C. C. 260.

**Accessories.** — By the common law, all accessories in treason and misdemeanors are principals, and, under the old rule, were to be tried where the guilty act took place; but by statute in most of the States he may now be tried by the court having jurisdiction of the principal felon. See *Rex v. Ferguson*, 2 Stark, N. P. C. 489; *Whart., Cr. L.* secs. 95, 97, 100, 103, 104, 210.

It has been held that where a person in one State employs an innocent agent in another State to commit a felony, he will be amenable to the laws of the latter. *People v. Adams*, 3 Denio (N. Y.), 190; affirming 1 N. Y. 173; *Reg. v. Garrett*, 6 Cox, C. C. 260; but that when the agent is personally responsible for the crime, the principal, who planned it, being absent from the State at the time of its commission, cannot be there tried for the same. *State v. Wyckoff*, 2 Vr. (N. J.) 69; *State v. Moore*, 6 Foster (N. H.), 448; *State v. Knight*, 1 Taylor (N. C.), 65; *Ex parte Smith*, 6 L. R. 57; *State v. Chapin*, 17 Ark. 561.

**Co-conspirators.** — In conspiracies each



*a. Continuing Offences.*—In England that, wherever a felony or misdemeanor and completed in another, the venue may and that offences committed when travel through a county through which the passenger, car and larceny or embezzlement may there into which the spoils are brought.<sup>1</sup>

It has been said, that by the common United States, where goods are stolen by the thief into another, the latter county of the offence;<sup>2</sup> but that the States may extend jurisdiction to the county into which the goods are brought.<sup>3</sup>

The question as to the jurisdiction where a crime is begun in one country and terminated in another, or where the offender is struck in one country and the victim in another, is much discussed in England and America, and the result is fluctuating and unsatisfactory.<sup>4</sup> The United States have held that such jurisdiction is conferred by special statute.<sup>5</sup>

The general principle that a person who commits a crime in one country is liable for its consequences in another has been frequently affirmed.<sup>6</sup>

conspirator is responsible for the crime to the jurisdiction in which an overt act is done by any of the co-conspirators. See *Commonwealth v. Corlies*, 3 Brewst. (Pa.) 575; *Rex v. Ferguson*, 2 Stark. N. P. C. 489; Whart., Conf. L. secs. 277-284, 2350.

*Attempts to commit a Crime.*—At common law, attempts to commit a crime are cognizable at the place of the crime; and such is to-day the law in cases of conspiracies where the conspiracy is the gist of the offence; but the parties are also all responsible at the place where the offence is committed. See *People v. Griffin*, 2 Barb. (N. Y.) 427; *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304; *People v. Rathbun*, 21 Wend. (N. Y.) 533; *United States v. Worral*, 2 Dall. (U. S.) 388; *Rex v. Girdwood*, 1 Leach, 142; *Rex v. Burdett*, 4 B & A. 95.

<sup>1</sup> See 7 Geo. iv. c. 64, secs. 12, 13; 1 Vict. c. 36, sec. 37.

<sup>2</sup> *Commonwealth v. Uprichard*, 3 Gray (Mass.), 434; *Butler's Case*, 13 Co. 53; 3 Inst. 113.

<sup>3</sup> See *People v. Burke*, 11 Wend. (N. Y.) 129; *Hemmaker v. State*, 12 Mo. 453; *State v. Seay*, 3 Stew. (N. J.) 123.

As between the different States of the Union, this jurisdiction is held to exist at common law by some of the courts. *State v. Ellis*, 3 Conn. 186; *Ferrill v. Commonwealth*, 1 Duv. (Ky.) 153; *Commonwealth v. Holder*, 9 Gray (Mass.), 7; *Cummings v. State*, 1 Har. & J. (Md.) 340; *State v. Brown*, 1 Hayw. (N. C.) 100; *Common-*

*wealth v. State*, 36 Ohio, 435 doctrine.

<sup>5</sup> Binn. (1 Vr. (N. J.) 5 (N. J.) 5 jurisdiction *Simmons* 619; *Simmons* 461; *Beal* 461.

It has been held that a person who steals in one State and carries the goods into another, is liable in the latter for the crime. *United States v. Bartlett*, 19 Me. 181; *Richard*, 3

<sup>4</sup> See C 426, 500;

<sup>5</sup> *United States v. Armistead*, 12

jurisdiction See *United*

A statute in a case has been held. See *Tyler v. Commonwealth*, 12

*ple v. Bur* *v. Seay*, 3 *State*, 12 <sup>6</sup> Thus side of th

3. JURISDICTION TO TRY OFFENCES. — It has been maintained that the jurisdiction to try a person for a crime belongs to the country where he is arrested. Where the crime is committed in the country where the arrest is made, there can then be no question as to the unqualified jurisdiction of the court; but in all other instances to the general proposition must be added the following qualifications: (1) The defendant must owe allegiance to the sovereign of the country where the arrest was made, and the offence be against its laws; (2) Such jurisdiction must be necessary for the prevention of crime, or (3) is necessary to protect or indemnify parties injured; (4) as to offences committed in foreign civilized lands, the country of arrest has jurisdiction only of offences distinctively against its sovereignty.<sup>1</sup>

7. Pleadings and Proofs. — 1. FOREIGN LAWS, ETC., MUST BE PLEADED. — Foreign laws must be averred and proved as facts.<sup>2</sup>

and killing a person on the American side, — "he amenable to the laws of the place: the man died. *United States v. Sumn.* C. C. 485; *State v. Wyck*, 1 N. J. 68; *Commonwealth v. Mon*, 101 Mass. 1; *Story*, Conf. L. sec. Whart., Conf. L. sec. 877; 1 Hale 475; but not until he is personally in the jurisdiction of such country. *v. Garrett*, 6 Cox, C. C. 260. 1 where one man struck another a blow in Canada, and the latter died in prison, he was held to be answerable in Michigan. *Tyler v. People*, 8 Mich. 326. 2 a person pollutes a stream in one way, and thereby creates a nuisance in another, he will be liable under the laws of the latter. *Stillman v. White Rock Co.*, 104 N. H. 538; *Thompson v. Tr.*, 9 Pick. (Mass.) 59; *Rex v. Bulwer*, 1 B. & A. 175, 176; *Bulwer's Case*, 7 B. & C. 36; *Com. Dig.*, tit. "Action," n. 3, Hawk. ch. 25, par. 27. And it has been held that the author of a libel uttered in one country, and published in another, even though he be absent from it at the time, is triable in the country where it is published. *Commonwealth v. Rogers*, 3 Pick. (Mass.) 304; *Rex v. East*, 65.

<sup>1</sup> See Whart., Conf. L., secs. 881-902. <sup>2</sup> *Armendiaz v. Serna*, 40 Tex. 291; *Atterson v. Carrell*, 60 Ind. 128; *Graves v. Champion*, 103 N. H. 33; *Trasher v. De Laistre*, 2 Conn. 517; *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 193, 219. But where the proof consists of the parol evidence of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury is to determine what the foreign law is. *Ingraham v. Hart*, 11 Ohio, 255; *Moore v. Gwynn*, 5 Ired. (N. C.) L. 187; *Dyer v. Smith*, 12 Conn. 384; *Holman v. King*, 7 Metc. (Mass.) 384; *Kline v. Baker*, 99 Mass. 255. Questions of the competency of the evidence and of the qualifications of the expert must be passed upon by the court as in any other case. Where the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of construction and effect is for the court. *Kline v. Baker*, 99 Mass. 255; *Owen v. Boyle*, 15 Me. 147; *People v. Lambert*, 5 Mich. 349; *State v. Jackson*, 2 B. Mon.

(Ky.) 306; *Territt v. Woodruff*, 19 Vt. 182; *Hosford v. Nichols*, 1 Paige Ch. (N. Y.) 220; *Douglas v. Brown*, 2 Dow. & C. 171; *Male v. Roberts*, 3 Esp. 163; *Mostyn v. Fabrigas*, Cowp. 175.

It is said that foreign laws are to be proved as facts to the court, and not as facts to the jury, because all matters of law are properly referable to the court, and the object of the proof of what the foreign laws are being to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy. The trial court are to decide what is proper evidence of the laws of a foreign country; and when they are properly proven, the court is to judge of their applicability to the case on trial. *Leavenworth v. Brockway*, 2 Hill (N. Y.), 201; *Robinson v. Dauchy*, 3 Barb. (N. Y.) 20; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234, 242; *Brackett v. Norton*, 4 Conn. 517; *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 193, 219. But where the proof consists of the parol evidence of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury is to determine what the foreign law is. *Ingraham v. Hart*, 11 Ohio, 255; *Moore v. Gwynn*, 5 Ired. (N. C.) L. 187; *Dyer v. Smith*, 12 Conn. 384; *Holman v. King*, 7 Metc. (Mass.) 384; *Kline v. Baker*, 99 Mass. 255. Questions of the competency of the evidence and of the qualifications of the expert must be passed upon by the court as in any other case. Where the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of construction and effect is for the court. *Kline v. Baker*, 99 Mass. 255; *Owen v. Boyle*, 15 Me. 147; *People v. Lambert*, 5 Mich. 349; *State v. Jackson*, 2 B. Mon.

2. PROOF GOVERNED BY LEX FORI. — The admissibility of evidence and its method of introduction are governed by the *lex fori*, and not by the *lex loci* or *lex loci domicilii*.<sup>1</sup>

2 Cr. (U. S.) 187; *Bremer v. Freeman*, 10 Moore, P. C. 306; *Di Sora v. Phillips*, 10 H. L. Cas. 624. Mr. Bennett, in his edition of Story's "Conflict of Laws" (section 638a), criticises this doctrine. He says that the general proposition that "proof, of general laws in a foreign country, is addressed exclusively to the court, will not be found to be confirmed by the general practice in those countries where jury trials prevail. There is no doubt the courts are to judge of what the law is, its force, construction, and application to the facts. But where there is any controversy in regard to the existence of any particular rule of law, as there more commonly is when it is referred to the testimony of experts, the ultimate fact must be referred to the jury, and any instructions necessary to be given by the court must be given hypothetically."

It devolves upon the party interested to claim the benefit of the foreign laws, to show, by appropriate pleading and proof, what is the law of the place where the contract was made, or was to be performed. In the absence of such affirmative showing, the courts of the State where the suit is brought will apply the law of such State to the contract. *Bean v. Briggs*, 4 Iowa, 464; *Whidden v. Seelye*, 40 Me. 247; *Dakin v. Pomeroy*, 9 Gill (Md.) 1; *Fonke v. Fleming*, 13 Md. 392; *Allen v. Watson*, 2 Hill (S. C.) 319; *Crosby v. Huston*, 1 Tex. 203. This is because it will be presumed, until the contrary is shown, that the foreign law is the same as that where the suit is brought. *Russell v. Kitchen*, 3 Irish C. L. Rep. 613. And where a contract would be a legal one if made under the *lex fori*, it will be taken to have been so where it was made, unless the party impeaching its validity shows that, by the *lex loci*, it was illegal and void. *Ellis v. Park*, 8 Tex. 205.

This presumption as to the laws of another State or country applies to contracts relating to personal estates and as to commercial matters particularly, but does not extend to statute law. *Langdon v. Young*, 33 Vt. 136; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521; *Ellis v. Maxson*, 19 Mich. 186; *Wright v. Delafield*, 23 Barb. (N. Y.) 498; *Chase v. Alliance Ins. Co.*, 9 Allen (Mass.), 311.

Where a defendant relies on a foreign discharge in bankruptcy, or on his having entitled himself to a certificate in bankruptcy, as a bar by which the cause of action is abated, he must set forth, not only

the statute, but the proceedings and the prior proceedings in the granting of it. *James v. Robt.* (N. Y.) Pr. N. S.

A declaration of what is the rate of interest was given. *Sur Marsh. (Ky.)* 174. of interest allowed of the United States must be produced. *Wash. C. C.* 253.

It is said that, a New York statute for death caused by territorial effect, on account of a State, the existence that State must. *Debevoise v. New R. R. Co.*, 98 N. Y. 683.

The New York to be brought in the interest does not; a New Jersey corporation in the New York court in the although he might. *Merchants' Loan Hun (N. Y.)*, 362.

1 See *Don v. Finn*, 1, 14-16; *Y. & Finn*, 577, 580; *F. J. R. Co.*, 3 H.

The reason is the evidence and the matters attaching of parties under other instruments of procedure, and governed by the law of the country where. *Lord Brougham Clark & Finn*, 570.

However, this is difficulties; and down any general to all cases of evidence points there is a instance, on the chant's book-accounts favor. See *Cogan* 217; *Starkis, Ev.* 1 kins, tom. 7, *Diss. tii Opera, de Collis*

OF.—In the proof of foreign laws and deeds, and other instruments, the general best testimony or proof shall be produced: a thing admits of.<sup>1</sup>

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bility of evidence, and that clearly brings us home to the *statute* of limitations. . . . It is not contended here that the practice of England is applicable to Scotland, but these are illustrations of the inconvenience of applying one set of rules of law, to an instrument which is to be enforced by a law of a different kind." And see also Lord Brougham's opinion in *Yates v. Thomson*, 3 Clark & Finn. 577, 580.

1 The manner of proving foreign laws, etc., varies according to circumstances; but in no case will such a species of testimony be required, as the institutions and usages of the foreign country do not admit of; and in no case will testimony be required which is shown to be unattainable. See *Isabella v. Pecot*, 2 La. An. 391; *Church v. Hubbard*, 2 Cr. (U. S.) 237.

As a general rule, authenticated copies of the written laws, or other public instruments of foreign countries, are expected to be produced, and are sufficient. But if on application a foreign country, for any reason, should refuse to authenticate its edicts, and the like, then inferior proofs would be admissible. *Church v. Hubbard*, 2 Cr. (U. S.) 237, 238. But it has been said that where a country has promulgated a foreign law or ordinance of a public nature, such promulgation is of itself sufficient evidence of the actual existence and provisions of such law or ordinance. *Talbot v. Seeman*, 1 Cr. (U. S.) 39.

Foreign laws are usually required to be verified by the sanction of an oath, unless verified in some equally satisfactory manner. *Brackett v. Norton*, 4 Conn. 517; *Hempstead v. Reed*, 6 Conn. 480; *Dyer v. Smith*, 12 Conn. 384; *Church v. Hubbard*, 2 Cr. (U. S.) 237. The most usual methods of verifying a foreign law or judgment, or instrument of record, is by an exemplification of a copy with the great seal of the State attached; by a copy proved to be a true copy by some one who has examined and compared it with the original; or by the certificate of an officer of the foreign State duly authorized by law to give the certificate, which certificate must itself be duly authenticated. See *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Church v. Hubbard*, 2 Cr. (U. S.) 238. The certificate of a deputy county recorder to the official character of an acting justice of the peace taking a deposition, must be tested by the laws of the State or Territory where taken. *Fredericks v. Davis*, 3 Montana, 251. The

legislatures of many of the States of the Union have provided by special enactments that printed copies of the laws of other States purporting to be published by authority, shall be *prima facie* evidence of such laws. See *Ennis v. Smith*, 14 How. (U. S.) 400; *Compere v. Jernegan*, 5 Blackf. (Ind.) 375. In some of the States they are admitted without the authority of a special statute. *Lord v. Staples*, 3 Foster (N. H.), 449; *Emery v. Berry*, 8 Foster (N. H.), 486; *Barkman v. Hopkins*, 6 English, 157. Other States hold that the printed statutes are not admissible, but that the only evidence of a foreign law which can be admitted, is an exemplified copy properly certified. *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *Brackett v. Norton*, 4 Conn. 517; *Hempstead v. Reed*, 6 Conn. 480; *Bailey v. McDowell*, 2 Harring (Del.) 34; *Van Buskirk v. Muloch*, 3 Harrison (N. J.), 184; *State v. Twitty*, 2 Hawks (N. C.), 441; *Church v. Hubbard*, 2 Cr. (U. S.) 236.

The public seal of a foreign sovereign, when affixed to a writing purporting to be a written law or judgment, proves itself. *Griswold v. Pitcairn*, 2 Conn. 85; *United States v. Johns*, 4 Dall. (U. S.) 416; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475;

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**CONFLICT OF LAWS.** Of Law Local Contractors.

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Golden, 141  
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Johns. (N. Y.) 189; Scoville v. Canfield, 14 Johns. (N. Y.) 338; Northup v. Foot, 14 Wend. (N. Y.) 248; Crosby v. Berger, 3 Edw. Ch. (N. Y.) 538; Hyde v. Goodnow, 3 N. Y. (3 Const.) 266; Touro v. Cassin, 1 Nott. & M. (S. C.) 173; Shelton v. Marshall, 16 Tex. 344; Bainbridge v. Wilcocks, Bald. C. C. 536; Camfranque v. Burnell, 1 Wash. C. C. 340; Courtois v. Carpenter, 1 Wash. C. C. 376; Webster v. Massey, 2 Wash. C. C. 157; Golden v. Prince, 3 Wash. C. C. 313; Morgan v. New Orleans, Mobile & S. R. R. Co., 2 Wood C. C. 244; Nicolls v. Rogers, 2 Paine C. C. 437.

Thus, by the law of New Jersey, upon a conditional sale of chattels followed by delivery of possession to the vendee, the reservation of title in the vendor, until the contract price is paid, is valid, as against creditors of a *bona fide* purchaser from the vendee, unless the vendor has conferred upon the vendee *inducia* of title beyond the mere possession, or has forfeited his rights of conduct, which the law regards as fraudulent; but by the law of Pennsylvania the reservation of title in the vendor upon such a conditional sale, is valid as between the parties, but is invalid as against creditors of the vendee, or *bona fide* purchasers from him. Hence, where S. purchased from the M. S. Co. a safe on credit, under a contract that the safe was to be the property of the company until the contract-price was paid, the purchase being made at the company's office in Philadelphia, and the safe delivered there to a carrier to be transferred to a town in New Jersey where S. resided, and subsequently S. sold the safe to N., and delivered possession to him in the town where he resided, N. being a *bona fide* purchaser, and paying the purchase-money without a knowledge of the contract between S. and the M. S. Co., in trover by the M. S. Co. against N. to recover the safe, the court held (1) that the contract of purchase by N. having been made in New Jersey, the legal effect of such contract, and his rights under it, were determined by the laws of that State; and (2) that N., by his purchase, acquired only such title as his vendor had when the property was taken into New Jersey, and became subject to the laws of that State, and that therefore the title to the safe was in the company. *Marvin Safe Co. v. Norton*, 48 N. J. L. 410; 2 C., 7 Alt. Rep. 418; 5 Cent. Rep. 341; 24 Cent. L. J. 161.

The general rule, that the validity and effect of a contract are to be determined by the law of the place where it is made, is subject to some exceptions; to wit, (1).

face that it was to be performed, or was made, in reference to the laws of some other place, in which case it will be governed by the laws of the place of the performance.<sup>1</sup>

The nature, validity, and interpretation of contracts are to be governed by the *lex loci contractus*;<sup>2</sup> but remedies, by the

No nation is bound to recognize or enforce contracts injurious to its own citizens. (2) The enforcement by one nation of contracts made under the laws of another, rests on the principles of comity, which cannot be so far extended as to violate the positive legislation of the nation called on to enforce such contracts. (3) When a contract which violates the revenue laws of the country where it was made comes before the courts of another country, those courts will not take notice of the foreign revenue laws. *Ivey v. Lalland*, 42 Miss. 444.

The general rule of the *jus gentium* is that in regard to questions of minority or majority, competency or incompetency, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the place where the contract is made, or the act done, furnishes the rule of decision. *Huey's Appeal*, 1 Grand (Pa.), Cas. 51. Thus the law of Ohio, making females of full age when they arrive at the age of eighteen years, enables them, while domiciled in Ohio, to make a valid contract of sale of their personal property in Pennsylvania. *Huey's Appeal*, 1 Grant (Pa.), Cas. 51.

The fact that a foreign contract, valid where it was made, is not recorded in pursuance of the law of the place where it is enforced, affects the operation only, and not the validity. *Le Prince v. Guillemot*, 1 Rich (S. C.), Eq. 187.

The sufficiency of the consideration of a contract is not a matter of remedy or procedure governed by the law of the forum, but belongs to the substance of the contract, and must be determined by the law of the place of the contract. *Pritchard v. Norton*, 106 U. S. 124; s. c., 1 Sup. Ct. Rep. 102.

It has been held that where a note of a married woman, executed by her for necessities, without a place of payment being named in the note, in a State in which such contract is obligatory, will be enforced in the State in which such contracts, if made there, would not be obligatory. *Griswold v. Golding* (Ky.), 3 S. W. Rep. 535; s. c., 24 Cent. L. J. 419.

The validity of a contract under the statute of frauds is to be decided by the proved law of the place of the contract. *Forward v. Harris*, 30 Barb. (N. Y.) 338. And it is said that, whether a purchase of goods be fraudulent as against the vendor, depends on the *lex loci contractus*. *Arnold v. Shade*, 3 Phila. (Pa.) 82.

The rule of damages to be recovered on a breach of contract is a part of the law to which the injured party is entitled. It is to be governed by the *lex loci contractus*. *Consequa v. Willings*, Pet. C. C. 22; *fray v. Dennis*, 2 Wash. C. C. 253. The effect of a release to one of two debtors is governed by the *lex loci contractus*. *Greenwald v. Kaster* (Pa.), 3 Weekly Rep. of Cases, 327.

The New York law relieving a tenant who has had to abandon untenable premises, for liability to pay rent, does not apply in an action there for rent of premises situated in another State. The common law is presumed to prevail there. The statute is no defence unless duly pleaded. *Graves v. Cameron*, 9 Daly (N. Y.) 178.

The adjustment of a general average is governed only by the *lex loci contractus*. *Lenox v. United Insurance Co.*, 3 Cas. (N. Y.) 178.

Where a contract was made in England, the currency of which is the representative of gold, a judgment upon it must be given in terms of the value of the gold in legal-tender. *Benners v. Clemens*, 58 Pa. St. 24. It has been held that a foreigner contracting with the government of Virginia, during the paper-money period, is bound by the statute of that State establishing the value of the currency. *Commonwealth v. Merchants*, 3 Call (Va.), 122.

For peculiar and unusual cases in which the application of the law of the place of the contract has been a question, see *Russell v. Wiggim*, 2 Story, C. C. 5; *L. Rep.* 533; *York v. Wist*, 16 Haz. Pa. Reg. 153; *Pritchard v. Norton*, 106 U. S. 124; s. c., 1 Sup. Ct. Rep. 102.

1 *Pittsburg & St. L. R. R. Co. v. Child* (Pa.), 4 Cent. Rep. 109; *Remer*, 8 Am. L. Reg. 654; *Shepherd v. Hopkins*, 1 Cow. (N. Y.) 103; *Lee v. Leck*, 32 Barb. (N. Y.) 522; s. c., 2 (N. Y.) Pr. 275; *Cox v. United States*, Pet. (U. S.) 172; *Bank of the United States v. Donnally*, 8 Pet. (U. S.) 32; *Andrews v. Pond*, 11 (U. S.) 65; *Armstrong v. Toler*, 11 (U. S.) 258; *Pope v. Nickerson*, 3 C. C. 465; *Willings v. Consequa*, C. C. 301.

2 *Scudder v. Union Nat. Bank*, 9 C. C. 406. Compare *Payson v. Withers*, C. C. 269.

*lex fori*.<sup>1</sup> The rights of the parties are governed by the *lex loci*.<sup>2</sup>

A contract by a resident of one State, made and to be performed in another, is governed by the *lex loci contractus* as regards its validity and construction, and not by the *lex fori* where remedy is sought for a breach.<sup>3</sup> And where a contract is to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed.<sup>4</sup>

In two cases only can foreign laws affect the contracts of American citizens: (1) when they reside or trade in a foreign country, and (2) when the contract plainly referring to a foreign country for its execution adopts and recognizes the *lex loci*.<sup>5</sup>

<sup>1</sup> Bank of the United States v. Donnelly, 8 Pet. (U. S.) 362; Wilcox v. Hunt, 13 Pet. (U. S.) 378; Van Reimsdyk v. Kane, 1 Gall. C. C. 371; Hinkley v. Marean, 3 Mason, C. C. 88; Willard v. Dorr, 3 Mason, C. C. 91; Pope v. Nickerson, 3 Story, C. C. 474; Rodgers v. Nicolls, 2 Paine, C. C. 437; Smith v. Atwood, 3 McL. C. C. 545; Matheson v. Crawford, 4 McL. C. C. 540; Broadhead v. Noyes, 9 Mo. 56; Dorsey v. Hardesty, 9 Mo. 157; Scoville v. Canfield, 14 Johns. (N. Y.) 338.

It is only in ascertaining the rights and liabilities of the parties that the law of the place where the contract is made governs: the remedy is governed by the law of the forum. If the liability of the party, ascertained by the law of the State where it was made, is equitable, it can be enforced, in a State where legal and equitable remedies are distinct, only in equity, notwithstanding it might, in the State where made, have been enforced at law. Burchard v. Dunbar, 82 Ill. 450.

<sup>2</sup> Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83.

<sup>3</sup> Williams v. Carr, 80 N. C. 204.

Thus, an agreement made in Alabama to deliver lumber in Georgia, for the building of a house there, is governed by the Georgia mechanics' lien laws, and the fact that the contractor is a citizen of Alabama does not prevent him from invoking those laws. Thurman v. Kyle, 71 Ga. 628. And in an action against an attaching officer or creditor for the conversion of personal property attached as that of the seller under a contract of sale which, although written in one State, was executed, delivered, and recorded in another State, where the property was at the time, the rights of the seller are to be settled by the law of such other State. Ames v. McCamper, 124 Mass. 85.

A contract made in one State to collect demand on shares, which is to be carried into effect in another State, will not be en-

forced in the latter State, though valid if made there, where it is illegal in the State in which entered into. Blackwell v. Webster (U. S., D. C.), 29 Fed. Rep. 614; s. c., 24 Cent. L. J. 397.

Whether a time-note given in New Hampshire by a New Hampshire debtor to a Massachusetts creditor has the effect of payment *pro tanto*, is determinable by the law of New Hampshire. Gilman v. Stevens, 63 N. H. 342.

On a bill of lading issued in New York for goods to be delivered in Pennsylvania the New York law governs. Brooke v. New York, L. E., etc., R. Co. (Pa.), 1 Cent. Rep. 123. And the effect of the indorsement and delivery of a private warehouse receipt for goods stored in another State, is to be determined by the laws of the latter State. Hallgarten v. Oldham, 135 Mass. 1, 7; s. c., 46 Am. Rep. 433.

In Louisiana, it is held, that where a contract is entered into in one place, to be executed in another, there are two *loci contractus*,—the *locus celebrati contractus* and the *locus solutionis*; and the laws of the former govern the interpretation, nature, and validity of the contract; those of the latter, its performance. Fontenot v. Soileau, 2 La. An. 774.

<sup>4</sup> Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118.

But it has been held that where a contract is made by a common carrier in one State to transport goods from that State into another, and the goods are lost, the rights of the parties are governed by the law of the State in which the loss happens. Gray v. Jackson, 51 N. H. 9.

<sup>5</sup> Searight v. Calbraith, 4 Dall. (U. S.) 325.

A contract made in one State is not affected by a discharge of the debtor under the insolvent laws of another State, in which the debtor resides. That the law was in force when the contract was made, does not affect the question. Cook v.



The laws which subsist at the time and place of the making of a contract, if it is to be there performed, enter into and form a part of the contract; and this is so whether such laws affect the validity, construction, discharge, or enforcement,<sup>1</sup> provided they can be shown; but if those laws are not in evidence, the courts must apply the rule of the law of the jurisdiction.<sup>2</sup>

The law of the country, where a contract is made, is the law of the contract, no matter where performance is demanded; and if the contract be discharged by the *lex loci contractus*, such discharge will be regarded wherever performance is demanded.

*a. What deemed the Place of Contract.*—The question, what law governs a contract, depends, theoretically at least, upon the intention of the contracting parties. An agreement to perform an act at a particular place is made with reference to that place, and an agreement to perform an act without designating a place for performance is presumed to be made with reference to the law of the place at which the agreement was made; and such presumptions are conclusive.<sup>3</sup> If not made with reference to the law of the place where it is made, or of the place where it is to be performed, being forbidden by both, the law of the place where it is made governs as to its invalidity.<sup>4</sup>

Moffat, 5 How. (U. S.) 295. *Vide, infra*, 11, "EFFECT OF FOREIGN DISCHARGES IN BANKRUPTCY."

<sup>1</sup> *Roberts v. Cocke*, 28 Gratt. (Va.) 207; *Walker v. Whitehead*, 16 Wall. (U. S.) 314.

<sup>2</sup> *The Scotland*, 105 U. S. 24; *Champion v. Wilson*, 64 Ga. 184.

Thus, a contract made in New York, and to be there performed, is to be enforced according to the law of New York; but the law of that State must be put in evidence. *Champion v. Wilson*, 64 Ga. 184.

<sup>3</sup> *Green v. Sarmiento*, Pet. C. C. 74; *Willings v. Consequa*, Pet. C. C. 301; *Le Roy v. Crowninshield*, 2 Mason, C. C. 151; *Poe v. Duck*, 5 Md. 1; *Roach v. St. Louis Type Foundry (Mo.)*, 3 West. Rep. 186.

<sup>4</sup> *Green v. Sarmiento*, Pet. C. C. 74; a. c., 3 Wash. C. C. 17; *Webster v. Massey*, 2 Wash. C. C. 157; *Golden v. Prince*, 3 Wash. C. C. 313; *Van Reimsdyk v. Kane*, 1 Gall. C. C. 371; *Willings v. Consequa*, Pet. C. C. 301; *Le Roy v. Crowninshield*, 2 Mason, C. C. 151; *Poe v. Duck*, 5 Md. 1.

It has been said that the general doctrine, that a defence or discharge, good by the law of the place of the contract, is good everywhere, is subject to several qualifications, one of which is that the discharge or defence must not be of such character that to recognize it would conflict with the duty of the State where it is sought to be enforced towards its own citizens, to recognize it. The laws of sovereignty have no extra-territorial vigor, and are enforced else-

where only upon considerations of public policy, and these always yield to those of the place of performance, which demand of every State the protection of its own citizens against the unwarrantable acts of a foreign State. *Gebbard v. Canada S. Ry. Co.*, 11 C. C. 416; a. c., 1 Fed. Rep. 387; *L. J.* 352; 9 Rep. 203. *Compare* *U. S.* 527.

<sup>5</sup> *Hyatt v. Bank of Kentucky* (Ky.) 193; *De Sobry v. De Laist* & J. (Md.) 191.

Where a party's residence is in one State, and his place of business in another, the presumption is that his contracts are made at his place of business, rather than at his place of residence. *Varick v. Cr. Ch. (N. J.)* 128. But the fact that a higher rate of interest is allowed by the law of the place of the making of the contract, specified therein, is evidence of an intention of the parties to contract with reference to the law of the place of making. *New England Mortgage Security Co. v. Vander*, 28 Fed. Rep. 265.

<sup>6</sup> *Andrews v. Pond*, 13 Pet. (U. S.) 100. Thus, where a contract has been made without reference to the laws of the place where it was made, or to the law of the place of performance, and a rate of interest is reserved, forbidden by the laws of the place where the contract was made, it is concealed under the name of exchange, in order to avoid the law against it. The question is not which law is to be applied in executing the contract, but which

Where a contract is delivered,<sup>1</sup> or first becomes a binding obligation upon the parties, is deemed the place of contract for the purpose of distinguishing what law governs.<sup>2</sup>

Where negotiations for a contract are carried on between two parties living in different States, partly by mail and partly through an agent of one of them, the contract is made in that State in which it first took effect as a binding obligation.<sup>3</sup>

side the fate of the security on an agreement which neither will execute. Unquestionably it must be the law of the State where the agreement was entered into, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with *bona fide* agreements, which are permitted by the *lex loci contractus*, and will even be enforced there if the party is found within its jurisdiction; but the same rule cannot be applied to contracts forbidden by its laws, and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere. *De Wolf v. Johnson*, 10 Wheat. (U. S.) 383; *Dewar v. Span*, 3 Durnf. & E. 425.

The mere fact that a contract is invalid where made, but valid elsewhere, does not of itself authorize the presumption that its performance is to be abroad, and that it is made with reference to the foreign law. *Evans v. Kittrell*, 33 Ala. 449; *Augusta Ins. Co. v. Morton*, 3 La. An. 417.

<sup>1</sup> *Butler v. Myer*, 17 Ind. 77.

<sup>2</sup> *Waldron v. Ritchings*, 3 Daly (N. Y.), 288; s. c., 9 Abb. (N. Y.) Pr. N. S. 359.

Thus, where the plaintiff, being in New York, agreed with defendant, the manager of an opera in Philadelphia, to go there and make her *début*, she to be assured, if she did not fail in the estimation of the public and the press, of an engagement upon terms specified in the negotiation between the parties, it was held that the contract was not made in New York, but in Philadelphia, upon her fulfilling the test of success. *Waldron v. Ritchings*, 3 Daly (N. Y.), 288; s. c., 9 Abb. (N. Y.) Pr. N. S. 359.

The contract of a travelling agent, which required ratification by his principal, is presumed to have been made at the place where the ratification was given. *Shuenfeldt v. Junkermann*, 20 Fed. Rep. 357.

Thus where B., a New York liquor-dealer, delivered on steamboat at New York, liquors for A. in Rhode Island, in accordance with an order given by A. in Rhode Island to B's agent there, which agent had no authority to make sales, but only to take orders, which B. filled or not as he saw fit, — the court held that the sale was

consummated in New York. *Mack v. Lee*, 13 R. I. 293. See *Backman v. Jenks*, 55 Barb. (N. Y.) 468; *Rindskopf v. De Ruyter*, 39 Mich. 1. And where an order for goods is taken by the agent of a New York house, from a buyer in Vermont, and forwarded to the New York house, and the goods were shipped to the buyer, who was to pay the carrier's charges, the contract is regarded as a New York contract, notwithstanding the seller has reserved the right to reject any order after its receipt. *Engs. v. Priest*, 65 Iowa, 232.

Where the residence of the payee of a note, dated in West Virginia, and made payable to a resident thereof, does not appear, the note will be treated as a West Virginia contract. *Heflebower v. Detrick*, 27 W. Va. 16. And the State in which a note was made payable, and where it was delivered in consummation of a bargain, is the place of contract, though it was executed in another State. *Johnston v. Gawtry*, 83 Mo. 339.

<sup>3</sup> *Waldron v. Ritchings*, 3 Daly (N. Y.), 288; s. c., 9 Abb. (N. Y.) Pr. N. S. 359.

A promissory note written in Maine, but signed in Massachusetts, by citizens there, and then returned by mail to the payee in Maine, is a note made in Maine, and to be construed by the laws thereof; so where one of the makers of such a note, thus written and signed, was a married woman who signed it as surety for her husband, and by the laws of Massachusetts she could not thus bind herself there, the note is to be construed by the laws of Maine, which authorize her to contract for any lawful purpose. *Bell v. Packard*, 69 Me. 105.

A contract to indemnify a party for advances made in another State, is an undertaking to replace the money at that place, and is governed by the law thereof. *Lanusse v. Barker*, 3 Wheat. (U. S.) 101; *Boyle v. Zacharie*, 6 Pet. (U. S.) 635; *York v. Wistar* (Pa.), 16 Haz. Pa. Reg. 153.

The right of a consignee who has made advances in excess of the amount realized by the subsequent sale to recover back the excess, is to be regarded as a contract of the place where the money was advanced. *Lanusse v. Barker*, 3 Wheat. (U. S.) 101; and if he is a citizen of that State, a discharge of the consignor, under the insolvent law of another State, will not operate

An instrument for the payment of money, executed in one State, but payable in another, is governed by the law of the place of payment.<sup>1</sup> And inasmuch as the contract of a drawee to pay the bill upon non-acceptance, not at the drawee's business, but where it was drawn, the drawer's liability is to be determined by the law of the place where the bill was

upon the debt. *Cook v. Moffat*, 5 How. (U. S.) 295. And where, by a contract in Mississippi between a party residing there, and the agent of a factor residing in Louisiana, the latter is bound to apply the proceeds of cotton delivered in Mississippi to be sold in Louisiana to certain claims of third persons, the rights of the parties are governed by the laws of Mississippi. *Oliver v. Lake*, 3 La. An. 78. The agents of a New York insurance company, at the request of its Canadian agent, insured a Canadian vessel, the premium note being made payable in Canada, and the policy delivered there: the contract was held to be a Canadian, not a New York, contract. *In re State of Pennsylvania Ins. Co.*, 22 Fed. Rep. 109.

Where the parties to a gambling transaction to purchase stocks, bonds, and grain in other States, both resided in one State, and deliveries were to be made in the State where they resided, the law of that State will govern, in an action by the broker, for money advanced. *Stewart v. Schall* (Md.), 3 Cent. Rep. 509.

An agreement by the consignor to indemnify his consignees residing in another State against liability by their having voluntarily become security to release his vessel from attachment, is to be regarded as a contract to be governed by the law of the latter place: whether their becoming security was authorized, or, being authorized, was subsequently ratified by him, the result in this respect would be the same. *Boyle v. Zacharie*, 6 Pet. (U. S.) 635; *Conseque v. Fanning*, 3 Johns. Ch. (N. Y.) 587; *Fanning v. Conseque*, 17 Johns. (N. Y.) 511; disapproving, *Martin v. Franklin*, 4 Johns. (N. Y.) 125; *Scofield v. Day*, 20 Johns. (N. Y.) 102; *Adams v. Cordis*, 8 Pick. (Mass.) 260; *Grant v. Healey*, 3 Sumn. C. C. 523, 2 L. Rep. 113. And where A., residing in Philadelphia, consigned goods to B., residing in New York, and drew on B., promising to pay him any balance not covered by the proceeds of the goods, and B. accepted and paid the bill, which exceeded the amount of sales, A. was held bound to reimburse B. in New York. *Woodhull v. Wagner*, Hald. C. C. 296.

In absence of contrary stipulation, a commission merchant's account for advances to a customer in another State on consignments to be made, is payable and

garnishable at the merchant's residence. *Bush v. Nance*, 61 Miss. 237.

1 *Warren v. Lynch*, 5 Johns. 239; *Curtis v. Leavitt*, 15 N. Y. 17 Barb. (N. Y.) 309; *Ralph v. W. & S. (Pa.)* 395; *Archer v. W. & S. (Pa.)* 327; *Wood v. Kelso*, 241; *Schell v. Stetson (Pa.)*, 34 114. See *infra* "CONTRACTS FORMED IN ANOTHER PLACE."

Thus, notes made and dated in one State, but delivered in New York for goods there purchased, are governed by the laws of New York. *Moffat*, 5 How. (U. S.) 295; *Clemson*, 6 McL. C. C. 622. A promissory note was made in Louisiana and indorsed by a party in Louisiana, for the accommodation of the maker, then returned to them so in Louisiana, where they subsequently indorsed it, the contract was held to be governed by the laws of that State. *Stetson v. Ramo*, 89 Ill. 221. It has been held by the Iowa supreme court, that a note dated and signed by one of its residents in another State, but delivered and indorsed by the other maker and the surety in this State, is governed by the laws of that State. *Wills*, 52 Iowa, 56. Where a note is indorsed in Indiana by indorsee against the maker of which was alleged to be a non-resident of Indiana, the only issue was the note, the indorsement was not in protest, and the court held that the indorsement must be presumed to be made at the time and place of making the note, and both note and indorsement were governed by the law of Ohio; that the common law must be presumed to be the law there, and the note, therefore, was governed by the law-merchant; that the 2 Indiana Revised Statutes, 77, that the law of Ohio should have been pleaded and proved; that the evidence did not show such diligence in proceedings against the maker as by 1 Indiana Revised Statutes, 636, § 4, is required to bind the indorser of a note not payable in Indiana; and, consequently, the evidence was insufficient to sustain the claim for the plaintiff. *Patterson v. C.* Ind. 128.

2 *Wood v. Gibbs*, 35 Miss. 500. Where a draft was drawn in

*b. Interest.*—Interest is payable according to the law of the country where the contract is made and to be performed,<sup>1</sup> although the rate at the place of payment is lower than that contracted for.<sup>2</sup> And the fact that there may be no statute prescribing a rate in the place where the transaction takes place, does not prevent the recovery of interest; and interest at a reasonable rate, and conforming to the custom which obtains in the community in dealings of the same character, will be allowed.<sup>3</sup>

But if the terms or nature of the contract, it is to be executed in another country, or it appears that the parties had reference to another country, then the rate of interest is to be governed by the laws of that other country.<sup>4</sup>

*Rate.*—Any rate of interest may be stipulated for that allowed by the place of performance,<sup>5</sup> although the rate allowed at the place of performance be greater than that allowed at the place of the contract; and the parties may stipulate for a higher interest without incurring the penalties of

bankers in New York or another New Orleans firm refused, it was held that no action arose in New York, though the plaintiff bank was in Louisiana, and subject to the law of that State. The fact that, prior to the time the drawer bank had been sued in the Louisiana court, been for the right of a creditor, or its commissioners in New York as to property, was no bar. *Hibernia Bank v. La. Nat. Bank*, 166 N. Y.

53 Barb. (N. Y.) 350; 18 N. Y. Pr. 181, 41 N. Y. Pr. 181; 3 Johns. Ch. (N. Y.) 511; *Fanning v. Fanning*, 3 Johns. Ch. (N. Y.) 511; *Hosford v. Fanning*, 3 Johns. Ch. (N. Y.) 220; *Stewart v. Stewart*, 3 Johns. Ch. (N. Y.) 604; *New York v. American Life Ins. Co.*, 3 Johns. Ch. (N. Y.) 215; s. c., 3 Johns. Ch. (N. Y.) 215; *Bank v. Amer. Life Ins. Co.*, 3 Johns. Ch. (N. Y.) 344; *Jacks v. Nichols*, 3 Johns. Ch. (N. Y.) 313; s. c., 5 N. Y. Pr. 124; *Cope v. Cope*, 37 N. Y. Pr. 37; s. c., 53 Barb. 350; 3 Wheat. (U. S.) 101; 33 N. J. L. (4 Vr.) 81. If a mortgage on lands is executed in one State, and there is no law in that State made payable, the mortgage is governed by the *lex loci*. *Ingersoll v. Keyes*, 1 Keyes Abb. (N. Y.) App. Dec.

acceptance drawn in Memphis on a New Orleans firm, to whom it is addressed at New Orleans, is to be

computed according to the law of Louisiana. *Frierson v. Galbraith*, 12 Lea (Tenn.), 120.

<sup>2</sup> *Second Nat. Bank v. Smoot*, 2 MacAr. (D. C.) 371.

And if the note be sued in the State where it was made, the stipulated rate of interest may be recovered. *Fisher v. Otis*, 3 Chand. (Wis.) 83.

<sup>3</sup> *Young v. Godbe*, 15 Wall. (U. S.) 562.

<sup>4</sup> *Fanning v. Consequa*, 17 Johns. (N. Y.) 511; reversing, *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587; *Berrien v. Wright*, 26 Barb. (N. Y.) 208.

Thus a promissory note, made in Lower Canada, payable in England, will bear interest according to the law of England. *Scofield v. Day*, 20 Johns. (N. Y.) 102.

But it has been held that the rate of interest upon notes made in one State, for money there loaned, payable at a given bank in another, is governed, as to the rate of interest, by the law of the former State. *Bank of Georgia v. Lewin*, 45 Barb. (N. Y.) 340; *First National Bank v. Morris*, 1 Hun (N. Y.), 680.

<sup>5</sup> *Robb v. Halsey*, 11 Smed. & M. (Miss.) 146; *Andrews v. Pond*, 13 Pet. (U. S.) 77; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Chapman v. Robertson*, 6 Paige Ch. (N. Y.) 627.

<sup>6</sup> *Andrews v. Pond*, 13 Pet. (U. S.) 65; *DeWolf v. Johnson*, 10 Wheat. (U. S.) 367; *Quinee v. Callender*, 1 Des. (S. C.) 160; *Scofield v. Day*, 20 Johns. (N. Y.) 102; *Thompson v. Powles*, 2 Simons, 194; *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Fitch v. Remer*, 8 Am. L. Reg. 654, 2 Kent, Com. 460.

A moneyed corporation, forbidden by its

(2) *Rate after Maturity.* — The rate of interest to be allowed on a promissory note, after maturity, is governed by the *lex loci contractus*.<sup>1</sup>

(3) *Usury.* — The *lex loci contractus* governs as to the defence of usury,<sup>2</sup> notwithstanding the fact that by the terms of the instrument the debt was to be secured by a mortgage on real property in another State.<sup>3</sup>

The discount in one State of a note made payable in another State, at an usurious rate of interest, is governed by the laws of the former State.<sup>4</sup>

c. *Contracts for the Loan of Money.* — A contract for the loan of money is governed by the *lex loci contractus*, though the loan is secured by a mortgage on lands in another State.<sup>5</sup> Yet a contract

made in one State, under a charter to make any contract amounting to usury, may make a loan in another State, at the rate of interest there lawful, though more than permitted in the State of its creation. *Bard v. Poole*, 12 N. Y. 495.

The rate of interest fixed by the law of Georgia, the contract having been made there, will be allowed in the courts of the United States on such contracts, although it may exceed the interest allowed by the law of the State in which the court sits. *Jaffray v. Dennis*, 2 Wash. C. C. 253.

If a note, executed in a State where twelve per cent interest per annum is allowed by law, though payable in a State where only six per cent interest is legal, be sued in the State where it was made, the stipulated rate of interest may be recovered. *Fisher v. Otis*, 3 Chand. (Wis.) 83. But a Pennsylvania court has said that a California contract to pay monthly two and a half per cent interest, and to compound it, though lawful by the *lex loci contractus*, is not only unconscionable, but deceptive, and will not be enforced in Pennsylvania. *Sime v. Norris*, 8 Phila. (Pa.) 84. Compare *Ransom v. Jones* (Pa.), Mass. 1860 (1190), *aff'd*, 1863 (33); *Hoag v. Dessan* (Pa.), 1 Pitts. (Pa.) 390.

<sup>1</sup> *Cowqua v. Lauderbrun*, 1 Wash. C. C. 521; *Evans v. White*, Hemp. C. C. 296.

Where the law of the place of contract fixes a general rate of interest, but allows parties to contract for a special rate, and they have done so, the rule of construction, followed in the federal courts, is to govern the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170; *Holden v. Trust Co.*, 100 U. S. 72.

<sup>2</sup> *Brewster v. Lyndes*, 2 Miles (Pa.), 185.

<sup>3</sup> *De Wolf v. Johnson*, 10 Wheat. (U. S.) 367.

In a suit for the foreclosure of a mortgage in which usury is set up as a defence,

and it appears that the parties to the mortgage both resided in one State, and the negotiations were conducted there, the contract made there, the validity of the mortgage must be decided according to the laws of that State. The fact that the land, which was the subject of the mortgage, is in another State, will not affect the question. *Dolman v. Cook*, 1 McC. Ch. 56; *Blydenburgh v. Cotheal*, 1 R. (N. J.) 17, 631; *Andrews v. Torrey*, 1 R. Ch. (N. J.) 355; *Uhler v. Semp*, 1 E. Gr. (N. J.) 288; *Marsh v. L. Beas*, (N. J.) 253. See *infra* "Mortgages." And it has been held that a contract made in Massachusetts, between a resident of that State and one of New York, for the loan of money on the mortgage of the latter of lands in New York, is not void, as to the question of usury, by the law of Massachusetts, as the *lex loci contractus*. *Van Schaick v. Edwards*, 1 Cas. (N. Y.) 355.

<sup>4</sup> *Pratt v. Adams*, 7 Paige Ch. 615; *Farmers' & Mechanics' Bank v. Smith*, 4 Law. Rep. 37.

If the maker and indorser of a note made in New York, where it is payable, is not usurious, because discounted in New Jersey, at seven per cent, which is less than the legal rate of interest in New York, the note is not void. *Hackettstown Bank v. Rea*, 6 Lans. 455; s. c., 64 Barb. (N. Y.) 175; 56 N. Y. 618.

<sup>5</sup> *De Wolf v. Johnson*, 10 Wheat. 367; *Davis v. Clemson*, 6 McL. C. 367; *Chappell v. Jardine*, 51 Conn. 64; *Price v. Price*, 4 W. Va. 4; *Cubbedge v. Price*, 62 Ala. 518.

It has been held that in an agreement for the loan of money made in New York, where the money advanced thereon, a note made in Nebraska payable in New York, secured by a mortgage on lands in Nebraska, to secure the debt, the fact that the note was made and dated in Nebraska is immaterial, for the note was but an incident to the agreement, and the contract was to

ance of lands to secure the payment of the loan, though executed in another State, is determined by the laws of the State where the lands lie and the suit is brought.<sup>1</sup> A contract for the loan of money, valid by the laws of the State where it is made, is not rendered void by the usury laws of another State, because it is to be repaid in such other State, unless it were a mere device to evade the usury laws of such State.<sup>2</sup>

*d. Contracts for Insurance.* — The general rule is, that the place of the contract of insurance is the place where it was accepted.<sup>3</sup>

Where an insurance policy is issued from the office of the company in one State on the life or property of A. in another, and sent to the local agent in such other State for delivery, containing a clause that it is not binding until countersigned and delivered there and the premium paid, the contract is completed in such other State; and its validity must be determined by the laws of that State.<sup>4</sup>

A contract of insurance made in one State upon property in

erned by the laws of New York. *Sands v. Smith*, 1 Neb. 108. See also *Mills v. Wilson*, 88 Pa. St. 118. And where A. of Indiana borrowed in Indiana, on notes secured by a mortgage of land there, money of a citizen of New York, some of the notes being made payable in New York, and some specifying no place of payment, the contract was held to be an Indiana contract, and that the question of its being usurious was to be tested by the law of Indiana. *Thompson v. Edwards*, 85 Ind. 414.

Where a mortgage is made of land supposed to be in New York, but by settlement of the State boundary decided afterwards to be in Connecticut, the incidents of the mortgage are those given to it by the New York law; and a court of equity, in Connecticut, will adapt the form of relief to the circumstances, the relief ordinarily given being inapplicable. *Chappell v. Jarline*, 51 Conn. 64.

<sup>1</sup> *Klinck v. Price*, 4 W. Va. 4.

<sup>2</sup> *Pratt v. Adams*, 7 Paige Ch. (N. Y.) 15.

<sup>3</sup> Where proposals for insurance were forwarded from Massachusetts to New York, and there accepted, and the policy there issued, and was forwarded to the company's agent in Massachusetts to be delivered to the insured, and it is so delivered, the contract is governed by the laws of New York. *Shattuck v. Mutual Life Ins. Co.*, 4 Cliff. C. C. 598; s. c., 7 Ins. L. J. 937; 7 Rep. 171; *Lamb v. Bowser*, 118 Mass. C. C. 315; *Wright v. Sun Mutual Ins. Co.*, 6 Am. L. R. 485; s. c., 23 How. (U. S.) 412; and will not be affected by any Massachusetts statute. *Shattuck v. Mut. Life Ins. Co.*, 4 Cliff. C. C. 598.

A policy which was issued in New Jersey

to a resident in Massachusetts, the loss to be paid at the principal office in New Jersey, is a contract to be governed by the laws of New Jersey, and not of Massachusetts. *Desmazes v. Mutual Benefit Life Ins. Co.*, 7 Ins. L. J. 926; s. c., 7 Rep. 136.

Where a policy of insurance is effected in New York, on coffee, at so much per pound, the American standard of weight governs in estimating a loss, not the foreign standard, where they differ. *Gracie v. Bowne*, 2 Cain. (N. Y.) 30.

<sup>4</sup> *North-western Mut. Life Ins. Co. v. Elliott*, 7 Sawy. C. C. 17; *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *Todd v. State Ins. Co.*, 11 Phila. (Pa.) 355; *Todd v. State Ins. Co. (Pa.)* 33 Leg. Int. 239; s. c., 3 Weekly Notes of Cases, 330.

But where a life policy was issued by a Connecticut company having its office at Hartford, to a citizen of Massachusetts, and sent to an agent in Massachusetts, and the latter countersigned and delivered it to the insured upon receipt of the premium, it was held that the contract was a Connecticut contract, and therefore not within the non-forfeiture law of Massachusetts (Stat. 1861, c. 186), the countersigning by the agent having been chiefly intended as proof that the premiums had been paid to him. *Whitcomb v. Phoenix Mut. Life Ins. Co.*, 8 Repr. 642; *Smith v. Mutual Life Ins. Co.*, 5 Fed. Rep. 582; s. c., 10 Ins. L. J. 180. And it has been held by the courts of New York that a policy of insurance, executed in that State in favor of a citizen, though sent abroad to be countersigned by an agent in a foreign country, is to be judged of by the New York laws, in the absence of any proof of the foreign law. *Huth v. New York Mut. Ins. Co.*, 8 Bosw. (N. Y.) 538.

another State is not void, because in violation of the laws of the latter State.<sup>1</sup> And it is not an ingredient of the contract of insurance that it shall be enforced conformably to the law of the place where it was executed.<sup>2</sup>

*e. Contracts relating to Personal Property.* — A contract entered into in one State, concerning personal property, when the property is situate and the contract to be performed in another State, may be made according to the law of the State where the contract is entered into, — not according to the law of the State where the property is to be performed.<sup>3</sup>

A chattel mortgage being valid in one State, without possession of the title of the mortgagee cannot be divested by proceeding *in invitum* in another State, where a different rule prevails, to which the property may have been taken for a temporary purpose.<sup>4</sup>

(1) *Mortgage of a Vessel.* — The validity of a chattel mortgage upon a vessel depends upon the laws of the State in which the mortgage is made, and where the vessel is registered.<sup>5</sup>

*f. Validity of Contract where made.* — If valid and binding where made, a contract is valid and binding everywhere;<sup>6</sup>

<sup>1</sup> *Huntley v. Merrill*, 32 Barb. (N. Y.) 626.

<sup>2</sup> *Griswold v. Union Mut. Ins. Co.*, 3 Blatchf. C. C. 231.

<sup>3</sup> *Dacosta v. Davis*, 4 Zab. (N. J.) 319; *Waters v. Cox*, 2 Ill. App. (Bradw.) 129.

Thus, a contract made in Michigan for the purchase of a piano, construed by the courts of that State to be a mere bailment giving the buyer no right to mortgage it, will be so construed by the courts of Illinois, upon the purchaser's removal to that State, and attempting to mortgage it. *Waters v. Cox*, 2 Ill. App. (Bradw.) 129.

<sup>4</sup> *Martin v. Hill*, 12 Barb. (N. Y.) 631.

The supreme court of the United States hold that the fiction of the law that the domicile of the owner draws to it his personal estate, wherever it may happen to be, must yield whenever it becomes necessary for the purpose of justice to examine into the actual *situs* of the property: accordingly, where a chattel mortgage was executed by a debtor to one creditor in New York, on personal property in Illinois, which was not required to be recorded in New York, but was required to be in Illinois, the mortgage was held invalid as against an attaching creditor of New York. *Green v. Van Buskirk*, 7 Wall. (U. S.) 140. See also *Gullander v. Howell*, 35 N. Y. 657.

It has been held that the *bona fide* purchaser of a chattel mortgage at a mortgagee's sale, under a mortgage executed and filed in New York, according to the statutes of that State, the chattel being there, and the mortgagor also residing there at the execution of the mortgage, and the mortgage

being due, is protected against a *bona fide* purchaser from the mortgagor where the property has been taken to another State and there sold. *Brady*, 8 Vr. (N. J.) 201.

In *Kunyon v. Groshon*, 1 Beas. 86, the owner of a picture, at the exhibition, in New York, executed in New Jersey a mortgage on it as a security for a loan, the domicile of both parties being New Jersey. Subsequently the mortgagor sold the picture to a *bona fide* purchaser. By the laws of New York, mortgages of pictures remaining in the possession of the mortgagor is void as against subsequent purchasers in good faith, unless the mortgage is filed in the office of the register, etc. The mortgagor, having taken the picture into New York, on a bill filed to foreclose the mortgage, the court held that the mortgage was valid as against the subsequent purchaser, and that notice, as the possession of the picture by the mortgagor was consistent with the transaction, and explained to the satisfaction of the court.

<sup>5</sup> *Watson v. Campbell*, 3 Alb. L. 1. A mortgage upon a British vessel, executed in a British province, is governed by the rules of the common law, notwithstanding the provisions of the revised statutes of the province. *Banks v. Bloomfield*, 5 Duer (N. Y.) 140. And the sale of a vessel, in Louisiana, is governed by the civil code of that State, notwithstanding the provisions of the revised statutes of the State. *By the general commercial law.* *v. Honold*, 19 How. (U. S.) 390; *St. v. Honold*, 19 How. (U. S.) 393.

<sup>6</sup> *Roach v. St. Louis Type Foundry*, 3 Mo. 186; *Dixon v. Martin*, 3 N. Eng. Rep. 777; *M.*



void or illegal there, it is generally held to be void and illegal everywhere else;<sup>1</sup> although, had the same contract been made where suit is brought, it would have been held valid.<sup>2</sup> But if a

Nesbit, 13 Fed. Rep. 872; Fitch v. Remer, 8 Am. L. R. 654; Smith v. Mead, 3 Conn. 253; Medbury v. Hopkins, 3 Conn. 472; Smith v. McLean, 24 Iowa, 329; Whiston v. Stodder, 8 Martin (La.), 95; Andrews v. His Creditors, 11 La. 465; Hollomon v. Hollomon, 12 La. An. 607; Poe v. Duck, 5 Md. 1; De Sobry v. De Laistre, 2 Harr. & J. (Md.) 193, 221, 228; Pearsall v. Dwight, 2 Mass. 88, 89; Le Roy v. Crowninshield, 2 Mason, C. C. 151; King of Prussia v. Kuemper, 22 Mo. 550; Stix v. Matthews, 75 Mo. 96; Houghton v. Page, 2 N. H. 42; Dyer v. Hunt, 5 N. H. 401; French v. Hall, 9 N. H. 137; Smith v. Godfrey, 8 Foster (N. H.), 381; Noble v. Thompson Oil Co., 79 Pa. St. 354; Bank of United States v. Donnelly, 8 Pet. (U. S.) 361, 372; Andrews v. Pond, 13 Pet. (U. S.) 65; Suydam v. Broadnax, 14 Pet. (U. S.) 67; Green v. Sarmento, Pet. C. C. 74; Willings v. Consequa, Pet. C. C. 301, 317; Trimble v. Vignier, 1 Bing. N. C. 151, 159; s. c., 4 Moore & S. 695; Fergusson v. Fyffe, 8 Clark & Finn 131; Lebel v. Tucker, L. R. 3 Q. B. 77; Lawrence's Wheaton, 179. See "SALE OF LIQUORS," *infra*, (1) note 4.

<sup>1</sup> Moore v. Clopton, 22 Ark. 125; McAllister v. Smith, 17 Ill. 328; Titus v. Scantling, 4 Blackf. (Ind.) 89; McDaniel v. Chicago & N. W. Ry. Co., 24 Iowa, 417; Ford v. Buckeye Ins. Co., 6 Bush (Ky.), 133; Kennedy v. Cochrane, 65 Me. 504; Trasher v. Everhart, 3 Gill & J. (Md.) 234; Harper v. Hampton, 1 Harr. & J. (Md.) 453, 622, 662; Pearsall v. Dwight, 2 Mass. 84; Powers v. Lynch, 3 Mass. 77; Baker v. Wheaton, 5 Mass. 509; Grimshaw v. Bender, 6 Mass. 157; Greenwood v. Curtis, 6 Mass. 358; Watson v. Bourne,

rleton, 12  
3 Mass. 1;  
; Hull v.  
Benjamin,  
ledway v.  
s. 157; In-  
habitants  
6; Ivey v.  
v. Davis,  
v. Phelps,  
v. Schaick  
Y.) 355;  
Y.) 235;  
Y.) 263;  
V. Y.) 285;  
ill v. Hop-  
ambers v.  
Am. Rep.  
McC. (S.  
9 Humph.

(Tenn.) 426; Andrews v. Pond, 13 Pet. (U. S.) 65; Allshouse v. Ramsay, 6 Whart. (Pa.) 331; Blackwell v. Webster, 23 Blatchf. C. C. 537; Van Reimsdyk v. Kane, 1 Gall. C. C. 371; McClintick v. Cummins, 3 McL. C. C. 158; La Jeune Eugénie, 2 Mason, C. C. 459; Carroll v. Nixon, 2 Miles (Pa.), 428; Warder v. Arell, 2 Wash. (Va.) 282; Robinson v. Bland, 2 Burr. 1077; Male v. Roberts, 3 Esp. 163; Burrows v. Jemino, 2 Str. 732; Alves v. Hodgson, 7 T. R. 241.

A contract entered into in New York, between Philadelphia coal companies, which is in contravention of the New York statute which makes it a misdemeanor for "persons to conspire to commit any act injurious to trade or commerce," will not be upheld in the Pennsylvania courts. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173. The distinction between contracts for the "protection" of trade, and those which are in "restraint" of trade, discussed. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173.

Where W., residing in Maine, there made a contract with an attorney residing in New York, whereby the latter was to prosecute W.'s claim in the New York courts on shares, it was held that the Maine law, which made such agreements void, covered the case. *Blackwell v. Webster*, 23 Blatchf. C. C. 537.

A promissory note made by a wife as surety for her husband in Louisiana, where she resides, although void by the law of that State, can be enforced against land in Mississippi devised to her sole and separate use, if she intended to charge it with the debt created by the note. *Frierson v. Williams*, 57 Miss. 451.

It has been questioned whether a mortgage on land, made by a foreign corporation having no power to execute a mortgage in the State where chartered, is good. *Amerman v. Wiles*, 9 C. E. Gr. (N. J.) 13, 16.

<sup>2</sup> *McAllister v. Smith*, 17 Ill. 328; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234.

Yet it has been said that the law of New Jersey governs as to property brought into that State, and the construction of contracts made elsewhere for its disposal. *The Marina*, 19 Fed. Rep. 760. The character and effect of a contract made in one State concerning property there, must be construed by the laws of that State, although the parties afterwards remove to another State, where the laws are different. *Hollomon v. Hollomon*, 12 La. An. 607.



contract be not executed, either with reference to the law of the place where it is made, or where it is to be performed, if forbidden by both, the law of the place where it is executed governs as to its invalidity.<sup>1</sup>

This rule is said to be founded on the necessity of nations "the whole system of agencies, of purchases and sales, of credits, and of transfers of negotiable instruments, rests on this foundation." We have no more forcible application of this doctrine than in the subject of international private contracts "in this, as a general principle, there seems a universal consent of all courts and jurists, foreign and domestic."<sup>2</sup>

A contract valid in the State where it is made will be enforced in another State, unless clearly contrary to good morals, or repugnant to the policy or positive institutions of the latter State.

<sup>1</sup> *Andrews v. Pond*, 13 Pet. (U. S.) 65.

<sup>2</sup> *Smith v. Mead*, 3 Conn. 253; *Medbury v. Hopkins*, 3 Conn. 472; *Brackett v. Norton*, 4 Conn. 517; *Atwood v. Protection Ins. Co.*, 14 Conn. 555; *Van Buskirk v. Hartford Ins. Co.*, 14 Conn. 583; *Thomas v. Beckman*, 1 B. Mon. (Ky.) 32; *Garnier v. Poydras*, 13 La. 177; *Chartres v. Cairnes*, 16 Mart. (La.), 1; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 193, 221, 228; *Dunscomb v. Bunker*, 2 Metc. (Mass.) 8; *Sessions v. Little*, 9 N. H. 271; *Bank of Orange County v. Colby*, 12 N. H. 520; *Crosby v. Berger*, 3 Edw. Ch. (N. Y.) 538; *Le Breton v. Miles*, 8 Paige Ch. (N. Y.) 261; *In re Roberts Will*, 8 Paige Ch. (N. Y.) 446, 525; *Decouche v. Savetier*, 3 John. Ch. (N. Y.) 190; *Watson v. Orr*, 3 Dev. (N. C.) L. 161; *Arrington v. Gee*, 5 Ired. (N. C.) L. 590; *Kneeland v. Ensley*, Meigs (Tenn.), 620; *Bryant v. Edson*, 8 Vt. 325; *Bank of United States v. Donnally*, 8 Pet. (U. S.) 361; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 331; *Feaubert v. Turst*, Prec. in Ch. 207; s. c., 1 Bro. P. C. 129; *Dues v. Smith*, Jacob. 544; *Anstruther v. Adair*, 2 My. & K. 513; *Freemoult v. Dedire*, 1 P. Wms. 429. <sup>3</sup> *Phinney v. Baldwin*, 16 Ill. 108; *Chewning v. Johnson*, 5 La. An. 678; *Greenwood v. Curtis*, 6 Mass. 358, 377.

An Indiana statute provides that "notes payable to order or bearer in a bank in this State, shall be negotiable as inland bills of exchange, and the payees and indorsees may recover as in case of such bills." Under this statute the Indiana courts hold that a note, to be negotiable, must be made payable at a bank in Indiana; that the name of the bank must be correctly stated in the note; and that a party is not estopped from denying that there is any such bank as that named in his note. In the case of a note executed in and made payable in Indiana, the Missouri courts will apply the same rules. *Stix v. Matthews*, 75 Mo. 96.

A Sunday contract valid by the law of the State where made, will be enforced by the courts of another State, by the law of which such contract would be void. *Swann*, 21 Fed. Rep. 299. But it has been held that a contract for speculation in stocks upon margins, made in another State where they are presumed to be lawful, will not be enforced in New Jersey, where such contracts are unlawful. *Flagg v. Baldwin*, 30 N. J. Eq. 219; s. c., 48 Am. Rep. 308.

A contract made in one State, with the full knowledge of the parties that the subject-matter, which is its subject-matter, is prohibited in another State, in no immoral or against public policy, but in violation of the positive law of the latter State, is valid, and will be enforced in the latter State, when it is shown that the parties knew that such conduct was forbidden. *Merchants' Bank v. Bank of New York*, 9 N. Y. (5 Seld.) 53. Though it has been held that the fact that an agent for the prosecution of suits for infringement of patents is made within a State, the common-law rules against champerty and maintenance have been abolished, and do not protect it against the objection that the suits contemplated are to be prosecuted in various States throughout the Union, many of which the common-law rules against champerty and maintenance are in force. *Gregerson v. Imlay*, 4 Blatchf. C. C. 167.

Where a contract is made in one State for conveyance of lands in another State, such contract is valid by the laws of the State where made, and sanctioned by the courts, it will be enforced in the other State, though it would have been void under the statute of frauds subsequently passed in the first State. *Arrington v. Brents*, 1 McL. C. C. 167. A contract of sale made in a State where the statute of frauds does not prevail, will be enforced in another, by the laws of which it would have been void, though the statute of frauds was in the latter State at the time of sale, were in the latter State. *Allen v. Schuchardt*, 10 Am. L. R.

A State, by virtue of its general authority, may act between its own citizens in every other country; but it is otherwise as to contracts between citizens and foreigners, made in foreign countries.<sup>1</sup>

*g. Contracts injurious to a Nation or its Subjects.* — To this general rule, there are qualifications or exceptions. Thus, no nation is bound to recognize and enforce any contract which is injurious to its own interests, or those of its subjects, out of deference to foreign laws.<sup>2</sup>

An indenture of apprenticeship, with covenants valid in the State where executed, will be enforced in the courts of another State, if not *contra bonos mores*, or against the policy of the law of that State. *Petrie v. Voorhees*, 3 C. E. Gr. (N. J.) 285.

Where a contract of guaranty was signed in Massachusetts by a married woman, domiciled there, and sent to Maine by mail, and assented to and acted on in Maine for the price of goods sold there, the law of Maine, but not that of Massachusetts, then allowed her to make such contract. It was held (1) that the contract was made in Maine, and (2) that an action lay against her thereon in a Massachusetts court. *Miliken v. Pratt*, 125 Mass. 374.

As between the maker and payee of a note executed and payable in the State of Louisiana, the legal effect of the note must be determined by the law of that State in which it is regarded as commercial paper, having the legal character of a bill of exchange. *Hyatt v. Bank of Kentucky*, 8 Bush (Ky.), 193. But an assignment of such a note is of itself a contract, by which the party making the assignment assumes certain liabilities, to be regulated and determined by the law of the place where the assignment is made, in the absence of an agreement upon his part, by which he assumes liabilities treated by the laws of another State or place. *Hyatt v. Bank of Kentucky*, 8 Bush (Ky.), 193.

Assumpsit may be maintained in Rhode Island for breach of a contract of sale there made, and there valid, of goods in process of manufacture, although the delivery was to take place in New York, where the contract was invalid by the New York statute of frauds. *Hunt v. Jones*, 12 R. I. 265.

A defendant who sets up infancy as a defence to a foreign contract, must show affirmatively that it would be a good defence by the foreign law. *Thompson v. Ketcham*, 8 Johns. (N. Y.) 189.

Where a daughter under the will of her father, valid by the laws of the State where it was executed, on receiving a legacy of money and bank stock, executed an obligation to carry out the provisions of the will, by leaving at her death, if she died without issue, the money and bank stock which she

had received, to the surviving children of the testator, such an obligation being a valid one by the laws of the State where it was executed, it was held that it will be enforced by the courts of another State. *Groves v. Nutt*, 13 La. An. 117.

1 *Van Reimsdyk v. Kane*, 1 Gall. C. C. 371.

And a contract implied by official relations in a foreign State, by the laws of that State, will be recognized and enforced in Missouri, at the suit of the sovereign, who is the creditor by force of such relations. *King of Prussia v. Kuepper*, 22 Mo. 550.

When by the laws of a foreign country where a contract between its citizens was made, the creditor's right to proceed to the enforcement of his contract is suspended, the tribunals of this country will give effect to the contract only according to such laws. *Camfranke v. Burnell*, 1 Wash. C. C. 340.

2 *Cole v. Lucas*, 2 La. An. 953; *Mary v. Brown*, 5 La. An. 269; *Tatum v. Wright*, 7 La. An. 358; *Groves v. Nutt*, 13 La. An. 117; *Hughes v. Klingender*, 14 La. An. 52; *Whiston v. Stodder*, 8 Martin (La.), 95; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 193, 228; *Greenwood v. Curtis*, 6 Mass. 376, 379; *Blanchard v. Russell*, 13 Mass. 1, 6; *Prentiss v. Savage*, 13 Mass. 20, 24; *Ingraham v. Geyer*, 13 Mass. 146; *Tappan v. Poor*, 15 Mass. 419, 422; *West Cambridge v. Lexington*, 1 Pick. (Mass.) 506; *Hinds v. Brazeale*, 3 Miss. (2 How.) 837; *Smith v. Godfrey*, 8 Foster (N. H.), 382; *Martin v. Hill*, 12 Barb. (N. Y.) 631; *Kanaga v. Taylor*, 7 Ohio St. 134; *Crosby v. Huston*, 1 Tex. 203; *Andrews v. Pond*, 13 Pet. (U. S.) 65, 78. See Story, *Conf. L.* § 244; *Huberus*, lib. 1, tit. 3, *De Conflict. Legu* § 2.

*Comitas inter Communitates.* — The enforcement by one nation of contracts made under the laws of another, rests on the principles of comity which cannot be so far extended as to violate the positive legislation of the nation called on to enforce such contracts, and in no case should it be carried to such an extent that the nation or its subjects will be in any way prejudiced thereby. *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *Pearsall v. Dwight*, 2 Mass. 88,

*h. Contracts founded on Political, etc., Interpitude.* — A contract, arising out of moral or political interpitude, will be enforced.<sup>1</sup>

*i. Contracts in Fraud, etc., of the Law of a Country.* — Contracts in fraud or evasion of the laws of another country will not be enforced.<sup>2</sup> Thus, if merchandise is sold in one place, to be delivered in another, where such sale is prohibited the contract will not be enforced in the courts of the latter country, because the contract is repugnant to the law and interest of the country making the prohibition.<sup>3</sup>

(1) *Contract for Sale of Intoxicating Liquors.* — Where a contract for the sale of spirituous liquors is valid by the laws of the State where the sale is made, but invalid by the laws of the State where the goods are to be delivered, the vendor cannot, in the latter State, recover the price, where he has knowledge that the vendee intends to use them in violation of law, and aids therein.<sup>4</sup> But the intent

89; *Greenwood v. Curtis*, 6 Mass. 378; *Ohio Ins. Co. v. Edmondson*, 5 La. 295, 299-300; *Ivey v. Lalland*, 42 Miss. 444; *Smith v. Godfrey*, 8 Foster (N. H.), 382; *Merchants' Bank v. Spalding*, 12 Barb. (N. Y.) 302; *Kentucky v. Bossford*, 6 Hill (N. Y.), 526; *Territt v. Bartlett*, 21 Vt. 189; *Forbes v. Cochrane*, 2 Barn. & Cress. 448, 471. For no nation is bound to recognize or enforce contracts injurious to its own citizens. *Ivey v. Lalland*, 42 Miss. 444. "The general comity and natural convenience of nations have established the rule, that the law of that place governs in every thing respecting the form, interpretation, obligation, and effect of the contract, wherever the authority, rights, and interests of other States and their citizens are not thereby prejudiced." *Lawrence's Wheaton*, 179; *Huberus*, tom. ii. lib. i. tit. 3, de Conflict. Leg. § 2.

1 *Armstrong v. Toler*, 11 Wheat. (U. S.) 258, 260; *Boucher v. Lowson*, Cas. Temp. Hard. 84, 89, 191; *Planche v. Fletcher*, Doug. 251.

2 *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Hannay v. Eve*, 3 Cr. (U. S.) 242; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Springfield Bank v. Merrick*, 14 Mass. 322; *Cannan v. Bryce*, 3 B. & Al. 179; *Holman v. Johnson*, Cowp. 341; *Jaques v. Withy*, 1 H. Black. 65. *Compare Pelletat v. Angell*, 2 Crompt. M. & R. 311.

When a contract which violates the revenue laws of the country where it was made, comes before the courts of another country, they will not take notice of the foreign revenue laws, — *Ivey v. Lalland*, 42 Miss. 444. — and they will enforce contracts by the subjects of such country, made to evade or defraud the revenue laws of another country. See *Ludlow v. Van Rensselaer*, 1 Johns. (N. Y.) 94; *Boucher v. Lowson*, Cas. Temp.

Hard. 85, 89, 191; *Holman v. Johnson*, Cowp. 341; *Biggs v. Lawrence*, 3 T. R. 466; *Clugas v. Penaluna*, 4 T. R. 466; *Foot v. Tenant*, 1 Bos. & Pull. 551; *v. Fletcher*, Doug. 251; *Lever v. Marsh. Ins.* 58-61; *La Jeune v. Mason*, C. C. 459, 461; *Pothier*, 58; 2 Valin, Comm. art. 49, p. 127; *erig. Ch. 8* §§ 5, 212, 215.

But it has been held that the sale of a lottery ticket in a State where such sale is not prohibited, to a resident of another State where such sale is illegal, is not void, and the contract will be enforced in the latter State, although the buying and selling were contrary to its laws. See *Smythe v. Parks*, 3 Metc. (Mass.) 207; *v. Gregory*, 4 Metc. (Ky.) 370.

3 *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Greenwood v. Curtis*, 6 Mass. 378; *Story*, Conf. L. § 252; *Huber*, lib. 1, De Conflictu Leg. § 5.

4 *Bancher v. Mausel*, 47 Me. 58; *v. Stratton*, 47 Me. 120; *Webster v. Gray* (Mass.), 584; *Dalter v. Iowa*, 538; *Spalding v. Preston*, 21 Vt. 184.

Where a sale of liquor was made by a Philadelphia firm, to its agent in Providence, Rhode Island, for the purpose of enabling the defendant to violate the laws of Rhode Island, which prohibited the sale of liquor without a license, no recovery can be had on a draft for the price of the liquor accepted by defendant. *Weil v. Gould*, 364; s. c., 2 N. Eng. Rep. 235. It has been said that an action cannot be maintained in New Hampshire to recover the price of intoxicating liquors sold by the plaintiff to defendant in Massachusetts (the sale was legal), when it appears that the plaintiff actively aided defendant in the commission of his purpose to keep and sell the

purchaser and the knowledge and aid of the vendor must distinctly appear to avoid the sale.<sup>1</sup>

However, if the transaction is completed in one State, where the sale is legal, although the seller knew the illegal purpose of the buyer, it is valid and binding, provided he did not engage actively to promote or share in it.<sup>2</sup> But if any thing remains to be

violation of law, by packing it for transportation in a way to conceal the fact that the packages contained liquor. *Fisher v. Lord*, 63 N. H. 514; s. c., 3 Atl. Rep. 297; 2 N. Eng. Rep. 285.

And where the agent of a Pennsylvania firm went to Rhode Island, and there effected a sale of whiskey by sample to a citizen of Rhode Island, to whom the whiskey was sent and delivered, in a suit brought in Massachusetts on an acceptance given by the buyer, it was held that the illegality of the transaction was determinable by the Rhode Island law. *Weil v. Golden*, 141 Mass. 364; s. c., 2 N. Eng. Rep. 235.

<sup>1</sup> *Samuel Bowman Distillery Co. v. Nutt*, 34 Kans. 724; *Savage v. Mallory*, 4 Allen (Mass.), 492; *Bligh v. James*, 6 Allen (Mass.), 570; *Barnard v. Field*, 46 Me. 526; *Whitlock v. Workman*, 15 Iowa, 351; *Langton v. Hughes*, 1 Maule & S. 593.

A mere knowledge on the part of the seller that the goods are to be used for an illegal or an immoral purpose in another country, will not affect the validity of the contract, even in the courts of that country. *Samuel Bowman Distillery Co. v. Nutt*, 34 Kans. 724. Yet it is said that "no one should furnish another with the means of transgressing the law, knowing that he intended to make that use of them." *Lightfoot v. Tenant*, 1 Bos. & Pull. 551; *Langton v. Hughes*, 1 Maule & S. 593. To render the contract void, there must be some participation or interest of the seller in the

in further-

use them  
*Seligman*,  
*Godfrey*, 8  
arl, 3 Gray  
, 14 N. Y.  
Cans. 621;

*Oil Co. v.*  
*Rowan*, 59  
f. H. 514;  
. Rep. 285;

; *Tracy v.*  
*Anderson v.*

; *Rose v.*  
*r. Rooney*,

u, 50 Iowa,  
474; *Hub-*

; *Langton*  
*Ritchie v.*

f. Rep., C.  
k Ald. 179.

181; *Catlin v. Bell*, 4 Camp. 183. Compare *Hodgson v. Temple*, 5 Taunt. 182; *Pellecat v. Angell*, 2 Crompt. M. & R. 311; *Johnson v. Hudson*, 11 East, 180.

But it was held in a recent case that a person who solicits orders for spirituous liquors in New Hampshire, where the sale of them is prohibited, to be delivered outside of the State, having reasonable cause to believe that if so delivered, they will be transported into the State for illegal sale, cannot recover the price of such liquors in the New Hampshire courts, although the contract of sale may have been lawful in the State where it was completed, and the delivery made. *Jones v. Surprise* (N. H. 1887), 9 Atl. Rep. 384.

The later English cases, however, seem to hold that mere knowledge on the part of the vendor that the vendee purchased the property for an illegal or immoral purpose, vitiates the contract. See *Cowan v. Milbourn*, L. R. 2 Ex. 230; *Pearce v. Brooks*, L. R. 1 Ex. 213; *Taylor v. Chester*, L. R. 4 Q. B. 309.

A purchase made in Missouri, of property to be sold in Arkansas, is valid in Arkansas, although the sale of such property is unlawful in Arkansas, if it is lawful in Missouri, and the seller is not actively to participate or be interested in the sale in Arkansas. *Parson's Oil Co. v. Boyett*, 44 Ark. 230.

<sup>2</sup> *Feineman v. Sachs*, 33 Kan. 62; s. c., 52 Am. Rep. 547; *Territt v. Hartlett*, 21 Vt. 184; *Spalding v. Preston*, 21 Vt. 9; *Mack v. Lee*, 13 R. I. 293.

An order for liquors to be forwarded to the buyer, made by a dealer in one State on an order taken in another by an agent having no authority to make sales, which is filled, is governed, as to its validity, by the laws of the State where filled, and a recovery may be had on notes given for the price, though the contract for the sale and delivery of spirituous liquors is a violation of the statute of the State where the buyer resides. *Backman v. Jenks*, 55 Barb. (N. Y.) 468; *Fuller v. Leet*, 59 N. H. 163. See also *Lauten v. Rowan*, 59 N. H. 215.

Where a contract signed in Massachusetts for the purchase of whiskey clearly contemplates that the title shall pass when the whiskey is in a bonded warehouse in Kentucky, the contract is for a sale to be made in Kentucky, and evidence that the seller had no license in Massachusetts is

done,—as, if the goods are sent by express, the price to be collected by the carrier on delivering them,—there can be no recovery.

(2) *Contracts by Subjects residing Abroad.*—Where a citizen of one country, who is residing abroad, sells to a citizen of his own country for the purpose of their being smuggled into such country, he will not be allowed to enforce the contract in the courts of that country, although the contract was complete in the foreign country, and might be enforced in the like case of a foreigner.

*j. Contracts which are Immoral, etc.*—Contracts which are immoral, or against public rights or religion, will not be enforced. But, to come within the rule, such contracts must not simply be contrary to the statutes of the country where they are sought to be enforced, but must involve moral interperitute.<sup>4</sup>

*k. Contracts opposed to National Policy.*—Contracts opposed to national policy and institutions will not be enforced.<sup>5</sup>

*l. Form, Proof, and Authentication of Contracts.*—The form, proof, and authentication of contracts are governed by the law of the country where they are made;<sup>6</sup> and this law must

be immaterial. *Sherley v. McCormick*, 135 Mass. 126.

<sup>1</sup> *State v. Four Jugs of Intoxicating Liquors*, 58 Vt. 594; s. c., 2 Atl. Rep. 586. See *Dolan v. Green*, 110 Mass. 322.

Where a verbal order for liquors was given in Michigan to the agent of a Wisconsin firm subject to the approval of the firm, and to the acceptance or rejection of the goods on their arrival in Michigan, it was held in an action on the contract, that the delivery of the liquors to a carrier in Wisconsin did not complete the sale as a Wisconsin contract within the statute of frauds, and that, as a Michigan contract, it was void under the prohibitory liquor law. *Rindskopf v. De Ruyter*, 39 Mich. 1.

An executory contract of sale of intoxicating liquors made in Massachusetts, and completed in New York, is not a sale in violation of law within the meaning of Massachusetts Gen. Stat. ch. 86, on which the money paid therefor can be recovered back. *Abberger v. Marrin*, 102 Mass. 70; *Ely v. Webster*, 102 Mass. 304; *Brockway v. Maloney*, 102 Mass. 308.

<sup>2</sup> See *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Waniell v. Reed*, 5 T. R. 599; *Clugas v. Penaluna*, 4 T. R. 466; *Biggs v. Lawrence*, 3 T. R. 454.

<sup>3</sup> 1 Bell, Comm. (4th ed.) § 232, pp. 232-242.

Thus, contracts in a foreign country for illicit cohabitation and prostitution will not be enforced. *Greenwood v. Curtis*, 6 Mass. 379; *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 193, 228; *Robinson v. Bland*, 2 Burr, 1084; *Walker v. Perkins*, 3 Burr. 1568; *Binnington v. Wallis*, 4 Barn. & Ald. 650; *Lloyd v. Johnson*, 1 Bos. & Pull. 340;

*Jones v. Randall*, Cowp. 37; *Appel v. Campbell*, 2 Carr. & P. 347; 1 N. P. tit. "Assumpsit," 59, 60.

will any contracts which are founded on moral interperitute, and are inconsistent with good order, and the best interests of society, be enforced. *Wolcot v. Wood*, Ves. 1; *Southey v. Sherwood*, 2 Jac. 435, 441; *Lawrence v. Smith*, Jac. 474, n.; *Jones v. Randall*, Cowp. 37; *v. Bennet*, 1 Camp. 348; *Jennings v. Throgmorton*, Ry. & Moody, 251; *ton v. Campbell*, 2 Carr. & P. 347; *v. Stotesbury*, 1 W. Black. 204; *Burr*, 924; *Fores v. Johns*, 4 L. R. 450.

<sup>4</sup> See *Kentucky v. Bassford*, (N. Y.), 526.

<sup>5</sup> *Richardson v. Marine Ins. Co.*, 102, 110, 112; *Greenwood v. Curtis*, 6 Mass. 358; *Musson v. Fales*, 16 Mass. 36; *Coolidge v. Inglee*, 13 Mass. 26; *C. v. Waddington*, 16 Johns. (N. Y.) s. c., 2 Wheat. Appendix 35; *C. v. wealth v. Aves*, 18 Pick. (Mass.), 1; *drews v. His Creditors*, 11 La. 46; *Warrender v. Warrender*, 9 Bligh, 1; *De Wutz v. Hendricks*, 9 Moore, 58; 2 Bing. 314; *Thompson v. Powles*, 194; *Jones v. Garcia del Rio*, 1 & Russ. 299; *Pattison v. Mills*, 1 Clark, 342; *Somerset v. Stewart*, L. Rex v. Sommersett, 20 Howell's Trials, 79; *Madrado v. Wilkes*, 3 Ald. 353; *Forbes v. Cochrane*, & Cress. 448.

<sup>6</sup> *Matthews v. Murchison*, 17 Fe. 760; *Harman v. Harman*, Bald. C. Satterthwaite v. Doughty, 1 Busbee L. 314; *Warrender v. Warrender*, 558.

strictly followed to entitle the contracts to be held valid elsewhere.<sup>1</sup>

*m. Nature, Obligation, and Interpretation of Foreign Contracts.*—The law of the place where the contract is made is to govern as to the nature, the obligation, and interpretation thereof.<sup>2</sup>

(1) *Nature.*—By the nature of a contract is meant those qualities which properly belong to it, and by law or custom always accompany it, or inhere in it.<sup>3</sup>

(2) *Obligation.*—By the obligation of a contract is meant the duty to perform it.<sup>4</sup>

(3) *Interpretation.*—The interpretation of a contract is ascertaining the real intention of the parties in their stipulations; and, when the latter are silent or uncertain, to ascertain what is the true sense of the words used, and what ought to be implied in order to give them their true and full effect.<sup>5</sup> The general principle is, that, in ascertaining the right of parties to a controversy, the law of the place where the right arises governs, provided it be

111, 112; *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Levy*, 3 Campb. 166, *Wynne v. Jackson*, 2 Russ. 351; *James v. Catherwood*, 3 Dowl. & Ry. 190. See 3 Burge, *Comm. on Col. & For. Law*, pt. 2, ch. 20, pp. 752-764; Föelix, *Conflict des Lois*, *Revue Étrang. et Franç.*, tom. vii. §§ 40-51, pp. 246-260; *Ersk. Inst. b. 3, tit. 2, §§ 39, 40, 41*, pp. 514, 515; 2 *Boullenois*, obs. 46, 467; 1 *Hertii Opera, de Collis. Leg.* § 11, n. 59.

Our courts will not require contracts, made in Cuba, to be stamped according to the Cuban laws. *Skinner v. Tinker*, 34 Barb. (N. Y.) 333.

1 *Bank of Rochester v. Gray*, 2 Hill (N. Y.), 227; *Tickner v. Roberts*, 11 La. 14; *Ogden v. Saunders*, 12 Wheat. (U. S.) 332, 338-347; *Blanchard v. Russell*, 13 Mass. 1, 4; *Leroux v. Brown*, 12 C. B. 801.

It seems that where goods are sold in one country to be delivered in another, and the laws of the countries governing such sales are different, those of the country where the goods are to be delivered will govern. See *Vidal v. Thompson*, 11 Mart. (La.) 23-25; *Acebal v. Levy*, 10 Bing. 376.

2 *Smith v. Mead*, 3 Conn. 253; *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 193; *Peck v. Hibbard*, 26 Vt. 703; *Jacks v. Nicholls*, 5 Barb. (N. Y.) 38; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Harrison v. Sterry*, 5 Cr. (U. S.) 289; *Delvalle v. Plomer*, 3 Camp. Rep. C. C. 47; *Le Roy v. Crowninshield*, 2 Mason, C. C. 151; *Van Reimsdyk v. Kane*, 1 Gall. C. C. 371; *Fergusson v. Fyffe*, 8 Clark & Finn. 121, 140; *Burrows v. Jemino*, 2 Str. 733, s. c., 2 Eq. Cas. Abr. 525; *Winchelsea v. Garett*, 1 Keen, 293; *Melan v. Fitz James*, 1 Bos. & Pull. 138; *Aymar v. Sheldon*, 12 Wend.

(N. Y.) 439; *Trimbey v. Vignier*, 6 Carr. & P. 25; s. c., 1 Bing. N. C. 151, 159; 4 *Moore & S.* 695; *King v. Harman's Heirs*, 6 La. 607, 617; *Brown v. Richardson*, 13 Mart. (La.), 202. Compare *Lebel v. Tucker*, L. R. 3 Q. B. 79.

3 See *Burrows v. Jemino*, 2 Str. 733; *Story, Conf. L.* § 263.

4 See *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Winchelsea v. Garett*, 2 Keen, 293, 309; *Drummond v. Drummond*, 6 Bro. Parl. (by Tomlin's), 601; *Elliott v. Minto*, 6 Madd. 16; *Melan v. Fitz James*, 1 Bos. & Pull. 138; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *King v. Harman's Heirs*, 6 La. 607, 617; *Brown v. Richardson*, 13 Mart. (La.) 202.

It has been said that the obligation of a corporation to pay its bonds executed and issued in the Dominion of Canada, but drawn and payable in the city of New York, cannot be deemed by our courts to be discharged by virtue of an act of parliament of the Dominion of Canada authorizing such railroad to issue new bonds, bearing a lower rate of interest, in substitution of such former bonds. *Gebhard v. Canada S. Ry. Co.*, 1 Fed. Rep. 387; s. c., 17 Blatchf. C. C. 416; 21 Alb. L. J. 352; 9 Rep. 203. But the supreme court reversed this decision, and held that the Canadian act was in the nature of a discharge in bankruptcy, was within the power of the parliament, and was binding on holders of the bonds everywhere. *Canada Southern R. R. Co. v. Gebhard*, 109 U. S. 527.

5 See *Prentiss v. Savage*, 13 Mass. 23; *Chapman v. Robertson*, 6 Paige, Ch. (N. Y.) 627, 630; *Warrender v. Warrender*, 9 Bligh, 89; s. c., 2 Clark & Finn. 488.

shown;<sup>1</sup> and the laws of a place where a contract is made, not where the action is brought, is to govern in enforcing and expounding the contract,<sup>2</sup> provided they are not repugnant to the laws or policy of the country where suit is brought,<sup>3</sup> unless the parties intended otherwise, in view of its being executed elsewhere.<sup>4</sup>

<sup>1</sup> The Scotland, 105 U. S. 24; Champion v. Wilson, 64 Ga. 184.

If a contract is ambiguous, it must be determined by the usages of the country where it was made; if not, and a contingency unprovided for occurs, the omission may be supplied by the same usage. Moore v. Johnston, 8 La. An. 488.

The *lex loci contractus* must control in interpreting a contract made in a foreign country. In the absence of any understanding to the contrary, a debt there contracted is there payable, and in the legal currency thereof. Benner v. Clemens, 58 Pa. St. 24. But where the performance of a contract made in a foreign country is sought here, in the absence of evidence it must necessarily be performed in the foreign country, the contract must be construed according to our own laws. White v. Perley, 15 Me. 470.

<sup>2</sup> Fitch v. Remer, 8 Am. L. Reg. 654; Brooke v. N. Y., L. E., etc., R. Co. (Pa.) 1 Cent. Rep. 123, 125; Howenstein v. Barnes, 9 Cent. L. J. 48; s. c., 8 Rep. 326; Peake v. Yeldell, 17 Ala. 636; McDougald v. Rutherford, 30 Ala. 253; Walker v. Forbes, 31 Ala. 9; Spears v. Shropshire, 11 La. An. 559; Barney v. Newcomb, 9 Cush. (Mass.) 46; Partee v. Silliman, 44 Miss. 272; Golson v. Ebert, 52 Mo. 260; Hodges v. Shuler, 24 Barb. (N. Y.) 68; Hildreth v. Shepard, 65 Barb. (N. Y.) 265; Ruggles v. Keeler, 3 Johns. (N. Y.) 263; Thompson v. Ketcham, 4 Johns. (N. Y.) 285; Fanning v. Consequa, 17 Johns. (N. Y.) 511; Cantu v. Bennett, 39 Tex. 303; Fisher v. Otis, 3 Chand. (Wis.) 83; Bell v. Bruen, 1 How. (U. S.) 169; Brabston v. Gibson, 9 How. (U. S.) 277; Cox v. U. S., 6 Pet. (U. S.) 172; Cox v. United States, 6 Pet. (U. S.) 203; Scudder v. Union Nat. Bank, 91 U. S. 406; Story, Conf. L. § 280; Story, Bills, 147. Compare Pope v. Nickerson, 3 Story, C. C. 465; Payson v. Withers, 5 Biss. C. C. 269; Robinson v. Bland, 2 Burr. 1077; Story, Conf. L. § 280.

The nature, validity, and construction of a contract, are determined, both in the civil and common law, by the *lex loci contractus*. Brooke v. New York, L. E., etc., R. Co. (Pa.), 1 Cent. Rep. 123, 125. But it is held that the law of New Jersey governs as to property brought into that State, and the construction of contracts made elsewhere for its disposal. The Marina, 19 Fed. Rep. 760.

A State statute declaring certain contracts invalid unless recorded, does not apply to a contract made in another State where the laws have no such provision. Drew v. Smith, 59 Me. 393.

On a contract to be executed in Maryland but made and sued in Pennsylvania, the court held that a sufficient consideration was expressed on the face of the contract. Roll v. Nixon, 2 Miles (Pa.), 428.

It being the custom at Canton to add to other charges on the amount of goods sold, and for which compensation was demanded, this will be allowed in the States on a Canton contract. White v. Consequa, Pet. C. C. 301.

Where a contract is made in one State to be partly performed in that State and partly performed in other States, the law is, that the construction of the contract shall be governed by the law of the place where it is made. Morgan v. New Orleans, R. R. Co., 2 Woods, C. C. 244; Williams v. Carr, 80 N. C. 294. But where a case, in the performance of the contract, conveyance and transfers of property are made in several States, the law of the States where the particular property is situated governs. Morgan v. New Orleans, etc., R. R. Co., 2 Woods, C. C. 244; Williams v. Carr, 80 N. C. 294.

<sup>3</sup> Bank of Augusta v. Earle, 13 Pet. (U. S.) 520; Pope v. Nickerson, 3 Story, C. C. 465.

<sup>4</sup> Cox v. United States, 6 Pet. 172; Duncan v. United States, 7 Pet. 435; Caldwell v. Carrington's Heirs, 10 Pet. (U. S.) 86; Pope v. Nickerson, 3 Story, C. C. 474; Willings v. Consequa, 17 Johns. 511; Camfranke v. Burnell, 1 Wa. 340; Courtois v. Carpentier, 1 Wa. 376; Mathuson v. Crawford, 4 Mo. 540. A citizen of Chicago made a contract with agents of a line of British steamers to carry cattle from Baltimore to Liverpool. It was stipulated that any question arising should be determined by the law in England. In a suit on this contract it was held that a federal court sitting in Maryland would recognize this stipulation and would apply the English rule in the solution of the question in controversy under the contract. The Oran, 19 Fed. Rep. 922.



Where a cause of action arises in another State, the *lex loci* only applies to the construction and effect of the contract, not to the remedy.<sup>1</sup> The law to be applied to the remedy is the *lex fori*, at the time such remedy is sought.<sup>2</sup>

(a) *Rules of Interpretation.*—If the full and entire intention of the parties does not appear from the words of the contract, and it can be interpreted by any custom or usage of the place where it was made, that should be done.<sup>3</sup>

Where an instrument executed by foreigners in a foreign country is free from obscurity, it will be construed according to the obvious import of the words used, unless there is proof that, according to the law of the country where executed, the true interpretation of them would be different.<sup>4</sup>

n. *Contracts made in One State to be performed in Another.*—Where contracts are made in one place, and to be performed in another, they are to be governed by the law of the place of performance as to validity, nature, obligation, and interpretation.<sup>5</sup>

<sup>1</sup> *Scoville v. Canfield*, 14 Johns. (N. Y.) 338.

<sup>2</sup> *Matheson v. Crawford*, 4 McL. C. C. 540; *Partee v. Silliman*, 44 Miss. 272; *Hodges v. Shuler*, 24 Barb. (N. Y.) 68; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Howenstein v. Barnes*, 8 Rep. 326; s. c., 9 Cent. L. J. 48; *Cox v. U. S.*, 6 Pet. (U. S.) 203; *Bell v. Bruen*, 1 How. (U. S.) 182; *Brabston v. Gibson*, 9 How. (U. S.) 277; *Fanning v. Consequa*, 17 Johns. (N. Y.) 511; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Hyde v. Goodnow*, 3 N. Y. 266; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Robinson v. Bland*, 2 Burr. 1077; *Fitch v. Remer*, 8 Am. L. Reg. 654. Compare *Payson v. Withers*, 5 Miss. C. C. 269.

<sup>3</sup> See *Leffingwell v. White*, 1 Johns. Cas. 1; *Phreys*, 20 1; *Bent v. Eves*, 11 1; *arpenter*, 1 1; *Robertson*, 6 1; *ecauche v. o*; *Trabue* 1; *Bank of et.* (U. S.) 3; *itory, C. C.* 4; *J. S.* 289; 378, 379; 151, 159; & Ad. 284, 1, 10 Barn. 1, 10 Barn. 1; *urst, Prec.* 1; *Mylne & ard, L. R.* 1; *Machado*, 4 3r. & Bing. 111; *Selw.* 111; *proving*, *Bowen v. Bradley*, 9 Abb. (N. Y.)

*Webb v. Plummer*, 2 Barn. & Ald. 746; *Wigglesworth v. Dallison*, Doug. 201, 207; *Kearney v. King*, 2 Barn. & Ald. 301; *Spowle v. Legge*, 1 Barn. & Cresw. 16.

<sup>4</sup> See *Blanchard v. Russell*, 13 Mass. 1, 4, 5; *King of Spain v. Machado*, 4 Russ. 225. Where a particular interpretation is established, that must be followed, for the reason that the courts of a country are presumed to be the best expositors of its own law, as well as the terms of a contract made in reference to them. See *Saul v. His Creditors*, 17 Martin (La.), 587; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 159.

<sup>5</sup> *Fitch v. Remer*, 8 Am. L. Reg. 654; *Pittsburgh & St. L. R. R. Co. v. Rothschild* (Pa.), 4 Cent. Rep. 109. *In re State of Pennsylvania Ins. Co.*, 22 Fed. Rep. 109; *Schell v. Stetson*, 34 Leg. Intel. 114; *Lewis v. McCabe*, 49 Conn. 141; *Herschfeld v. Dexel*, 12 Ga. 582; *Dunn v. Welsh*, 62 Ga. 241; *Sherman v. Gassett*, 9 Ill. (4 Gilm.) 521; *Lewis v. Headley*, 36 Ill. 433; *Boyd v. Ellis*, 11 Iowa, 97; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 417; *Goddin v. Shipley*, 7 B. Mon. (Ky.) 575; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306; *White v. Perley*, 15 Me. 470; *Powers v. Lynch*, 3 Mass. 77; *Prentiss v. Savage*, 13 Mass. 20, 23, 24; *Denny v. Williams*, 5 Allen (Mass.), 1; *Wooten v. Miller*, 15 Miss. 380; *Frazier v. Warfield*, 9 S. M. & Mar. (Miss.) 220; *Broadhead v. Noyes*, 9 Mo. 56; *Dorsey v. Hardesty*, 9 Mo. 157; *Thayer v. Elliott*, 16 N. H. 104; *Howard v. Fletcher*, 59 N. H. 151; *Campbell v. Nichols*, 33 N. J. L. (4 Vr.) 81; *Baeder v. Carnie*, 44 N. J. L. 208; *Irvine v. Barrett*, 2 Grant (Pa.), 73; *Hyde v. Goodnow*, 3 N. Y. 266; *disap-* *Selw.* 111; *proving*, *Bowen v. Bradley*, 9 Abb. (N. Y.)



Pr. N. S. 395; Scott v. Pilkington, 15 Abb. (N. Y.) Pr. 280; Curtis v. Leavitt, 15 N. Y. 9; s. c., 17 Barb. (N. Y.) 309; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118; Berrien v. Wright, 26 Barb. (N. Y.) 208; Lee v. Selleck, 32 Barb. (N. Y.) 522; s. c., 20 How. (N. Y.) Pr. 275; Cartwright v. Green, 47 Barb. (N. Y.) 91; Adams v. Honness, 62 Barb. (N. Y.) 265, 326; Kentucky v. Barford, 6 Hill (N. Y.), 526; Andrews v. Herriot, 4 Cow (N. Y.) 510, note; Hildreth v. Shepard, 65 Barb. (N. Y.) 265; Dickinson v. Edwards, 58 How. (N. Y.) Pr. 24; Richardson v. Draper, 23 Hun (N. Y.), 188; Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 94; Thompson v. Ketcham, 4 Johns. (N. Y.) 285; Brooker v. Coffin, 5 Johns. (N. Y.) 189; Warren v. Lynch, 5 Johns. (N. Y.) 239; Fanning v. Consequa, 17 Johns. (N. Y.) 511; reversing s. c., 3 Johns. Ch. (N. Y.) 587; Commercial Bank v. Simpson, 90 N. C. 467; Kanaga v. Taylor, 7 Ohio St. 134; Wood v. Kelso, 27 Pa. St. 241; Brown v. Camden & A. R. Co., 83 Pa. St. 316; Archer v. Dunn, 2 Watts & S. (Pa.) 327; McCandlish v. Cruger, 2 Bay. (S. C.) 377; Fisher v. Otis, 3 Chand. (Wis.) 83; Bell v. Bruen, 1 How. (U. S.) 169; Cox v. United States, 6 Pet. (U. S.) 172, 203; Bank of United States v. Donnelly, 8 Pet. (U. S.) 361; Andrews v. Pond, 13 Pet. (U. S.) 65; Scudder v. Union Nat. Bank, 91 U. S. 406; Pritchard v. Norton, 106 U. S. 124; Armstrong v. Toler, 11 Wheat. (U. S.) 258; Harman v. Harman, Bald. C. C. 129; Woodhull v. Wagner, Bald. C. C. 296; Ladd v. Dulany, 1 Cr. C. C. 583; Van Reimsdyk v. Kane, 1 Gall. C. C. 371; Huthsing v. Bosquet, 3 McCr. C. C. 569; s. c., 11 Fed. Rep. 44. See also 7 Fed. Rep. 533; Hayden v. Davis, 3 McL. C. C. 276; Oregon & Wash. Trust, etc., Co. v. Rathbun, 5 Sawy. C. C. 32; Pope v. Nickerson, 3 Story, C. C. 465; Bushby v. Camac, 4 Wash. C. C. 396; Dent v. Smith, L. R. 4 Q. B. 413; Robinson v. Bland, 2 Burr. 1077, 1078; Don v. Lippmann, 5 Clark & Finn. 1, 13, 19; Fergusson v. Fyffe, 8 Clark & Finn. 121; Peninsular & Oriental Co. v. Shand, 3 Moore, P. C. (N. S.) 272. Compare Joslin v. Miller, 14 Neb. 91; Payson v. Withers, 5 Biss. C. C. 269.

But where no place of performance is designated by the contract, or it may be performed anywhere, it must be referred to the *lex loci contractus*. Don v. Lippmann, 5 Clark & Finn. 1, 13, 19. Thus, where a contract for the payment of money is made in one State, which is payable in another, without any stipulation as to interest, the rate of interest is to be governed by the law of the place where it is payable. Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118; Fanning v. Consequa, 17 Johns. (N. Y.) 511; reversing s. c., 3 Johns. Ch. (N. Y.)

587; Berrien v. Wright, 26 Barb. 208. Cartwright v. Green, 47 Barb. 9; Hildreth v. Shepard, 65 Barb. 265; Warren v. Lynch, 5 Johns. (N. Y.) 239; Curtis v. Leavitt, 15 N. Y. 9; Barb. (N. Y.) 309; Archer v. Watts & S. (Pa.) 327; Wood v. Pa. St. 241; Schell v. Stetson Leg. Intel. 14; Irvine v. Barrett, (Pa.), 73; Bushby v. Camac, 4 W. 296; Andrews v. Pond, 13 Pet. (U. S.) 65. See also ante § 1, b. tit. "INTEREST."

A letter of guaranty, written in the United States, but to be executed in another country, must be construed according to the law of that country. Bell v. Bruen, 1 How. 169. And a bond for a certain sum of sterling money, to be paid in Ireland, under a warrant of attorney to confess judgment in some court in Ireland, is payable in British sterling money, but bears interest. Bushby v. Camac, 4 W. 296.

Where a note was made in Jamaica, but payable in New York, the contract was held to be governed by the laws of New York. Thompson v. Ketcham, 4 Johns. 285; s. c., 8 Johns. (N. Y.) 189. The Nebraska supreme court has held that the validity of a promissory note made in Nebraska, and payable in New York, is determined by the laws of Nebraska. Miller, 14 Neb. 91.

The law of the place where goods are to be delivered, according to a contract, determines their mercantile quality. Dulany v. Dulany, 1 Cr. C. C. 583. But where an agent sold goods to a person in New York, subject to the approval of his principal, who resided in New York, and the principal approved the contract, the goods were delivered in Connecticut, and the payment was expected to be made to the agent, it was held that the contract was governed by the laws of the latter State. Lewis v. McCabe, 49 Conn. 141.

The effect of the indorsement of a bill of lading, in one State, of a private warehouse receipt for goods stored in another State, is to be determined by the law of the State. Hallgarten v. Oldham, 111 U. S. 1; s. c., 46 Am. Rep. 433. But it was held that, on a bill of lading issued in New York for goods in Pennsylvania, New York law governs. Brooke v. N. L. E., etc., R. Co. (Pa.), 1 Cent. R.

A passenger contract to be performed in another State, by a railroad company incorporated by such State, is governed by the laws thereof, though the ticket was purchased elsewhere. Brown v. C. & A. R. R. Co., 83 Pa. St. 316. But where a contract is made by a common carrier in one State to transport goods from that State into another, and the goods are delivered in the latter State, the rights of the parties are gov-

But the remedy upon it will be governed by the law of the State in which a remedy is sought.<sup>1</sup> And if, by the law of the place, where a remedy is sought on a contract, it is not a sealed instrument, although it would be considered as under seal in the place where it was made, covenant will not lie upon it.<sup>2</sup> Where a contract is made in one State, and intended to have effect in another, it must conform to the laws of the latter State.<sup>3</sup>

2. LEX LOCI REI SITÆ. — *a. Real Property.* — That all real property, and contracts and instruments affecting the title thereto, and immovable property, are exclusively subject to the laws of the government within whose territory the land is situated, is the generally accepted doctrine, both in America<sup>4</sup> and in Eng-

the law of the State in which the loss happens. *Gray v. Jackson*, 51 N. H. 9.

It has been held that the New Jersey statute giving a lien for work done on vessels in that State, applies if the work is done there, although the contract is made in another State. *Baeder v. Carnie*, 44 N. J. L. 208.

A purchase of movable effects in another State, for delivery in Louisiana, to be paid for on inspection, evidences a contract to be executed in Louisiana, and the Louisiana law applies as to the vendor's privilege to secure payment of the credit instalments. *McIlvaine v. Legare*, 36 La. An. 359. Yet it has been held that an agreement made in Alabama to deliver lumber in Georgia for the building of a house there, is governed by the Georgia mechanics' lien laws; and the fact that the contractor is a citizen of Alabama, does not alter those laws.

executed in New York, real estate in joint guaranty, &c. and others. Citizens of San Francisco assignment benefit of his bonds provides that, if indebted on a state shall be fact had been d, (1) that the and the liability by the laws of W. was liable on so guar-  
*v. Draper*, 23

Mo. 56; Dorsey v. Hardesty, 9 Mo. 157.  
An instrument in the form of a promissory note, made in Vermont, the scroll "L. S." being at the end of the maker's name (which by the laws of that State, constitutes a seal), and payable in New York, is to be governed by the laws of New York, and is but a simple contract. *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Andrews v. Herriot*, 4 Cow. (N. Y.) 508; *Ayre's Case*, 6 C. H. Rec. 30.

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they are not discharged by an extension, the agreement for which was not in writing, signed by the creditor. *Howard v. Fletcher*, 59 N. H. 151.

2 *Broadhead v. Noyes*, 9 Mo. 56; *Dorsey v. Hardesty*, 9 Mo. 157.

3 *Stricker v. Tinkham*, 35 Ga. 176; *Wooten v. Miller*, 15 Miss. (7 Smed. & M.) 380.

Thus, it was held in a suit on two notes given as collateral security for a deposit with a bank of Illinois, by a bank of another State, of its notes of a denomination of less than five dollars, for circulation in Illinois, that although the arrangement was made in another State, the law of Illinois, where it was to be carried out, and where the notes were payable, must govern; and that it made no difference whether the foreign bank knew of the illegality of the transaction under the Illinois laws or not.

*Lewis v. Headley*, 36 Ill. 433.  
But it is held by some courts that a contract entered into in one State, concerning personal property, when the property is situated, and the contract to be performed, in another State, must be made according to the law of the State where the contract is entered into, not according to the law of the State where it is to be performed. *Dacosta v. Davis*, 4 Zab. (N. J.) 319.

4 *United States v. Crosby*, 7 Cr. (U. S.) 115; *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Oakey v. Bennett*, 11 How. (U. S.) 33; *Christian Union v. Yount*, 101 U. S. 352; *Darby v. Mayer*, 10 Wheat. (U. S.) 465; *McCormick v. Sullivan*, 10 Wheat. (U. S.) 192; *Kerr v. Moon*, 9 Wheat. (U. S.) 566;

land.<sup>1</sup> And the title thereto can be acquired and lost, and devised thereof made only in the manner prescribed by the law of the place where the land is situate.<sup>2</sup>

(1) *Distinctive Features of Real Property.* — Real property does not depend altogether upon the will of private individuals, but is regarded as having certain qualities impressed upon it by the law of the country where it is situate. These qualities remain independent of whatever the laws of another State, or the private dispositions of its citizens, may provide to the contrary. The State in which any real property is situated cannot suffer its own laws to be changed by such laws or dispositions of foreign States and citizens, without great confusion and prejudice to its own interests. For this reason the law of a place where real property is situated governs exclusively as to the tenure, the title,<sup>3</sup> and

Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627; Harper v. Hampton, 1 Harr. & J. (Md.) 622, 687; Goodwin v. Jones, 3 Mass. 514, 518; Cutter v. Davenport, 1 Pick. (Mass.) 81, 86; Holmes v. Remsen, 4 John. Ch. (N. Y.) 460, s. c., 20 Johns. (N. Y.) 254; Nicholson v. Leavitt, 4 Sanf. (N. Y.) 276; Hosford v. Nichols, 1 Paige Ch. (N. Y.) 220; Blake v. Williams, 6 Pick. (Mass.) 286; Milne v. Moreton, 6 Binn. (Pa.) 353, 4 Cow. 510, 527; Wills v. Cowper, 2 Ohio, 124; Augusta Ins. Co. v. Morton, 3 La. An. 418.

1 Curtis v. Hutton, 14 Ves. 537, 541; Elliott v. Minto, 6 Madd. 16; Cockerell v. Dickens, 3 Moore, P. C. 98, 131, 132; Tulloch v. Hartley, 1 Younge & C. 114; Sill v. Worswick, 1 H. Black. 665; Hunter v. Potts, 4 T. R. 182; Phillips v. Hunter, 2 H. Black. 402; Selkrig v. Davies, 2 Rose, 97; s. c., 2 Dow. 230; Coppin v. Coppin, 2 P. Wms. 290, 293; Brodie v. Barry, 2 Ves. & B. 130; Birtwhistle v. Vardill, 5 Barn. & Cress. 438. See, also, 2 Burge, Comm. on Col. & For. Law, pt. 2, ch. 9, pp. 840-870; 4 *Id.* pt. 2, ch. 4; § 5, p. 150; *Id.* ch. 5, n. 11, pp. 71, 217; *Id.* ch. 12, p. 576; Föelix, Conflict des Lois, Revue, Étrang. et Franç. tom. i. §§ 27-37, pp. 216-250, 307-312 (ed. 1740); Vattel, b. 2, ch. 8, §§ 100, 103; Pothier, Coutume d'Orléans, ch. 1, §§ 22-24; *Id.*, ch. 3, n. 51; Hertii Opera, tom. i. de Collis. Leg. § 4, n. 9, p. 125 (ed. 1737); Bouhier, Cout. de Bourg. ch. 23, §§ 36-63; Le Burn, de la Communauté, lib. 1, ch. 5, pp. 9, 10; D'Agnesseau, Œuvres, tom. iv. p. 660 (4to ed.); Cochin, Œuvres, tom. i. p. 545 (4to ed.); 1 Froland, Mém. ch. 4, p. 49; *Id.*, ch. 7, p. 155; Liverm. Dissert. §§ 9-162, pp. 28-106; Ersk. Inst. B. 3, tit. 2, § 40, p. 515; 2 Bell, Comm. (4th ed.), § 1266, p. 690; Henry on Foreign Law, 12, 14, 15, *Id.*, Appx. 169.

The 24th section of the Act of Sept. 24, 1789, is a mere legislative recognition of

the principles of universal jurisprudence as to the operation of the *lex loci*. man v. Southard, 10 Wheat. (U. S.)

2 United States v. Crosby, 7 Cr. 115; Clark v. Graham, 6 Wheat. 577; Kerr v. Moon, 9 Wheat. (U. S.) McCormick v. Sullivan, 10 Wheat. 192; Darby v. Mayer, 10 Wheat. (U. S.) Watts v. Waddle, 6 Pet. (U. S.) 389; Manufacturing Co. v. Brown, 2 W. & M. C. C. 450; Root v. Brother McL. C. C. 230; Jeter v. Fellowes, St. 465; Abell v. Douglass, 4 Denio (305. And see Giddings v. Eastman, 6 Ch. (N. Y.) 19; Hawley v. James, 7 Ch. (N. Y.) 213; Mills v. Fogal, 4 Ch. (N. Y.) 559; Monroe v. Doug Sandf. Ch. (N. Y.) 126; s. c., 5 N. Y. White v. Howard, 46 N. Y. 144; D son v. Phillips, 18 Pa. St. 170; Cha v. Robertson, 6 Paige Ch. (N. Y.) 627; Potter v. Titcomb, 22 Me. 300; Cu Hutton; 14 Ves. 537, 541; Elliott v. 6 Madd. 16; Birtwhistle v. Vardill, 5 & Cress. 438; s. c., 9 Bligh, 32-88.

The disposition of real estate, whether by deed, descent, or other mode, must be governed by the laws of the State in which the land is situated. Pittsburgh & R. R. Co. v. Rothschild (Pa.), 4 Cent. 109. And though a person having no legal title to land in one State, may be decreed by a court of equity in another State, to convey the land, yet neither decree, nor any conveyance in execution of it, by one not having the title, can operate beyond the jurisdiction of the court. Watkins v. Holman, 16 Pet. (U. S.) 30. An inquisition of lunacy, taken in another State, confers no power to sell the land or real estate in New York, for his maintenance. *Ex parte Perkins*, 2 Johns. (N. Y.) 124.

3 The law of the *situs* must determine what constitutes title and seisin, and what

descent<sup>1</sup> of such property;<sup>2</sup> and a deed or will transferring real property, made in a foreign country, or in another State of the Union, must be executed in the form and with the formalities required by the laws of the State where the land is situated.<sup>3</sup>

(2) *Conveyance of Real Estate.*—All instruments and contracts conveying or affecting the title to real estate must be executed in the form and with those solemnities prescribed by the law where the law is situated, in order to have any validity;<sup>4</sup> and such contracts and instruments are to be construed and given effect to by the law of the *situs*.<sup>5</sup>

a covenant of title and seisin be broken. *Kling v. Sejour*, 4 La. An. 128.

<sup>1</sup> *Birtwhistle v. Vardill*, 5 Barn. & Cress. 438. But see s. c., in 9 Bligh, 32-88; 2 Clark & Finn. 571.

Where lands of an infant in another State are sold by partition proceedings there, if by the law of that State the proceeds are considered personal estate, they will pass as such in another State, although the infant is a resident in such other State. *Oberle v. Lerch*, 3 C. E. Gr. (N. J.) 346, 575.

<sup>2</sup> *Lawrence's Wheat.*, 164, 166; *Huberus*, i. iv. i. 3, de Conf. Leg. § 15.

<sup>3</sup> *United States v. Crosby*, 7 Cr. (U. S.) 115; *Robinson v. Campbell*, 3 Wheat. (U. S.) 212.

<sup>4</sup> "No one maintains that a form expressly imposed as an exclusive one by the *lex situs* can even be dispensed with." *Westlake*, Priv. Int. L. § 87.

But this application of the rule is said to be peculiar to American and British laws, and that, "according to the international jurisprudence recognized among the different nations of the European continent, a deed or will, executed according to the laws of the place where it is made, is valid; not only as to personal but as to real property, wherever situated; provided the property is allowed by the *lex loci rei sitæ* to be alienated by deed or will; and those cases excepted, where that law prescribes as to instruments for the transfer of real property, particular forms, which can only be observed in the place where it is situated, such as the registry of a deed on the probate of a will." *Lawrence's Wheaton*, 165; *Fœlix*, Droit Intern. Privé, § 52; *Huberus*, i. iv. tit. 3, de Conf. Leg. § 15.

However, the French law, by requiring every act, in reference to the transfer *inter vivos* of real property, of rights susceptible of hypothecation, to be inscribed at a particular place, prevents the operation of a transfer made elsewhere, according to the laws of the place where made. *Tripier*, Codes Français, 16, 18.

<sup>4</sup> It has been declared to be the well-

settled rule in America, that any title or interest in land or in other immovables, can only be acquired or lost agreeably to the law of the place where the same is situated. See *Wills v. Cowper*, 2 Ohio St. 124; *Cutter v. Davenport*, 1 Pick. (Mass.) 81; *Hosford v. Nichols*, 1 Paige Ch. (N. Y.) 220; *Goddard v. Sawyer*, 9 Allen (Mass.) 78; *Houston v. Howland*, 7 Gill & J. (Md.) 480; *Osborn v. Adams*, 18 Pick. (Mass.) 245; *Rabun v. Rabun*, 15 La. An. 471.

The same doctrine prevails in England, also. See *Warrender v. Warrender*, 9 Bligh, 127, 128; *Robinson v. Bland*, 1 W. Black. 259; s. c., on re-agreement, 2 Burr. 1079; *Scott v. Allnutt*, 2 Dow. & Clark, 404; *Selkirk v. Davies*, 2 Dow. 230, 250; *Jerningham v. Herbert*, 1 Tamlyn, 103; *Elliott v. Minto*, 6 Madd. 16; *Winchelsea v. Garety*, 2 Keen, 293, 309, 310; *Drummond v. Drummond*, 6 Bro. Parl. C. (by Towlins) 601; 2 Darris on Statut. 648; *Ersk. Inst. b. 3, tit. 9, § 4*; *Id.*, §§ 40, 41, p. 515; *Henry*, For. Law, pp. 12-15; 3 Burge, Comm. on Col. & For. Law, pt. 2, ch. 9, pp. 863-870; *Id.*, ch. 20, pp. 751, 752; 2 Kames, Eq. b. 3, ch. 2, § 2; *Ferguson*, Mar. & Div. 401; 2 Bell, Comm. pp. 7, 8 (4th ed.); *Id.*, § 1266, p. 690.

<sup>5</sup> *Cantu v. Bennett*, 39 Tex. 303; *Warrender v. Warrender*, 9 Bligh, 127, 128; 2 Darris on Statut. 648; *Story*, Conf. L. §§ 350 d, 364.

When a contract is made in one State for the purchase of land lying in another, and the money is to be paid in the State in which the contract is made, the *lex rei sitæ* will govern as to the title to the land, and the *lex loci contractus*, as to the effect of a failure of consideration. *Glenn v. Thistle*, 23 Miss. 42.

When a husband and wife in one State enter into a contract transferring land in another from the husband to the wife, the effect of such contract on the land is governed by the laws of the State in which the land is situated. *Kelly v. Davis*, 28 La. An. 773. Any marriage contract executed in one country will not operate upon real estate situate in another. *Ordronaux v. Rey*, 2 Sandf. Ch. (N. Y.) 33. The same

(a) *Nature and Extent of Interest transferred.* — The *lex loci sitæ* governs the nature and extent of the interest in real estate or immovables, to be disposed of by a conveyance made according to such laws.<sup>1</sup>

(b) *Capacity to take Real Estate.* — It is a general principle that a person, natural or artificial, must have a capacity to take, according to the law of the *situs*, otherwise he will be excluded from ownership.<sup>2</sup>

(c) *Estates acquired by Operation of Law.* — Independent of contract, express or implied, no estate can be acquired by operation of law in any other manner, or to any other extent, or by other means, than those prescribed by the *lex loci rei sitæ*.<sup>3</sup>

is true of mutual gifts or donations between husband and wife. Story, Conf. L. §§ 143-159, 453; Liverm. Dissert. §§ 181, 182, pp. 114, 115.

<sup>1</sup> Waterhouse v. Stansfield, 9 Hare, 234; s. c., 12 Eng. L. & Eq. 206, 13 *Id.* 465.

Where restrictions are imposed by the *lex loci rei sitæ* upon the devise or transfer of real estate, such restrictions will be operative without regard to the place where the will or the deed is made. See Attorney-General v. Mill, 2 Dow. & Clark, 393; s. c., 3 Russ. 328.

<sup>2</sup> Thus, whether a foreign corporation can take and hold lands in a State, is to be determined by the *lex loci rei sitæ*. Boyce v. St. Louis, 29 Barb. (N.Y.) 650; s. c., 18 How. (N.Y.) Pr. 125. See Santa Clara Female Academy v. Sullivan, 116 Ill. 375; s. c., 4 West. Rep. 114; Barnes v. Suddard, 117 Ill. 237; s. c., 4 West. Rep. 134.

It is held that a bastard, although legitimated by the law of another State, does not thereby acquire the right of inheriting in Pennsylvania. Smith v. Derr, 34 Pa. St. 126.

But in *Scott v. Key*, 11 La. An. 232, it was held that a statute of one State, legitimating a person residing in that State, was a "real statute," and made him so far legitimate in another that he could inherit real property situated in such other State. The same doctrine prevails in England. See *Shedden v. Patrick*, 4 Wils. & Shaw, 89-95; cited in 5 Barn. & Cr. 444; in 3 Hagg. Ecc. 652; in 6 Bligh, 474, 475, 487; in 9 Bligh, 51, 52, 75, 76, 80; the Strathmore Peerage Case, 9 Bligh, 51; *Munro v. Saunders*, 6 Bligh, 468; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, 59; s. c., 9 Bligh, cited 45, 46; and in some of the States of the Union. See Story, Conf. L. § 93, n. 3; also, Burge, Comm. on Col. & For. Law, ch. 3, p. 3, § 101.

Where the laws of a country exclude aliens from holding lands, either by successions, by devise, or by purchase, title in them becomes inoperative, whatever may be the law of their domicile. *Sewall v. Lee*,

9 Mass. 363; *Buchanan v. Deshon*, 1 Md. & J. (Md.) 280; and if by the law of the *situs* an alien may take and hold either by purchase, succession, or devise, title in him will be valid whatever may be the law of his domicile. Story, Conf. L. § 430, p. 541.

If a person is by the law of the country for any reason, such as infancy or coverture, incapable of transferring immovable property, any transfer by such person will be invalid, although no such personal incapacity may exist under the law of the domicile, and *vice versa*. See *Saul v. His Creditors*, 17 Martin (La.), 569, 597.

Foreign and Continental jurists generally, but not universally, hold that the question of legitimacy or illegitimacy, as well as the capacity to dispose of real estate, is to be determined exclusively by the law of the domicile of origin; and by the law of the country where a husband was born, such bastard is legitimate. After the subsequent marriage of his parents there, he ought everywhere to be regarded as legitimate; and *vice versa*. See Liverm. Dissert. § 44, p. 48; §§ 47, 48, p. 50; p. 52; §§ 59-62, pp. 58-60; 1 Burge, Comm. on Col. & For. Law, pt. I, pp. 101-106; Boullenois, obs. 4, pp. 64; *Id.*, obs. 5, p. 102; *Id.*, obs. 12, p. 103; *Id.*, obs. 13, p. 183; *Id.*, obs. 23, p. 499; obs. 28, pp. 700, 705, 720; *Id.*, Questions, p. 19; Vinnius, ad. Inst. lib. 1, tit. 1, § 1, n. 1; Huberus, de Conn. Leg. lib. 3, § 9; Stockmanus, Decis. 125, § 6, p. 1; J. Voët, Comm. ad. Pand. lib. 1, tit. 1, p. 40; Bouhier, Cout. de Bourg. C. 1, § 122, 123, p. 481; Hertii, de Collis. tom. 1, § 4, n. 15, p. 184 (ed. 1716); *Id.*, land, Mém. Ch. 5, § 4, p. 89 (ed. 1716); *Id.*, ch. 7, § 2, p. 156; Roudenburg, de Stat. tit. 2, ch. 1. Compare Burge, Comm. on Col. & For. Law, Tract. 1, ns. 7, 8, pp. 19, 20; Bartol. Cod. lib. 1, tit. 1, n. 27; Bartol. tom. 7, p. 5.

<sup>3</sup> See *Birtwhistle v. Vardill*, 7 Cl. & F. 67; *Brodie v. Barry*, 2 Ves.

(3) *Immovables not Land*. — Among the class of immovables, not land and houses, are servitudes and easements,<sup>1</sup> and other charges on lands, as mortgages, ground-rents, trust estates, "heritable bonds," dowry, tenancy by courtesy, and all other things, movable or immovable in their nature, which by the local law are deemed immovables, and governed by the *lex loci*.<sup>2</sup>

(4) *Incumbrance of Real Property*. — The validity of a mortgage of land situated in another State is to be governed by the law of that State, although the parties may reside, and the instrument be executed, in another State.<sup>3</sup> Thus, a conveyance of lands executed in another State to secure the repayment of a loan of money is governed by the laws of the State where the lands lie and the suit is brought.<sup>4</sup>

b. *Personal Property*. — The general doctrine is, that a disposition of personal property, or movables, is to be governed by the law of the domicile of the owner, and not by the law of the place where they are situated;<sup>5</sup> and this view is maintained by nearly all foreign jurists, ancient and modern.<sup>6</sup>

127; *Gambier v. Gambier*, 7 Sim. 263, 270; Story, Conf. L. § 448, p. 569. Liverm. Dissert. §§ 88, 89, pp. 72, 73.

Hence persons married where the law of community exists, owning immovable property in a State where it does not exist, on the death of the husband, the wife would be entitled to a dower interest only, and not to a moiety in fee simple; and on the death of the wife, the husband would be entitled to a tenancy by courtesy simply. Story, Conf. L. § 454, p. 572.

1 All servitudes and easements, and other charges on lands, are deemed to be, in the sense of the law, immovables, and governed by the *lex rei sitæ*. *Pittsburg & St. L. R. R. Co. v. Rothschild* (Pa.), 4 Cent. Rep. 109. And in determining whether a conveyance of real estate contains a covenant that runs with the land, the *lex rei sitæ* governs. *Fisher v. Parry*, 68 Ind. 465.

2 *Chatfield v. Berchtoldt*, 25 L. T. (N. S.)

111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

57, 382, 447; -652; 2 *Id.*, 2, §§ 9-20; *Traité des*

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*Mass.*, 78;  
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Appx. Cas.  
5, 67, note;  
: Shaw, 61;  
5, 15; *Id.*,  
.. 8, § 2, p.

328; 2 Burge, Comm. on Col. & For. Law, pt. 2, ch. 9, p. 865.

Thus, where a married woman in Ohio executes in that State a mortgage on her real property in Indiana, the contract is governed by the law of the latter State; and if the mortgage is given to secure the husband's debt, will be invalid. *Swank v. Hufnagle* (Ind.); s. c., 25 Cent. L. J. 60, 11; 12 N. E. Rep. 303.

But a mortgage of real estate being personal property, the assignment thereof is to be governed by the law of the State where the contract of assignment is made, and not by that where the land is situated. *Dundas v. Bowler*, 3 McL. C. C. 397.

4 *Klinck v. Price*, 4 W. Va. 4; *Oregon & Wash. Trust Co. v. Rathbun*, 5 Sawy. C. C. 32.

When not varied by contract, the law of the State where a mortgage is executed, and the mortgaged property situated, furnishes the rule for determining the rights of the mortgagor after condition broken. *Dow v. Memphis and Little Rock R. R. Co.*, 20 Fed. Rep. 260.

A mortgage conveying substantially all a debtor's property, including lands in another State, is governed, as to whether it operates as a general assignment, as to those lands, by the law of the State where they are situated. *Danner v. Brewer*, 69 Ala. 191.

5 See *Cockerell v. Dickens*, 3 Moore, P. C. 98, 132; *Thomson v. Advocate-General*, 13 Sim. 153, 160. *In re Bruce*, 2 Cromp. & Jerv. 436; *Thorne v. Watkins*, 2 Ves. 35; 3 Burge, Comm. on Col. & For. Law, pt. 2, ch. 20, pp. 750-752; 1 Kames Eq. b. 3, ch. § 3; *Ersk. Inst. b. 3, tit. 2, § 40*, p. 515; Story, Conf. L. §§ 364.

6 See *Boullenois, Prin. Gen. 33, p. 8*; 1

The doctrine that movables follow the person<sup>1</sup> has received such general sanction that it may now be regarded as part of the *jus gentium*,<sup>2</sup> and has been maintained both in England<sup>3</sup> and America<sup>4</sup> "with unbroken confidence and general unanimity."

Hence by the law of the owner's domicile is to be determined the validity of each transfer, alienation, or disposition of personal property, whether it be *inter-vivos* or *post-mortem*.<sup>5</sup>

Boullenois, obs. 20, p. 348; 2 Boullenois, Appx. pp. 6, 48; Liverm. Dissert. pp. 128, 129, 130, 162, 163; P. Voet, de Statut. ch. 2, § 4, n. 8, p. 126 (ed. 1715); Fœlix, Conflict des Lois, Revue Étrang. et Franç. tom. 7, pp. 216-227 (ed. 1840); J. Voet, ad Pand. lib. 1, tit. 4, pt. 2, § 11, p. 44; 2 *Id.*, lib. 38, tit. 17, n. 34, p. 596; i. Hertii Opera, de Collis. Leg. § 4, n. 6, pp. 122, 123 (ed. 1737); Rodenburg, de Divers. Stat. tit. 1, ch. 2; *Id.*, tit. 2, ch. 5, § 16; 3 Burge, Comm. on Col. & For. Law, pt. 1, ch. 20, pp. 750, 751; D'Argentré, de Leg. Brit. tom. 1, des Donations, art. 218, Gloss. 6, n. 30, p. 654; Bouhier, Cout. de Bourg. ch. 25, § 2, p. 490; Burgundus, Tract. 2, n. 20, pp. 71, 72.

<sup>1</sup> Holmes v. Remsen, 4 John. Ch. (N.Y.) 487.

It has been said that, if the *lex loci rei sitæ* "were generally to prevail in regard to movables, it would be utterly impossible for the owner in many cases to know in what manner to dispose of them during his life, or to distribute them at his death, not only in the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing with minute accuracy the law of transfers *inter vivos* or of testamentary dispositions and successions in the different countries in which they might happen to be. Any change of place at a future time might defeat the best considered will, and any sale or donation might be rendered inoperative from the ignorance of the parties of the law of the actual *situs* at the time of their acts. There would be serious evils pervading the whole community, and equally affecting the subjects and interests of all civilized nations. But in maritime nations, depending upon commerce for their revenues, their power, and their glory, the mischief would be incalculable. A sense of general utility, therefore, must have first suggested the doctrine; and, as soon as it was promulgated, it could not fail to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy." Story, Conf. L. § 379, p. 478. See Swearingen v. Morris, 14 Ohio St. 28; Harvey v. Richards, 1 Mason, C. C. 412.

<sup>2</sup> Bremer v. Truman, 10 Moore, P. C. 358; Sill v. Worswick, 1 H. Black. 690;

Phillips v. Hunter, 2 H. Black. 408; Bruce v. Bruce, 2 Bos. & Pull. 23; Hunter v. Potts, 4 T. R. 182; Kames, Eq. b. 3, ch. 8, § 3; Ersk. 3, tit. 2, § 40; Story, Conf. L. § 379.

"It is a clear proposition, not only of the law of England, but of every country in the world where law has the sanction of science, that personal property follows the person of the owner, but that it is subject to that law in respect to the disposition of it, and to the transmission of it, by succession or by the act of the person. The law of the country in which the person in any country may dispose of his property is, but the law of the country of which the property is a subject, that will regulate the disposition." Sill v. Worswick, 1 H. Black. 690; Hoffman v. Carow, 22 Wend. (N.Y.) 323; Thomson v. Advocate-Gen. of Scotland, 1 Clark & Finn. 1.

<sup>3</sup> Cockerell v. Dickens, 3 Moo. 98, 131, 132; Phillips v. Hunter, 2 H. Black. 402, 405; Hunter v. Potts, 4 T. R. 182, 192; Bruce v. Bruce, 2 Bos. & Pull. 23 (note); Pipon v. Pipon, Amb. 249; whistle v. Vardill, 5 Barn. & C. 452; Selkrig v. Davies, 1 Rose, B. 478; *In re* Ewin 1 Tyrwhitt, 151; on Foreign Law, pp. 13-15; Karb. b. 3, ch. 8, §§ 3, 4; Ersk. Inst. 2, § 40, p. 515; Dwarria on Statu. 6; 2 Bell, Comm. (5th ed.) 2-10; Dissert. 128-132; 3 Burge, Comm. on Col. & For. Law, pt. 2, ch. 20, pp. 749-751.

<sup>4</sup> French v. Hall, 9 N. H. 137; Williams, 6 Pick. (Mass.) 286, 314; Ewin v. Jones, 3 Mass. 514, 517; D. v. De Laistre, 2 Harr. & J. (Md.) 1; Guier v. O'Daniel, 1 Binn. (Pa.) 3; Holmes v. Remsen, 4 John. Ch. 460; Andrews v. Herriot, 4 Cow. 517 note; 2 Kent, Com., 405, 428. <sup>5</sup> Story, Conf. L. § 380, p. 479. <sup>6</sup> French v. Hall, 9 N. H. 137; v. Little, 9 N. H. 271; Roe Highlant, 2 Doug. (Mich.) 522.

This is true unless there is positive enactment or customary law of the country where they are situate, providing



(1) *Sale valid according to Lex Loci Contractus, but invalid according to Lex Loci Rei Sitæ.* — By the common law a sale of movables is complete without delivery;<sup>1</sup> but in those States where the laws are founded upon the civil law, as in Louisiana, delivery is necessary to complete the transfer:<sup>2</sup> hence, whenever there is a transfer of personal property situated in a State where the civil-law rule prevails, by a person domiciled in a State where the common law is supreme, according to the *lex loci contractus*, there must of necessity be a conflict of principles as to the validity of the transaction.<sup>3</sup>

cial cases, or unless from the nature of the property it has an implied locality. See *Herrick v. King*, 19 N. J. Eq. (4 C. E. Gr., 80; *Bentley v. Whittemore*, 19 N. J. Eq. (4 C. E. Gr.) 465; *Moore v. Bonnell*, 31 N. J. L. (2 Vr.) 92; *Milne v. Moreton*, 6 Binn. (Pa.) 361.

It seems that contracts respecting public stocks or funds are to be carried into execution according to the local law. *Robinson v. Bland*, 2 Burr. 1079; s. c., 1 W. Black. 47.

To the same class belong all local stock or funds, such as bank stock, insurance stock, turnpike or canal or bridge shares, and all other incorporeal property owing to or regulated by local laws. See *Attorney-General v. Bouwens*, 4 Mees. & W. 171, 191-193; *Attorney-General v. Hope*, 1 Crompt., M. & R. 538; s. c., 8 Bligh, 44; 2 Clark & Finn. 84; *Attorney-General v. Dimond*, 1 Crompt. & Jerv. 356, 370, 371.

Such property can be transferred only in the manner prescribed by the local laws. See *In re Ewin* 1 Tyrwh. 151; *Attorney-General v. Dimond*, 1 Tyrwh. 243.

But in the case of *Hoyt v. Thompson*, 19 N. Y. 207, where a canal and banking corporation of New Jersey owned a mortgage security, which they sold and transferred in the State of New York to a bona fide purchaser for value, it was held that such purchaser acquired a perfect title to the mortgage security, notwithstanding the fact that by the law of New Jersey, where the corporation was created and had its situs, the transfer was inoperative as to creditors. See also *Curtis v. Leavitt*, 15 N. Y. 9.

<sup>1</sup> But this is only as between the parties, not as to third persons. To complete his title, the purchaser must take possession within a reasonable time; and if the property be at sea, or *in transitu* from another State, and is incapable of delivery, the title, though complete without delivery, may be lost by an omission to take possession within a reasonable time after its arrival. See *Laufear v. Sumner*, 17 Mass. 110; *Bholen v. Cleveland*, 5 Mason, C. C. 174; *Meeker v. Wilson*, 1 Gall. C. C. 419; Long

on Sales (ed. 1839), 259; 3 Chitty, Comm. Manuf. 272; 1 Black. Com. 446, 448; 2 Kent, Com. 492, 493, 498, 515-522.

By the law of England and of other commercial States, the legal title to goods passes by the mere indorsement and delivery of the bill of lading, without any actual manual possession of the goods represented by it. *Lickharrow v. Mason*, 2 T. R. 63; *Desty on Admr. & Ship.*; *Abbott on Shipp.* pt. 3, ch. 9, § 16; *Story, Conf. L.* § 395, p. 498.

<sup>2</sup> *Durnford v. Brooks' Syndics*, 3 Martin (La.), 222, 225; *Morris v. Mumford*, 4 Martin (La.), 20; *Fisk v. Chandler*, 7 Martin (La.), 24; *McNeil v. Glass*, 13 Martin (La.), 261; *Olivier v. Townes*, 14 Martin (La.), 93, 162.

This is in accordance with the requirements of the well-known rule in the civil law, "*Traditionibus et usucapionibus dominia rerum non nudis pactis, transferuntur.*" Cod. lib. 2 tit. 3, l. 20.

The doctrine as set forth by the Louisiana decisions has been vigorously assailed. See *Liverm. Dissert.* §§ 220-223; *Taylor v. Boardman*, 25 Vt. 589; *Martin v. Hill*, 12 Barb. (N. Y.) 635; *Southern Bank v. Wood*, 14 La. An. 561; *Hughes v. Klingender*, 14 La. An. 52. But this attack is made from the stand-point of the common law.

<sup>3</sup> Thus in *Olivier v. Townes*, 14 Martin (La.), 93, 102, where a ship was sold in Virginia, but before delivery was attached by creditors at New Orleans, and the court held the sale void as to the attaching creditors. And see *Lanfear v. Sumner*, 17 Mass. 110; *Lamb v. Durant*, 12 Mass. 54; *Caldwell v. Ball*, 1 T. R. 205. Compare *Bholen v. Cleveland*, 5 Mason, C. C. 174; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386, 445; *Nathan v. Giles*, 5 Taunt. 558.

But in the case of *Thuret v. Jenkins*, 1 Martin (La.), 318, 353, 354, a ship belonging at New York, and owned there, was transferred while at sea, according to the law of New York, and the ship subsequently arrived at New Orleans, and was attached there before delivery to the vendee, the court held that where a chattel which is "at sea, or in any other place, if any there



It has been said that personal property is subject to the law of the *situs*, without regard to the domicile of the owner;<sup>1</sup> and the validity of a chattel mortgage upon property in another State must be determined by the law of that State.<sup>2</sup> It is competent for a State to adopt such a rule in its own legislation, having perfect jurisdiction over all property, movable as well as immovable, within its territorial limits.<sup>3</sup>

be, in which the law of no particular country prevails, the bargain will have its full effect, *eo instanti*, as to the whole world. And the circumstance of the chattel being afterwards brought into a country, according to the law of which the sale would be invalid, would not effect it." The doctrine of this case has since been affirmed in the case of *Southern Bank v. Wood*, 14 La. An. 561.

In *Simpson v. Fogo*, 1 Hen. & M. (Va.) 195, where a vessel had been mortgaged in England, and was taken to New Orleans by the mortgagor, in whose possession she was left, and there attached by creditors, citizens of Louisiana, in an action to recover their debt, but not on a proceeding *in rem*. The mortgagee intervened and claimed possession of the property. The Louisiana court refused to recognize his right, though valid in England, and sold the ship for the benefit of the Louisiana creditors, and distributed the proceeds amongst them. On the ship being taken subsequently to England, the mortgagee set up his claim, which the English court of exchequer sustained on the ground that the Louisiana judgment was examinable for error on its face, by reason of its disregard of the comity of nations, and was only a judgment *inter partes* and not *in rem*. This doctrine was approved there in the subsequent case of the *Liverpool & Marine Credit Co. v. Hunter*, L. R. 4 Eq. 62; s. c., L. R. 3 ch. App. 479.

<sup>1</sup> *Guillander v. Howell*, 35 N. Y. 657.

The validity of a sale and delivery of personal property in another State, must be determined by the law of the *situs*. *Born v. Shaw*, 29 Pa. St. 288; *Baltimore & O. R. R. Co. v. Hoge*, 34 Pa. St. 214; *D'Ivernois v. Leavitt*, 23 Barb. (N.Y.) 63.

Under an agreement for the construction and delivery of certain machinery, which is to remain the property of the vendors until payment of the purchase-money, they are not bound to deliver it, in order to its erection in another State, by the laws of which it would become part of the realty. *Hawkins v. Brown*, 30 Barb. (N.Y.) 206.

Where the plaintiff's firm in New York sent goods by railroad to the plaintiff's firm in Boston, where they were destroyed by fire while in the freight-house of the defendant company, and it appeared that by the law of Massachusetts (*Rice v. Hart*, 118 Mass. 201) the carrier was not liable

under the circumstance proved, it was held that that law must govern the case, and the action could not be maintained. *Hart v. Hart*, 44 N. Y. Super. Ct. R.

Where a married woman, domiciled in Maryland, owned stock in a bank in Virginia, where the relations of husband and wife are determined by the rule of the common law, a judgment of dividends to the husband was held to discharge the bank from liability. *Bank v. Norfolk Bank*, 84 N. Y. 393; 38 Am. Rep. 528.

The tax laws of a State are not repugnant, as applied to shares of national banks, on the ground that such laws would interfere with the operation of such institutions, as the fiscal agent of the government of the United States. *Haight*, 2 Vr. (N. J.) 399; *State v. Haight*, 2 Vr. (N. J.) 434.

<sup>2</sup> *Watson v. Campbell*, 38 N. Y. 335; s. c., 6 Tr. App. (N. Y.) 335; *Tyler v. Strang*, 21 Barb. (N. Y.) 528.

The law of the *situs*, and not the law of the *domicili*, governs chattel mortgages. Where a mortgage was executed and recorded in Illinois, upon personal property in Indiana, but was recorded in the State, and no delivery was made to the mortgagee, it was held to be invalid as against attaching creditors. *Ames Iron Works v. Warren*, 76 Ind. 512; s. c., 40 A. 258. And a mortgage of chattels in New Hampshire, and not conforming to the law of New Hampshire, but of Massachusetts, where the mortgage was made and the parties resided, has been held to be invalid as against an attaching creditor. *Clark v. Tarbell*, 58 N. H. 88. Where a mortgagor of chattels removes to another State, the mortgagee, to serve his rights, need not again re-mortgage in such other State. *Kennedy v. Stimson*, 32 Minn. 377.

Though a chattel mortgage, executed in another State, be valid, without regard to the property, by the *lex loci contractus*, yet, if the mortgagor take the property into another State, and sell to a purchaser, the title of the latter will be good under the *lex loci rei sitæ*. *McBryre*, 9 Phila. (Pa.) 615; *McBryre v. Jones*, 2 Clark (Pa.) 123.

<sup>3</sup> *Vide ante*, this title, § 1, 48 EIGHTY AND JURISDICTION OF NA

(2) *Assignment of Choses in Action.* — In some countries the assignment of a debt is valid without notice to the debtor; in others, notice to the debtor is necessary to perfect the title in the vendee.<sup>1</sup> It would seem that in England an assignment of personal property, whether it be goods held or debts owing, according to the law of the domicile of the owner, will pass the title in whatever country such debt or *chose in action* is situated, in the absence of any prohibitory law in that country.<sup>2</sup> In America an assignment, made by a creditor residing in a foreign country, according to the formalities and requirements of the laws of that country, will be recognized and enforced, even though it be informal, provided only it be good *jure gentium*.<sup>3</sup>

(3) *Foreign Assignments for Benefit of Creditors.* — A voluntary assignment for the benefit of creditors, with preferences, if valid,

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er v. Howell, 35  
Bonnell, 2 Vr.

9 Fla. 104; 3 Burge,  
Law, pt. 2, ch. 20,  
fl. L. § 395, p. 498.  
ine which prevails

generally throughout the American States,  
the assignment of a debt or *chose in action*  
operates, *per se*, as an equitable transfer of  
the debt; but notice to the debtor is neces-

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4 Mass.  
Wood v.  
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92, 93;  
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R. 185;  
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, 48, 49.

It has been held in this country that  
an assignment of a *chose in action*, valid  
by the law of the place of the domicile  
of the payee, but not perfected according  
to the law of the place of the domicile of  
the payor, which requires notice to him  
of such assignment, will not defeat a valid  
attachment according to the law of the  
*rei sitæ*. See Ward v. Morrison, 25 Vt. 593;  
Emerson v. Partridge, 27 Vt. 8. But in  
Culver v. Benedict, 13 Gray (Mass.), 7, it  
was said that when the law of the place  
of assignment gives the assignee perfect  
title under such assignment, the effect of  
the assignment, and of the title acquired  
under it, is to be determined by the law  
of the place where the assignment was  
made.

3 Blake v. Williams, 6 Pick. (Mass.)  
286, 307, 314; Holmes v. Remsen, 4 John.  
Ch. (N. Y.) 460, 486; s. c., 20 Johns. (N. Y.)  
229, 267; Milne v. Moreton, 6 Binn. (Pa.)  
353, 361, 369.

Where a creditor has assigned a debt  
due to him from a person residing in a  
foreign State, which debt is liable to attach-  
ment or garnishment there, and before  
notice of such assignment is given, the  
debt is attached or garnished by a creditor  
of the assignor, according to the law of the  
*rei sitæ*, it seems that such will not avail if  
the debtor receives notice of such assign-  
ment *pendente lite*, and in time to set it up  
in discharge of the suit against him. See  
Foster v. Sinkler, 4 Mass. 450; Dix v.  
Cobb, 4 Mass. 508; Wood v. Partridge, 11  
Mass. 488; Blake v. Williams, 6 Pick.  
(Mass.), 286, 307, 308, 314; Richardson v.  
Leavitt, 1 La. An. 430; Merchants' Bank  
v. Bank of United States, 2 La. An. 659;  
Chewning v. Johnson, 5 La. An. 678;  
Southern Bank v. Wood, 14 La. An. 561;  
Holmes v. Remsen, 4 John. Ch. (N. Y.),  
460, 486; Muir v. Schenck, 3 Hill (N. Y.),  
228.

by the laws of the State where made, and where he resides, will be valid and binding in all other jurisdictions.

It is an unsettled question whether an involuntary assignment by operation of law in the domicile which is sufficient under the bankrupt or insolvent law has universal operation, so as to transfer the mortgage to the party situated in other countries, and with the process of local or foreign laws by way of arrest, the like, in favor of foreign creditors in the case of movable property is situated. The courts of this country hold that the assignment has an universal operation wherever situated at the time;<sup>1</sup> but most of the States of the Union confine the operations of such an assignment to the territory where the party is declared to be a bankrupt.

<sup>1</sup> Richardson v. Leavitt, 1 La. An. 430; Merchants' Bank v. Bank of United States, 2 La. An. 659; Chewning v. Johnson, 5 La. An. 678; Paradise v. Farmers' and Merchants' Bank of Memphis, 5 La. An. 710. The same rule is said to apply to real estate situated in Louisiana, assigned by an owner residing in a foreign State. See Chewning v. Johnson, 5 La. An. 678; Merchants' Bank v. Bank of United States, 2 La. An. 659.

<sup>2</sup> See Wadham v. Marlow, 1 H. Black. 437-439, note; Sill v. Worswick, 1 H. Black. 690, 691; *In re* Wilson, 1 H. Black. 691, 692; Phillips v. Hunter, 2 H. Black. 402, 405; Wadham v. Marlow, 8 East, 314, 316, note 1; Solomons v. Ross, 1 H. Black. 131, note 691; Jollet v. Deponthieu, 1 H. Black. 132, note 691; Neal v. Cottingham, 1 H. Black. 132, note; Quelin v. Moisson, 1 Knapp, Appeal, 266, note; *Ex parte* Blakes, 1 Cox, 398; Sill v. Worswick, 1 H. Black. 665, 690, 691, 694; Hunter v. Potts, 4 T. R. 192; s. c., in Error, 2 H. Black. 402; Royal Bank of Scotland v. Cuthbert, 1 Rose, Bank Cas. Appx. 472; 2 Rose, Bank Cas. 78, 91; Smith v. Buchanan, 1 East, 6; Selkirk v. Davies, 2 Rose, Bank Cas. 291, 314; s. c., 2 Dow. 230, 250; *In re* Blithman, 35 Beav. 219; 2 Bell, Comm. B. 8, ch. 2, § 1266, pp. 684-690 (4th ed.); Liverm. Dissert. 140; Beames, Lex Merc. (6th ed.) 5, 6.

It is said now to be the well-settled law of England, — "First, that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England; Secondly, that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment; Thirdly, that in England the same doctrine holds under assignments, by her own bankrupt laws, as to personal property and debts of the bankrupt in foreign

countries; Fourthly, attachments made in such assignment in to be held invalid; a British creditor will hold the property under an attachment in a foreign country after such a that a foreign creditor's laws, will be judgment, the local title." See, also, *In re* 219.

<sup>3</sup> See Blake v. V. 286; Olivier v. T. 93, 97-100; Milne v. 353; Very v. McHe v. Fredericks, 4 Z. v. Hubbard, 28 Co. entine, 1 Curt. C. 17 How. (U. S.) 32 23 Ark. 526; Thur in 35 N. Y. 661; 2 91; Law v. Mills, 18 v. Peshine, 1 C. E. Rogers v. Allen, ; McCullough v. Ro born v. Adams, 18 v. Breed, 7 Cush. Columbian Ins. Co Pingree v. Hudson (Mass.), 170; Wall & McH. (Md.) 463 3 Wend. (N. Y.) 1 Page, Ch. (N. Y.) 1 13 Mass. 146; Harv S.) 289; Ogden v. S.) 213, 360-369; N. H. 213; Fox v. v. Armory, 11 Ma ster, 2 Wall. Jr. C v. Bank of United 2 Kent, Com. 404-

and with the English doctrine;<sup>1</sup> but is well as current of the decisions,

*situs* of the subject of a power

*capacity to contract.* — *Personal Status.* Contract depends upon the law of the place of personal ability or disability.<sup>4</sup>  
*of Creditors.* — The validity of an assignment to creditors is to be tested by the law

*in Estate*, 1 Pars. Cas. (Pa.) 399. And where a husband and wife residing in Mississippi, made in that State a contract transferring lands in Louisiana from the husband to the wife, it was held that her capacity to take lands from the husband must be determined by the law of Mississippi; but the effect of the contract on the lands must be determined by the law of Louisiana. *Kelly v. Davis*, 28 La. An. 773.

But it has been held by a federal court that the capacities and incapacities of an individual are to be determined by the law of the place where the person is, and not by that of his domicile. *Polydore v. Prince*, 1 Ware (U. S.), D. C. 402, citing and reviewing *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 1 Pick. (Mass.) 506; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Commonwealth v. Green*, 17 Mass. 515; *Saul v. His Creditors*, 17 Martin (La.), 596; *Case of Francesco*, 9 Am. Jur. 490; *Butler v. Hopper*, 1 Wash. C. C. 499; *Ex parte Simmons*, 4 Wash. C. C. 396; *Lunford v. Coquillon*, 14 Martin (La.), 401; *Rankin v. Lydia*, 2 A. K. Marsh. (Ky.) 470, *The Slave Grace*, 2 Hagg. Adm. 105-114; *Schrimshire v. Schrimshire*, 2 Hagg. Cons. 407; *Compton v. Bearcroft*, Buller's N. P. 114; *Steuart v. Somerset*, 1 Black. Com. 425 note; *Somerset v. Stewart*, 1 Lofft's Rep. 1; *Steuart v. Somerset*, 11 Ed State Trials, 340; s. c., 20 How. St. Tr. 1; *Forbes v. Cochrane*, 2 Barn. & Cr. 448; *Williams v. Brown*, 3 Bos. & Pull. 69; *Shanley v. Harvey*, 2 Eldon Rep. 127, quoted in 2 Hagg. 116.

*Livermore v. Jenckes*, 21 How. (U. S.) 126; *Wickham v. Dillon*, 2 West, L. Mo. 511; *Caskie v. Webster*, 2 Wall. Jr. C. C. 131; *D'Ivernois v. Leavitt*, 23 Barb. (N. Y.) 63; *Ockerman v. Cross*, 54 N. Y. 29; s. c., 40 Barb. (N. Y.) 465; *Moore v. Willett*, 35 Barb. (N. Y.) 663; *Smith's Appeal*, 104 Pa. St. 381.

In Maine, a general assignment for the benefit of creditors, by a debtor domiciled in another jurisdiction, will not protect his property, found in that State, from the attachment of a resident creditor. The

*c. Contract by Master of a Vessel.*—A contract made by the master of a vessel in a foreign country is governed by the law of the owner's domicile, so far as respects his liability.<sup>1</sup>

*d. Personal Property.*—Personal property has no locality: the law of the owners' domicile is to determine the right to its possession,<sup>2</sup> as well as the validity of its transfer or alienation, unless there be some positive or customary law of the country where it is found to the contrary.<sup>3</sup> And a title to personal property, acquired under the laws of the domicile, is available in any other State.<sup>4</sup>

The law appertaining to the domicile of the owner determines the character of personal property.<sup>5</sup>

A transfer of stock is governed by the *lex fori* as to the form of the transfer; but the rights of the parties under it are determined by the *lex domicilii*.<sup>6</sup>

Where property is pledged as security for a debt, the domicile of the creditor is the place at which a redemption must be made.<sup>7</sup>

If a trust of personal property be valid by the law of the domicile, it will be protected on a subsequent removal of the parties into another State.<sup>8</sup> The *lex domicilii* governs as to the testamentary capacity.<sup>9</sup> And the validity of a bequest of personal property depends upon the *lex domicilii*.<sup>10</sup>

Watchman, 1 Ware (U. S.), D. C. 232. But this rule only applies to such property as is found within the jurisdiction of the State at the time of assignment. The Watchman, 1 Ware (U. S.), D. C. 232.

<sup>1</sup> Pope v. Nickerson, 3 Story, C. C. 465. Thus, it has been held that the liability of an English vessel on which goods are shipped in England on an ordinary bill of lading, is to be determined according to the law of the flag. The Titania, 19 Fed. Rep. 101. And a contract of affreightment made, in a foreign port, by the master of a vessel owned in Massachusetts, for the delivery of the cargo in Pennsylvania, is governed by the law of the former State. Pope v. Nickerson, 3 Story, C. C. 465.

<sup>2</sup> Blane v. Drummond, 1 Brock. C. C. 62.

<sup>3</sup> Black v. Zacharie, 3 How. (U. S.) 483; Speed v. May, 17 Pa. St. 91; Oakey v. Bennett, 11 How. (U. S.) 33; Harvey v. Richards, 1 Mason, C. C. 381.

The fiction of law, that the domicile of the owner draws to it his personal estate, wherever it may happen to be, must yield whenever, for the purpose of justice, the actual situs of the property ought to be examined. Green v. Van Buskirk, 7 Wall. (U. S.) 139; reversing s. c., 2 Keyes (N. Y.), 119; 34 Barb. (N. Y.) 457. Thus, by the laws of Illinois, an attachment of personal property there will take precedence over an unrecorded mortgage, executed in another State, where record is not necessary, though the owner, the attaching cred-

itor, and the mortgagee, be all residents of such other State; and effect must be given in the latter to the judgment in the attachment suit. Green v. Van Buskirk, 7 Wall. (U. S.) 139; reversing s. c., 2 Keyes (N. Y.), 119; 34 Barb. (N. Y.) 457.

<sup>4</sup> Shelby v. Guy, 11 Wheat. (U. S.) 361. A deed of personal property, valid by the law of the place where the parties resided, and duly there recorded, protects their title when they afterwards remove into another State to reside. Bank of the United States v. Lee, 13 Pet. (U. S.) 107; s. c., 5 Cr. C. C. 319.

<sup>5</sup> The Kosciusko, 11 N. Y. Leg. obs. 38.

<sup>6</sup> Burr v. Sherwood, 3 Bradf. (N. Y.) 85. A transfer of the stock of a bank located in another State, if good by the law of the owner's domicile, passes the equitable title to it, unless the law of the State where the corporation is located, prohibits such transfer. Black v. Zacharie, 3 How. (U. S.) 483.

Contracts respecting public funds or stock, bank stock, and other property of that incorporeal nature, which owes its existence to, and is regulated by, peculiar and local laws, must be made and carried into execution according to those laws. Dow v. Gould, etc., Co., 31 Cal. 629.

<sup>7</sup> Stoker v. Cogswell, 25 How. (N. Y.) Pr. 267.

<sup>8</sup> Reid v. Gray, 37 Pa. St. 508.

<sup>9</sup> Schultz v. Dambmann, 3 Bradf. (N. Y.) 379.

<sup>10</sup> Knox v. Jones, 47 N. Y. 389; Des-

*c. Married Women.* — The *status* of a married woman and her capacity to carry on business in a foreign State are determined by the law of her domicile.<sup>1</sup> But it is said that the forms of contract she must use, and the manner in which she must sue, are to be determined by the *lex loci actus*; <sup>2</sup> and the forms of conveyance used are to be determined by the *lex rei sitæ*.<sup>3</sup>

Personal property, given to a married woman, is received under the law of her actual domicile, and not of the matrimonial domicile.<sup>4</sup> And a purchase of personal property by a wife, in a State where the common law prevails, vests the same in her husband: it is governed by the law of the domicile.<sup>5</sup>

The mere removal by husband and wife from another State of personal property to which the husband's marital rights had attached by the law of their former domicile, will not change the ownership of the property.<sup>6</sup>

4. OF THE *LEX FORI*. — *a. General Rules.* — The general rule is, that the operation of a contract, and the rights of the parties, so far as they depend on the construction and validity of the agreement, or on questions of sufficiency of performance, are governed by the laws of the place where it is put in suit.<sup>7</sup> The

pard *v. Churchill*, 53 N. Y. 192; *Dupuy v. Wurtz*, 53 N. Y. 556.

A will of personal property must be executed according to the law of the testator's domicile at the time of his death, or it will not pass personal property in a foreign country, though executed with all the formalities required by the laws of that country. *Desesbats v. Berquier*, 1 Binn. (Pa.) 336; *Guier v. O'Daniel*, 1 Binn. (Pa.) 349, n.; *Flannery's Will*, 24 Pa. St. 502; *Carey's Appeal*, 75 Pa. St. 201. And jurisdiction over the estate of a decedent belongs exclusively to the *forum* of the domicile where the assets are situate. *Van Dyke's Appeal* (Pa.), 31 Leg. Int. 69; s. c., 6 Leg. Gaz. 70.

The succession to and distribution of personal property is regulated by the law of the owner's domicile, not by the *lex loci rei sitæ*. *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 460; *Vroom v. Van Horne*, 10 Paige Ch. (N. Y.) 549; *Mills v. Fogal*, 4 Edw. Ch. (N. Y.) 559; *Suarez v. New York*, 2 Sand. Ch. (N. Y.) 173; *Parsons v. Lyman*, 20 N. Y. 103; s. c., 28 Barb. (N. Y.) 564; reversing s. c., 4 Bradf. (N. Y.) 268; *Graham v. Public Administrator*, 4 Bradf. (N. Y.) 127; s. c., 10 Law Rep. 386; *Public Administrator v. Hughes*, 1 Bradf. (N. Y.) 125; *Burr v. Sherwood*, 3 Bradf. (N. Y.) 85; *Mercure's Estate*, 1 Tuck. (N. Y.) 288; *Grote v. Pace*, 71 Ga. 231; *Hutton's Ex'rs v. Hutton* (N. J.), 2 Cent. Rep. 216; *Richardson v. Lewis* (Mo. App.), 4 West Rep. 267.

1 *Hill v. Pine River Bank*, 45 N. H. 300; *Cosio v. De Dernaes*, 1 C. & P. 266; s. c., *Ry. & Wood*, 102; *Story, Conf. L.*, § 136;

*Pothier, Traité des Oblig.* par. 2, ch. vi. § 3; *Savigny*, 137; *Boullenois*, i. 437-439; *Fœlix*, i. 188, no. 89.

Yet it has been held that where a married woman, having a separate estate in lands in Missouri, made a contract in another State, her capacity to make the contract, and its validity, are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract against her separate estate there. *Johnston v. Gawtry*, 11 Mo. App. 322.

2 *Ilderton v. Ilderton*, 2 H. Bl. 145; *Bar. Priv. Intr. L.*, § 53; *Wächter*, ii. 180.

3 *Sell v. Miller*, 11 Ohio St. 331.

4 *Gidney v. Moore*, 86 N. C. 484.

5 *Davis v. Zimmerman*, 67 Pa. St. 70.

6 *Cahalan v. Monroe*, 70 Ala. 271; *Gluck v. Cox*, 75 Ala. 310; *Bush v. Garner*, 73 Ala. 162.

Bringing a wife's property from Mississippi into Alabama could not convert an equitable title into a legal one. *Gluck v. Cox*, 75 Ala. 310.

7 *Broughton v. Bradley*, 36 Ala. 689; *Maguire v. Pingree*, 30 Me. 508; *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Phila. Loan Co. v. Towner*, 13 Conn. 249; *Watson v. Brewster*, 1 Pa. St. 381; *Watson v. Orr*, 3 Dev. (N. C.) L. 161; *Martin v. Martin*, 9 Miss. (1 Smed. & M.) 176; *Bulger v. Roche*, 11 Pick. (Mass.) 36, 38; *Blanchard v. Russell*, 13 Mass. 1, 4; *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137; *Jones v. Jones*, 18 Ala. 248; *Young v. Harris*, 14 B. Mon. (Ky.) 556; *Dakin v. Pomeroy*, 9 Gill (Md.), 1; *De Sobry v. De Laistre*, 2

*lex fori* governs as to the form of the contract and the nature of the action.<sup>1</sup>

*b. The Rule as to Remedies upon Contracts.*—All questions touching the remedy to be allowed upon a contract, and the proper course of enforcing it, are to be determined by the law of the place where suit is brought, according to their own course of proceeding;<sup>2</sup> but this should be in such a manner

Harr. & J. 191; Pitkin v. Thompson, 13 Pick. (Mass.) 64; Smith v. Smith, 2 Johns. (N. Y.) 235; Ruggles v. Keeler, 3 Johns. (N. Y.) 263; Thompson v. Ketcham, 8 Johns. (N. Y.) 189; Sherrill v. Hopkins, 1 Cow. (N. Y.) 103; Whittemore v. Adams, 2 Cow. (N. Y.) 626; Andrews v. Herriot, 4 Cow. (N. Y.) 508, note; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118; Brown v. Free-land, 34 Miss. 181; Anderson v. Doak, 10 Ired. (N. C.) L. 295; Ayres v. Audubon, 2 Hill (S. C.), 601; Le Prince v. Guillemot, 1 Rich. (S. C.) Ch. 187; Pegram v. Williams, 4 Rich. (S. C.) L. 219; Warder v. Arell, 2 Wash. (Va.) 282.

The remedial statutes of one State cannot be invoked to enforce a contract in another. Mineral Point R.R. Co. v. Barron, 83 Ill. 365.

A decree by the court of chancery in England, dismissing a bill filed by an administrator against an executor with respect to assets in that country, is no bar to a like suit in the United States, between the same parties, upon the same title, with respect to American assets. Aspden v. Nixon, 4 How. (U. S.) 467; Stacey v. Thrasher, 6 How. (U. S.) 44.

<sup>1</sup> Lodge v. Phelps, 2 Cai. Cas. (N. Y.) 321; s. c., 1 Johns. Cas. (N. Y.) 139; Andrews v. Herriot, 4 Cow. (N. Y.) 508; Stoneman v. Erie Railway Co. 52 N. Y. 429; Watson v. Brewster, 1 Pa. St. 381; Le Roy v. Beard, 8 How. (U. S.) 451; Ayer's Case, 6 C. H. Rec. 30; Thornton v. Western Reserve Farmers' Ins. Co., 31 Pa. St. 529.

Thus, an instrument, executed with a scroll seal, though considered a deed in the place of its execution, yet, if sued on in a State where scrolls are not treated as seals, the remedy must be as upon an unsealed, simple contract. Bank of United States v. Donnally, 8 Pet. (U. S.) 361; Le Roy v. Beard, 8 How. (U. S.) 451; Warren v. Lynch, 5 Johns. (N. Y.) 239; Andrews v. Herriot, 4 Cow. (N. Y.) 508; Meredith v. Hinsdale, 2 Cai. (N. Y.) 362; Adam v. Kerr, 1 Bos. & Pull. 360. And a note with a scroll seal, although treated as a simple contract in the State where made, yet, if sued in a State where scroll seals are valid, it will be regarded as a specialty. Watson v. Brewster, 1 Pa. St. 381; Treshar v. Everhart, 3 Gill & J. (Md.) 234; Bank of United States v. Donnally, 8 Pet. (U. S.) 361.

<sup>2</sup> Smith v. Atwood, 3 McL. C. Jones v. Jones, 18 Ala. 248; D. Bowler, 3 McL. C. C. 396; Cox v. 2 Ga. 158; Brent v. Shouse, 15 110; De Sobry v. De Laistre, 2 B. (Md.) 191; Dakin v. Pomeroy, 9 G. 1; Pitkin v. Thompson, 13 Pick. (M. Smith v. Spinolla, 2 Johns. (N. Y.) Andrews v. Herriot, 4 Cow. (N. Y.) Watson v. Brewster, 1 Pa. St. 381; v. Loder, 13 N. J. L. (1 Gr.) 68; Watson, 2 Hill (S. C.), 319; McK McKissick, 6 Humph. (Tenn.) 7; v. Drummond, 1 Brock. C. C. 62; & Charlotte Air Line Ry. Co. v. 68 Ga. 384; Bird v. Caritat, 2 Johns. 342; Holmes v. Remsen, 4 Joh. (N. Y.) 460; Bank of the United Donnally, 8 Pet. (U. S.) 361; V. Hunt, 13 Pet. (U. S.) 378; Laird v. 26 Ark. 356; Willard v. Wood (Cent. Rep. 675; Thornton v. Wes serve Farmers' Insurance Co., 31 529; Denny v. Faulkner, 22 K. Alexandria Canal Co. v. Swann, (U. S.) 83; Columbia Fire Ins. Kinyon, 8 Vr. (N. J.) 33; Van R. v. Kane, 1 Gall. C. C. 371; H. Marcan, 3 Mason, C. C. 88; W. Dorr, 3 Mason, C. C. 91; Burchard bar, 82 Ill. 450; Mumford v. Cant 370; Canfranque v. Burnell, 1 Wa 340; Courtois v. Carpentier, 1 C. C. 376; Webster v. Massey, C. C. 157; Golden v. Prince, 3 Wa 313; Bainbridge v. Wilcocks, Bal 536; Nicolls v. Rodgers, 2 Paine, C. Scudder v. Union Nat. Bank, 91 U. Compare Payson v. Withers, 5 Bis 269.

The remedy upon a contract, in substance and form, must be regulated by the *lex fori*, and not by the *lex loci contractus*, even where the contract was formed in the place of making it. v. Brink, 4 Zab. (N. J.) 334; V. Malin, 5 Hal. (N. J.) 208; Gulick v. 1 Gr. (N. J.) 68; Armour v. Mc 7 Vr. (N. J.) 92, 94; Carr v. S. Harr. (Del.) 403, 405; Murray v. 2 La. An. 311; Roberts v. Wilk La. An. 379, 379; Bacon v. Dahl La. An. 600; Collins, etc., Co., v. 10 Mich. 283.

Whether or not an assignment

give effect to the contract according to the laws which gave it validity.<sup>1</sup>

c. *As to Arrest on Foreign Contract.* — It has been held that in an action upon a contract made in a foreign country, the defendant may be held to bail, although by the *lex loci contractus* he would

sonal property, without delivery of possession, be fraudulent as to creditors, is a question of evidence, and determinable by the law of the *forum*. *Barton v. Bolton*, 3 Phila. (Pa.) 369. And the question whether an assignee can sue in his own name, is sometimes a technical one, and sometimes one that is essential. When it is technical, the *lex fori* is to decide. *Glenn v. Busey* (D. C.), 4 Cent. Rep. 614.

A creditor, domiciled in Illinois, there executed an assignment of a debt due from a resident of Minnesota, and there payable. Before notice to the debtor of the assignment, a creditor of the assignor attached the debt by service of a garnished summons. Pending the proceedings, the assignee appeared, and was made a party thereto. The law of Minnesota makes an assignment of a *chose in action* complete without notice to the debtor. In Illinois the law is otherwise. It was held that the law of Minnesota must govern, the proceedings being there instituted, and that being the *sums* of the debt. *Lewis v. Bush*, 10 Minn. 244.

A transfer of stock is governed by the *lex fori* as to the form of the transfer, but not as to the rights of the parties under it. *Burr v. Sherwood*, 3 Bradf. (N. Y.) 85.

The effect of a sale of personal property, under proceedings in attachment, must be determined by the *lex fori*. *Green v. Van Buskirk*, 5 Wall. (U. S.) 307.

A case of general average, settled in a foreign port, according to the local law, binds the right of the parties, though it may differ from our own law. *Peters v. Warren Insurance Co.*, 14 Pet. (U. S.) 99. And where a collision occurs in a foreign port, the rights of the parties depend on the foreign law. *Smith v. Condry*, 1 How. (U. S.) 28.

When, by the laws of the foreign country, where a contract between its citizens was made, the creditor's right to proceed

contract is sus-  
his country will  
t only according  
ue v. Burnell, 1

ns on railroad  
United States,  
rt-on-the-Main by

... brought in good faith for value,  
and sent them to New York for collection,  
it was held that the true owner could en-  
join their payment to the purchaser, and

that the law of New York must control the law and usage existing in Frankfort. *Wylie v. Speyer*, 62 How. (N. Y.) Pr. 107.

Questions of lien, or priority among creditors, relate to the remedy, and must be determined by the law of the forum. *Owens v. Daves*, 15 La. An. 22. *Le Prince v. Guillemot*, 1 Rich. (S. C.) Eq. 187.

An attorney's warrant to appear must be executed in accordance with the *lex fori*. *Commonwealth v. Peterson*, 1 Clark (Pa.), 482.

A contract which has been recognized as valid by the courts of another State will not be enforced by the courts of New Jersey, if it is in violation of the public policy of that State. *Union, etc., Co. v. Erie R. Co.*, 37 N. J. L. 23.

Where a person was killed in a collision on a railroad running through two States, it was held that the right of action was determined by the law of the State where the collision occurred. *Chicago, St. Louis, etc., R. R. Co. v. Doyle*, 60 Miss. 977.

It was held in an action brought in New York, on a promissory note made in Lower Canada, and payable in England, "with interest until paid in England," that interest is only to be calculated to the time of judgment, and that the plaintiffs cannot recover the difference of exchange. *Scofield v. Day*, 20 Johns. (N. Y.) 102. The same court has held that, where a defendant is sued there for a debt contracted in a foreign country, the plaintiff is only entitled to recover the amount at the par of exchange. *Martin v. Franklin*, 4 Johns. (N. Y.) 124.

Where a contract is to be completed in a foreign country, the compensation for which is payable in the money of account of that country, it is deemed performable there, so far that the value of the currency of that country is to be estimated at the place of the forum. *Brown v. Post*, 6 Rob. (N. Y.) 111.

In the absence of any finding to the contrary, it will be assumed in favor of a judgment in an action on a contract made in another State, that the *lex loci* is the same as the *lex fori*. *Chapin v. Dobson*, 78 N. Y. 74.

1 *Camfranke v. Burnell*, 1 Wash. C. C. 340; *Courtois v. Carpentier*, 1 Wash. C. C. 376; *Webster v. Massey*, 2 Wash. C. C. 157; *Golden v. Prince*, 3 Wash. C. C. 313; *Bainbridge v. Wilcocks*, Bald. C. C. 536; *Nicolls v. Rodgers*, 2 Paine, C. C. 437.



not be liable to arrest.<sup>1</sup> It has been said that there is a broad distinction between a contract which *ex directo* excludes personal liability, and a contract made in a country which binds the party personally, but where the laws do not enforce the contract *in personam*, but only *in rem*; for in the latter case the remedy constitutes no part of the contract, and the liability under it is general, so far as the acts of the parties go; and the mode of enforcement is merely a matter of municipal regulation, which may be changed from time to time, as the legislature may choose.<sup>2</sup>

The rule, as settled in England and America, seems to be, that it is of no consequence whether the contract authorizes the arrest and imprisonment of the party in the country where it was made, if there is no exemption of the party from personal liability on the contract.<sup>3</sup>

Where the laws of two States are brought into conflict, the rule is, that the laws prevailing where the relief is sought must have the preference.<sup>4</sup> The rule that the laws relative to the binding force of a contract form a part of the contract to secure the remedy to the creditor, does not extend so far as to carry the remedy into another jurisdiction, and regulate the mode of enforcement of a contract in an action in the courts of another State.<sup>5</sup>

Where interest is allowed, not under contract, by the way of damage, the rate must be according to the *lex fori*.<sup>6</sup>

Questions of evidence are to be determined exclusively by the *lex fori*; <sup>7</sup> and the mode of authenticating a foreign protest, so as to make it evidence, is regulated by the same law.<sup>8</sup>

1 *Bird v. Caritat*, 2 Johns. (N. Y.) 345; *Smith v. Pinolla*, 2 Johns. (N. Y.) 198; *Whittemore v. Adams*, 2 Cow. (N. Y.) 226; *Willings v. Consequa*, 1 Pet. C. C. 317; *Courtois v. Carpentier*, 1 Wash. C. C. 376; *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *De la Vega v. Vianna*, 1 Barn. & Ad. 284; *Don v. Lippmann*, 5 Clark & Fin. 1-15.

But if the contract is simply binding *in rem*, and not *in personam*, in the country where entered into, the rule will be different. See *Ohio Ins. Co. v. Edmonson*, 5 La. 295, 300; *Melan v. Fitz James*, 1 Bos. & P. 138; *Talleyrand v. Boulanger*, 3 Ves. 447; *Flack v. Holm*, 1 Jac. & Walk. 405; *Liverpool Marine Credit Co. v. Hunter*, L. R. 3 Ch. App. 479; *Burge*, Comm. on Col. & For. Law, pt. 2, ch. 20, pp. 766-768; *Story*, Conf. L. § 568, p. 709.

2 See *Symonds v. Union Ins. Co.*, 4 Dall. (U. S.) 417; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Melan v. Fitz James*, 1 Bos. & P. 142; *Hinkley v. Marean*, 3 Mason, C. C. 88; *Titus v. Hobart*, 5 Mason, C. C. 378.

3 *Peck v. Hozier*, 14 Johns. (N. Y.) 346; *Smith v. Pinolla*, 2 Johns. (N. Y.) 198, 200; *Atwater v. Townsend*, 4 Conn. 47; *Woodbridge v. Wright*, 3 Conn. 523, 526; *Smith*

*v. Healy*, 4 Conn. 49; *Imlay v. Ellefsen*, 2 East, 453; *Robinson v. Bland*, 2 Burr, 1077; *De la Vega v. Vianna*, 1 Barn. & Ad. 284.

4 *Runyon v. Groshon*, 1 Beas. 86; *Taberner v. Brentnall*, 3 Harr. (Del.) 262, 265.

5 *Smith v. Atwood*, 3 McL. C. C. 545.

Thus, where an action is brought in one State upon a contract made in another, the creditor's remedy by execution for satisfaction of the judgment is governed by the law existing in the State where the remedy is sought, at the time it is sought. *Doe ex dem. Mathuson v. Crawford*, 4 McL. C. C. 540; *McCracken v. Hayward*, 2 How. (U. S.) 608.

6 *Goddard v. Foster*, 17 Wall. (U. S.) 23.

After judgment recovered, the rate of interest is governed by the *lex fori*. *Hoag v. Dessan* (Pa.), 1 Pitts. 390.

In estimating the interest to be allowed on the judgments of another State, the common law is not presumed to have been in force in such State where it was never subject to the laws of England; in such case the laws of the forum must govern. *Crone v. Dawson* (Mo.), 1 West. Rep. 689.

7 *Kirtland v. Wanzer*, 2 Duer (N. Y.), 278; *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339.

8 *Bank of Rochester v. Gray*, 2 Hill (N. Y.), 227.

*d. Form of Judgments and Executions.* — The form of the judgments to be rendered, and of the executions to be issued, must conform to the *lex fori*, although the party defendant may, in his domestic forum, be entitled to a judgment exempting his person from imprisonment, by virtue of an insolvent law existing there, and of which he has taken the benefit.<sup>1</sup>

*e. Defences arising from Matters Ex Post Facto.* — Defences growing out of matters *ex post facto* may be in the nature of a counter-claim or set-off to an action, or may be matters of discharge, or the limitation of actions.

(1) *Counter-claim, or Set-off.* — It is held at common law that a set-off to an action, allowed by the local law, is to be regarded as a part of the remedy, and may, therefore, be admissible by the *lex fori*, although not admissible by the law of the country where the contract was entered into.<sup>2</sup>

(2) *Discharge.* — The general rule is, that a defence or discharge which is good by the law of the place where the contract is made or is to be performed, is to be held of equal validity wherever the question may be litigated.<sup>3</sup> But this general rule is subject to

The evidence by which a contract is to be proved is a part of the law of the remedy, not of the law of the contract; hence the question whether a contract may be proved by parol, or whether written evidence must be adduced, or whether parol evidence may be received to show the actual agreement of the parties to a blank indorsement of a negotiable instrument, must be determined by the law of the State where the action is brought, and not by that of the State where the contract was made. *Downer v. Chesebrough*, 36 Conn. 39.

1 *Woodbridge v. Wright*, 3 Conn. 523, 526; *Atwater v. Townsend*, 4 Conn. 47; *Smith v. Healy*, 4 Conn. 49; *Hinkley v. Marean*, 3 Mason, C. C. 88; *Titus v. Hobart*, 5 Mason, C. C. 378.

It makes no difference that the contract sued on was made in the State granting such discharge in bankruptcy, because the effect of such discharge is purely local, and is addressed solely to the courts of that jurisdiction. It cannot reach or effect process of courts located in other States, which are governed by their own rules and regulations. And wherever a remedy is sought, the judgment obtained must be governed by the municipal jurisprudence of the State where suit is brought. *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Toomer v. Dickerson*, 37 Ga. 440; *Dimick v. Brooks*, 21 Vt. 569; *Batley v. Holbrook*, 11 Gray (Mass.), 212; *Woodbridge v. Wright*, 3 Conn. 523; *Atwater v. Townsend*, 4 Conn. 47; *Smith v. Healy*, 4 Conn. 49; *Hinkley v. Marean*, 3 Mason, C. C. 88; *Titus v. Hobart*, 5 Mason, C. C. 378.

2 *Ruggles v. Keeler*, 3 Johns. (N. Y.)

263; *Carver v. Adams*, 38 Vt. 502; *Harrison v. Edwards*, 12 Vt. 648; *Gibbs v. Howard*, 2 N. H. 296; *Bliss v. Houghton*, 13 N. H. 126; *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 601; *Davis v. Morton*, 5 Bush (Ky.), 161.

But where a defence inheres in the transaction itself, and does not arise out of something wholly distinct and independent, it may be set up wherever the contract is put in suit, and its effect must be determined by the *lex loci contractus*, and not by the *lex fori*. *Britton v. Bishop*, 11 Vt. 70; *Harrison v. Edwards*, 12 Vt. 648.

Where the *lex fori* allows a plea of want of consideration in a suit on an obligation, which by the *lex loci contractus* could not be pleaded, the *lex fori* is to control. *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Andrews v. Herriot*, 4 Cow. (N. Y.) 508; *Douglass v. Oldham*, 6 N. H. 150; *Williams v. Haynes*, 27 Iowa, 251; *United States v. Donnally*, 8 Pet. (U. S.) 361.

3 See *Bartsch v. Atwater*, 1 Conn. 409; *Atwater v. Townsend*, 4 Conn. 47; *Hempstead v. Reed*, 6 Conn. 480; *Houghton v. Page*, 2 N. H. 42; *Dyer v. Hunt*, 5 N. H. 401; *Hall v. Boardman*, 14 N. H. 38; *Very v. McHenry*, 29 Me. 214; *Smith v. Smith*, 2 Johns. (N. Y.) 235; *McMenomy v. Murray*, 3 Johns. Ch. (N. Y.) 435, 440; *Hicks v. Brown*, 12 Johns. (N. Y.) 142; *Andrews v. Herriot*, 4 Cow. (N. Y.) 515, n.; *Blanchard v. Russell*, 13 Mass. 1; *Prentiss v. Savage*, 13 Mass. 20, 23; *Baker v. Wheaton*, 5 Mass. 511; *Watson v. Bourne*, 10 Mass. 337; *Walsh v. Nourse*, 5 Binn. (Pa.) 381; *Van Reimsdyk v. Kane*, 1 Gall. C. C. 371; *Green v. Sarmiento*, 1 Pet. C. C. 74; *Sturges*

exceptions, which the various States enforce according to their sense of justice.<sup>1</sup>

The American doctrine seems to be, that a discharge under the insolvent laws of one State is not valid against a creditor who is a citizen of another State, and was at the time the contract was entered into, although the contract was made and was to be performed in the State where the debtor received his discharge.<sup>2</sup>

*v. Crowninshield*, 4 Wheat. (U. S.) 122; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 358; *Potter v. Brown*, 5 East, 124; *Ballantine v. Golding*, 1 Coop. Bank. Laws, 397; *Hunter v. Potts*, 4 T. R. 182; *Quin v. Keefe*, 2 H. Black. 553; 2 Kent, Comm. 392, 393, 459; *Story*, Conf. L. § 331, p. 415; *Burge*, Comm. on Col. & For. Law, pt. 2, ch. 21, §§ 1-2, pp. 781-886; *Bell*, Comm. b. 8, ch. 3, § 1267, p. 692 (4th ed.); *Dwarris on Stat.* pt. 2, 650, 651. See, to same effect, *J. Voet ad Pand. lib.* 4, tit. 1, § 29, p. 240; *Id.*, de Statut. ch. 2, § 20, p. 275 (ed. 1715); *Casaregis*, Disc. 179, §§ 60, 61; *Huberus*, lib. 1, tit. 3, §§ 3, 7; 2 *Boullenois*, obs. 46, p. 462; *Molin. Comm. ad Cod. lib.* 1, tit. 1, l. 1; *Conclus. de Stat. tom.* 3, p. 354.

Thus, if infancy is a valid defence by the *lex loci contractus*, it will be a valid defence everywhere. *Thompson v. Ketcham*, 8 Johns. (N. Y.) 89; *Male v. Roberts*, 3 Esp. 163. The same is true of a tender and refusal, which amounts to a full discharge or present fulfilment of the contract by the *lex loci contractus*. *Warder v. Arell*, 2 Wash. (Va.) 282, 293. Also where, by the *lex loci*, equitable defences may be set up by the maker of a negotiable instrument, any subsequent indorsement will not change this right in regard to the holder, who must take such instrument *cum onere*. *Ory v. Winter*, 16 Martin (La.), 277; *Evans v. Gray*, 12 Martin (La.), 475; *Chartres v. Cairnes*, 16 Martin (La.), 1. Payment which is sufficient where made, will be good everywhere. *Bartsch v. Atwater*, 1 Conn. 409; *Warder v. Arell*, 2 Wash. (Va.) 282, 293; *Searight v. Calbraith*, 4 Dall. (U. S.) 325. And where a payment by negotiable bills or notes is held to be a conditional payment by the *lex loci*, it will be so held where suit is brought, although by the *lex fori* such payment would be regarded as absolute. *Bartsch v. Atwater*, 1 Conn. 409; *Descadillas v. Harris*, 8 Greenl. (Me.) 298. Where, by the law of a foreign country, an accepted bill is but a qualified contract, it is governed by that law, although the rule be different in the *lex loci*. *Ellicott v. Early*, 3 Gill (Md.), 439; *Van Cleef v. Therasson*, 3 Pick. (Mass.) 12; *Burrows v. Jemino*, 2 Str. 733; s. c., 2 Eq. Abridg. 525. Acceptances are said to be demand contracts, and are governed by the *lex loci contractus*; and the

same is true of indorsements. *Cooper v. Waldegrave*, 2 Beav. 282; *Lewis v. Owen*, 4 Barn. & Ald. 654; *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Rothschild v. Currie*, 1 Q. B. 43; *Hirschfeld v. Smith*, L. R. 1 C. P. 344. Compare *Short v. Trabue*, 4 Met. (Ky.) 299; *Carlisle v. Chambers*, 4 Bush (Ky.), 273; *Hunt v. Standart*, 15 Ind. 160.

<sup>1</sup> *Story*, Conf. L. § 334, p. 417.

Thus, where the country in which a contract was made, by a general bankrupt law, authorizes a discharge of its subjects from all contracts made with foreigners, and also excludes such foreign creditors from all participation with domestic creditors in the bankrupt's assets, such law would not be enforced in the country of the foreign creditor's residence. *Blanchard v. Russell*, 13 Mass. 1, 6. Neither will courts give effect to the discharge of a foreign debtor under the laws of his domicile, where, under its own laws, the creditor had previously acquired a right to proceed against such foreign debtor's property within its territory. *Hall v. Winchell*, 38 Vt. 590; *Tappan v. Poor*, 15 Mass. 419; *Le Chevalier v. Lynch*, 1 Doug. 170; *Hunter v. Potts*, 4 T. R. 182; *Philips v. Hunter*, 2 H. Black. 402.

In the case of *Wolff v. Oxholm*, 6 Maule & Sel. 92, two Danish subjects, one of them being domiciled in England, entered into a contract, and subsequently the debt was confiscated by the Danish government, and paid into the public treasury. Suit was afterwards brought for the debt in an English court, where it was held that the confiscation by and payment to the Danish government constituted no discharge. The ground on which the English court of King's Bench put their decision was, that the confiscation by the Danish government was not warranted by the law of nations.

<sup>2</sup> See *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Fessenden v. Willey*, 2 Allen (Mass.), 67; *Kelley v. Drury*, 9 Allen (Mass.), 27; reversing *Scribner v. Fisher*, 2 Gray (Mass.), 43.

But where a contract is made between citizens of the same State, within such State, and the creditor afterwards removes to and becomes a citizen of another State, and the debtor, who continued to reside in the State where the contract was made, subsequently obtains a discharge under the

And it is said, that a State insolvent law discharging its citizens from contracts made in a foreign country, while binding on its own citizens,<sup>1</sup> would not be binding anywhere else.<sup>2</sup>

It may be laid down as a general rule, that where, in a discharge in bankruptcy, there is not any positive or virtual extinguishment of all rights and remedies of the creditor, the contract is not deemed to be extinguished,<sup>3</sup> and may be enforced in other countries.<sup>4</sup>

A discharge of a contract by the law of the place where it is made, is generally regarded as a discharge everywhere, without regard to the fact whether it is between citizens, between citizens and foreigners, or between foreigners.<sup>5</sup>

insolvent laws of that State, which laws were in force at the time the contract was entered into, the creditor cannot afterwards enforce the contract in the State where the debtor resides, and the contract was discharged. See *Brigham v. Henderson*, 1 Cush. (Mass.) 430; *Converse v. Bradley*, 1 Cush. (Mass.) 434, note; *Stoddard v. Harrington*, 100 Mass. 87. Judge Redfield says, in a note appended to the case of *Baldwin v. Hale*, 3 Am. Law Reg. (N. S.) 469, 470, that a discharge under State insolvent laws is not a bar to an action upon a promissory note given in and payable in the same State where the discharge was obtained, and which in terms is declared to be operative upon all contracts to be performed within that State, but that a discharge under the general bankrupt laws of the United States has an universal operation throughout the Union, and is not embarrassed by any questions affecting discharges under foreign bankrupt laws. But the Judge cites no authorities in support of his last assertion.

<sup>1</sup> See *Penniman v. Meigs*, 9 Johns. (N. Y.) 325; *Babcock v. Weston*, 1 Gall. C. C. 168; *Murray v. De Rottenham*, 6 John. Ch. (N. Y.) 52; *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 471.

<sup>2</sup> *Blanchard v. Russell*, 13 Mass. 6; *Ellis v. Early*, 3 Gill (Md.), 439; *Very v. McHenry*, 20 Me. 208; *Van Roush v. Van Arsdale*, 3 Caine (N. Y.), 154; *Smith v. Smith*, 2 Johns. (N. Y.) 235; *McMenomy v. Murray*, 3 Johns. Ch. (N. Y.) 435; *Smith v. Buchanan*, 1 East, 6; *Wolff v. Oxholm*, 6 Maule & Sel. 92.

<sup>3</sup> There is a marked difference between cases where by the *lex loci contractus* there is a direct or virtual discharge of the contract or extinguishment of the debt, and where there is only a partial extinguishment of the remedy thereon. See *Carver v. Adams*, 38 Vt. 501; *Story, Conf. L. § 338*, p. 421.

By some insolvent laws there is an absolute discharge from all rights and remedies

of the creditors, and the whole contract extinguished; while others fall short of this extent and operation, in some cases only liberating the person from imprisonment, in others exempting particular portions of the property, and in yet others modifying the liabilities of both the person and property. See *Morris v. Eves*, 11 Martin (La.), 730; *Mather v. Bush*, 16 Johns. (N. Y.) 233; *Phillips v. Allan*, 8 Barn. & Cress. 477; 2 Kent, Comm. 389-404; *Burge, Comm. on Col. & For. Law*, pt. 2, ch. 22, pp. 886-926; 1 Domat. Civ. Law, b. 4, tit. 5, § 1.

<sup>4</sup> See *Boston Type Foundry v. Wallack*, 8 Pick. (Mass.) 186; *Coffin v. Coffin*, 16 Pick. (Mass.) 323; *Judd v. Porter*, 7 Greenl. (Me.) 337.

Where an insolvent law absolves the person of the debtor from imprisonment, but does not relieve his future property, or which only suspends the remedies against the one or the other or both for a limited period, will not be regarded as a discharge of the debt or an extinguishment of the liability in any other country. See *White v. Canfield*, 7 Johns. (N. Y.) 117; *Wright v. Paton*, 10 Johns. (N. Y.) 300; *Peck v. Hozier*, 14 Johns. (N. Y.) 346; *Tappan v. Poor*, 15 Mass. 419; *Boston Type Foundry v. Wallack*, 8 Pick. (Mass.) 186; *Morris v. Eves*, 11 Martin (La.), 730; *Judd v. Porter*, 7 Greenl. (Me.) 337; *Le Roy v. Crowninshield*, 2 Mason, C. C. 160; *Hinkley v. Marean*, 3 Mason, C. C. 88; *Titus v. Hobart*, 5 Mason, C. C. 378; *James v. Allen*, 1 Dall. (U. S.) 188; *Walsh v. Nourse*, 5 Binn. (Pa.) 381; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Quin v. Keefe*, 2 H. Black. 553; *Phillips v. Allan*, 8 Barn. & Cress. 479; *Ex parte Burton*, 1 Atk. 255.

<sup>5</sup> See *Smith v. Smith*, 2 Johns. (N. Y.) 235; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103, 107; *Peck v. Hibbard*, 26 Vt. 703; *Blanchard v. Russell*, 13 Mass. 1; *May v. Breed*, 7 Cush. (Mass.) 15; *Ory v. Winter*, 16 Martin (La.), 277; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Potter v. Brown*, 5

But it is held that the provisions of the Constitution of the United States, prohibiting the States from passing laws impairing the obligations of contracts, prevents a discharge under insolvent laws where the contract is made, from operating as a discharge, unless made between citizens of that State,<sup>1</sup> unless a foreign creditor should become a party to the bankrupt proceedings, prove his claim, and receive his share of the assets.<sup>2</sup>

It is a general rule, that the discharge of a contract by the laws of a place where it was not made, or to be performed, will not operate as a discharge of it in any other country. This doctrine is well established, both in the United States<sup>3</sup> and England.<sup>4</sup>

*East*, 124; *Robinson v. Bland*, 1 W. Black. 258.

There are some cases, however, which lay down a more limited doctrine, and which appear to confine the universal discharge to the case where it is between citizens of the same State. See *Baker v. Wheaton*, 5 Mass. 511; *Watson v. Bourne*, 10 Mass. 337, 340; *Braynard v. Marshall*, 8 Pick. (Mass.) 194. Compare *Blanchard v. Russell*, 13 Mass. 1, 10-12; *Ory v. Winter*, 16 Martin (La.), 277; *Sherrill v. Hopkins*, 7 Cow. (N. Y.) 103, 107; *Peck v. Hibbard*, 26 Vt. 702.

A discharge in bankruptcy in one State is a bar to an action elsewhere on a contract previously made by citizens of that State, although entered into and to be performed in a foreign country. *Marsh v. Putnam*, 3 Gray (Mass.), 551; reviewing *Ogden v. Saunders*, 12 Wheat. (U. S.) 333; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Blanchard v. Russell*, 13 Mass. 7; *McMillan v. McNeill*, 4 Wheat. (U. S.) 209; *Farmers' & Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheat. (U. S.) 131; *May v. Breed*, 7 Cush. (Mass.) 15; *Shaw v. Robbins*, 12 Wheat. (U. S.) 369, note; *Clay v. Smith*, 3 Pet. (U. S.) 411; *Boyle v. Zacharie*, 6 Pet. (U. S.) 635; *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Cook v. Mofat*, 5 How. (U. S.) 295; *Brigham v. Henderson*, 1 Cush. (Mass.) 434; *Springer v. Foster*, 2 Story, C. C. 387; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Hettis v. Bagley*, 12 Pick. (Mass.) 572; *Agnew v. Platt*, 15 Pick. (Mass.) 417; *Savoie v. Marsh*, 10 Met. (Mass.) 594; *Fiske v. Foster*, 10 Met. (Mass.) 597; *Woodbridge v. Allen*, 12 Met. (Mass.) 470; *Isley v. Merriam*, 7 Cush. (Mass.) 242; *Clark v. Hatch*, 7 Cush. (Mass.) 455; *Scribner v. Fisher*, 2 Gray (Mass.), 43; *Potter v. Brown*, 5 East, 131. See, also, *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103, 108.

<sup>1</sup> *Donnelly v. Corbett*, 7 N. Y. 500; *Hicks v. Hotchkiss*, 7 John. Ch. (N. Y.) 297; *Van Hook v. Whitlock*, 26 Wend. (N. Y.) 43; *Soule v. Chase*, 39 N. Y. 342; *Savoie v. Marsh*, 10 Met. (Mass.) 594;

*Agnew v. Platt*, 15 Pick. (Mass.) 417; *Producers' Bank v. Farnum*, 5 Allen (Mass.) 10; *Poe v. Duck*, 5 Md. 1; *Boyle v. Zacharie*, 6 Pet. (U. S.) 348; *Ogden v. Saunders*, 12 Wheat. (U. S.) 358-369.

<sup>2</sup> *Soule v. Chase*, 39 N. Y. 342; *Smith v. Smith*, 3 Pet. (U. S.) 411.

But this doctrine is not applicable to those contracts and discharges made in a foreign country: such contracts and discharges are governed by the general principles of international law. See *Peck v. Hibbard*, 26 Vt. 704; *Very v. McMillan*, 29 Me. 214; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *McMillan v. McNeill*, 4 Wheat. (U. S.) 209; *Ogden v. Saunders*, 12 Wheat. (U. S.) 358; *Haldwin v. Wall*, (U. S.) 223.

<sup>3</sup> See *Smith v. Smith*, 2 Johns. (N. Y.) 235; *Van Raugh v. Van Arsdale*, 3 Johns. (N. Y.), 154; *Frey v. Kirk*, 4 Gill & Cr. (Md.) 509; *Ellicott v. Early*, 3 Gill (Md.) 18; *Bradford v. Farrand*, 13 Mass. 18; *v. Sarmiento*, Pet. C. C. 74; *Le v. Crowninshield*, 2 Mason, C. C. 151; *v. Sheldon*, 12 Wend. (N. Y.) 439; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Ogden v. Saunders*, 12 Wheat. (U. S.) 333-364; *Northern Bank v. Squires*, 18 An. 318; *Peck v. Hibbard*, 26 Vt. 702.

<sup>4</sup> *Lewis v. Owen*, 4 Barn. & Ald. 1; *Phillips v. Allan*, 8 Barn. & Cresk. 1; *Quelin Moisson*, 1 Knapp, 265, note; *v. McLeod*, 4 S. & D. 311; *Smith v. Chanan*, 1 East, 6, 11; 2 Kent, Com. 345, 459; 2 Bell, Comm. (4th ed.) 511, pp. 691-695; 3 Burge, Comm. on For. Law, pt. 2, ch. 22, pp. 924-929.

But it seems that where a promissory note is executed in one State, and indorsed in another State to a citizen thereof, the indorsement is governed by the law of the State where the note was made, and a discharge in bankruptcy in that State will operate as a discharge of the note. See *Blanchard v. Russell*, 13 Mass. 1, 11, 12; *Prentiss v. Savage*, 13 Mass. 20, 23, 24; *Ory v. Winter*, 16 Martin (La.), 277; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103; *Ogden v. Saunders*, 12 Wheat. (U. S.) 360; *Slack*

(3) *Statute of Limitations.*—Statutes of limitation are not questions upon the merits, but simply questions affecting the remedy.<sup>1</sup> Therefore all suits must be brought within the time prescribed by the *lex fori*,<sup>2</sup> although the law of the country where

*Pomery*, 6 Cr. (U. S.) 221; *Potter v. Brown*, 5 East, 123, 130; *De la Chaumette v. Bank of England*, 9 Barn. & Cress. 208; s. c., 2 Barn. & Ad. 385.

Yet the formalities of the indorsement necessary to charge the indorser must be such as are required by the law of the place of indorsement. See *Chatham Bank v. Allison*, 15 Iowa, 357; *Short v. Tarbut*, 4 Met. (Ky.) 299; *Artisans' Bank v. Park Bank*, 41 Barb. (N. Y.) 599; *Trabue v. Short*, 18 La. An. 257; *Musson v. Lake*, 4 How. (U. S.) 262.

*Decouche v. Savatier*, 3 John. Ch. (N. Y.) 190; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Andrews v. Herriot*, 4 Cow. (N. Y.) 528, note 10; *Gulick v. Loder*, 2 Gr. (N. J.) 572; *Van Reimsdyk v. Kane*, 1 Gall. C. C. 371; *Le Roy v. Crowninshield*, 2 Mason, C. C. 151; *Higgins v. Scott*, 2 Barn. & Ad. 413; *British Linen Co. v. Drummond*, 10 Barn. & Cress. 903; *De la Vega v. Vianna*, 1 Barn. & Ad. 284; *Ferguson v. Fyffe*, 8 Clark & Finn. 121, 140.

Continental jurists maintain the same doctrine. See 1 *Boullenois*, obs. 2, 3, p. 530; *J. Voet*, ad Pand. Lib. 5, tit. 1, § 53, p. 338.

The statute of frauds is said to be like the statute of limitations, affecting the remedy merely. See *Leroux v. Brown*, 12 C. B. 801; s. c., 14 Eng. L. & Eq. 247.

<sup>1</sup> See *Medbury v. Hopkins*, 3 Conn. 472; *Woodbridge v. Wright*, 3 Conn. 523; *Decouche v. Savatier*, 3 John. Ch. (N. Y.) 190; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Andrews v. Herriot*, 4 Cow. (N. Y.) 528, note 10; *Brown v. Stone*, 4 La. An. 235;

An. 233; 1) 36; *Van C. 371*; *Le C. C. 151*, ns. (N. Y.) C. C. 437; C. C. 86; 521; *Nash Carpenter Murray v. Ruggles v. nat. Frank. m v. Lach- 5; s. c., 37 ny v. Silli- 10. Barney, ited States McElmoyle 2; Nicolls Townsend*

*v. Jemison*, 9 How. (U. S.) 407; *Bacon v. Rives*, 106 U. S. 99; s. c., 1 Sup. Ct. Repr. 3; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 200, 207; *Louisville, etc., Ky. Co. v. Letson*, 2 How. (U. S.) 497; *Ruckmaboye v. Mottichund*, 8 Moore, P. C. 36; *British Linen Co. v. Drummond*, 10 Barn. & Cress. 903; *De la Vega v. Vianna*, 1 Barn. & Ad. 284; *Huber v. Steiner*, 2 Ding. N. C. 202, 209, 212; *Don v. Lippmann*, 5 Clark & Finn. 1, 13-17.

Where the State and the federal courts have concurrent jurisdiction, a State statute of limitations may be pleaded as effectively in a federal court as it could be in a State court, and in such cases the federal courts will follow the decisions of local State tribunals, and will administer the same justice which the State courts would administer between the same parties. *Price v. Yates*, 19 Alb. L. J. 295; s. c., 246 Mass. *Price v. Gates*, 25 Int. Rev. Rec. 113.

The statute of limitations of another State, where the contract was made, cannot be pleaded in bar. *Townsend v. Jemison*, 9 How. (U. S.) 407; *Le Roy v. Crowninshield*, 2 Mason, C. C. 151; *Egberts v. Dibble*, 3 McL. C. C. 86; *Stillman v. White Rock Manuf. Co.*, 3 Wood. & M. C. C. 539. Compare *Gilpin v. Plummer*, 2 Cr. C. C. 54; *Loveland v. Davidson*, 3 Clark (Pa.), 377; *Hoag v. Demau*, 1 Pitts. (Pa.) 390.

Although the time within which an action may be brought, relates generally to the remedy, and must be determined by the law of the forum, yet when a statute gives a right unknown to common law, and limits the time within which an action shall be brought to assert it, the limitation will be enforced by the courts of any State wherein the plaintiff may sue; and hence, where a statute of the province of Ontario gave compensation for death caused by the wrongful act of another, and further provided that action should be brought within twelve months after the death, it was held that this limitation was also applicable to actions brought in the State of Michigan, under this statute. *Hoyd v. Clark*, 8 Fed. Rep. 849; s. c., 24 Alb. L. J. 508, 13 Repr. 40.

A negotiable promissory note, made in New Orleans, secured by mortgage of real estate in Mississippi, the maker being a citizen of Arkansas, and the promisee a citizen of Louisiana, and no place of payment being named in the note, is subject to the limitations of actions prescribed by



a contract is made between residents of another State, the statute of limitations of such other State cannot be pleaded to a suit brought in New York, though the parties continued to reside in such other State until the bar was complete.<sup>1</sup>

**§. Bills and Notes.** — 1. NOTES, BONDS, ETC. — *a. Rights of Original Parties.* — In general, the rights of the original parties to a negotiable instrument are determined by the law of the place where it was made, and is payable, rather than by that of the State where suit is brought,<sup>2</sup> or than by that of the State in which the consideration may have arisen,<sup>3</sup> unless it stipulates for payment in another jurisdiction.<sup>4</sup>

*b. Liability of Parties.* — It is the general rule of law, both in England<sup>5</sup> and in this country,<sup>6</sup> that every person who places his

(U. S.) 419; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312, 327, 328; *Don v. Lippmann*, 5 Clark & Finn. 19-21.

Thus, the statute of limitations of Georgia can be pleaded to an action in that State founded upon a judgment rendered in the State court of the State of South Carolina. *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312.

Where the laws of a State provide that when a cause of action has arisen in a State or Territory out of that State, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in that State, the removal of a debtor into such State after having resided in another State sufficiently long to avail himself of the bar of the statute of limitations there, will not revive the cause of action in the State into which he removes. *Osgood v. Artt*, 10 Fed. Rep. 365; s. c., 11 Biss. C. C. 160. Thus, under 1 Ind. Rev. Stat. (1852) 77, providing that where a cause has been fully barred by the laws of a place where the defendant resided, such bar will be effective in Indiana. A suit on an administrator's bond executed in Maryland cannot be maintained in Indiana after the expiration of the time allowed by the laws of Maryland in which to bring a suit on such a bond, although before the expiration of such time the defendant has removed to Indiana. *State v. Todd*, 1 Biss. C. C. 69.

<sup>1</sup> *Power v. Hathaway*, 43 Barb. (N. Y.) 214.

<sup>2</sup> *Stacy v. Baker*, 2 Ill. (1 Scam.) 417; *Mendenhall v. Gately*, 18 Ind. 149; *Lawrence v. Baasett*, 5 Allen (Mass.), 140; *Bliss v. Houghton*, 13 N. H. 126; *Emerson v. Partridge*, 27 Vt. 8.

<sup>3</sup> *Pratt v. Wallbridge*, 16 Ind. 147.

<sup>4</sup> *Dunn v. Clement*, 2 Ala. 392; *Holbrook v. Vibbard*, 3 Ill. (2 Scam.) 465; *Rose v. Park Bank*, 20 Ind. 94; *Collins, etc., Co. v. Burkam*, 10 Mich. 283; *Ballard v. Webster*,

9 Abb. (N. Y.) Pr. 404; *Palmer v. Yarrington*, 1 Ohio St. 253; *Wilson v. Lazier*, 11 Gratt. (Va.) 477; *Nichols v. Porter*, 2 W. Va. 13.

The law of the place where a promissory note first becomes binding as a valid contract, governs as to the rights of the parties. *Ludlow v. Bingham*, 4 Dall. (U. S.) 47. Thus, whether a time note given in New Hampshire, by a New Hampshire debtor, to a Massachusetts creditor, has the effect of payment *pro tanto*, is determinable by the law of New Hampshire. *Gilman v. Stevens*, 63 N. H. 342.

Negotiable paper is personal property, within the rule that personal property has no locality, but follows the person of its owner. *Ballard v. Webster*, 9 Abb. (N. Y.) Pr. 404.

The statutes of Alabama require the negotiability and character of bills of exchange, foreign and inland, and promissory notes, payable in bank, to be governed by the general commercial law. *Smyth v. Strader*, 4 How. (U. S.) 404.

The laws of a State where a promissory note is made and assigned, must govern as to the validity of a defence to a suit brought on the note in another State, by the assignee against the maker. *Yeatman v. Cullen*, 5 Blackf. (Ind.) 240.

Whether the rights of a *bona fide* purchaser of a bill or note should be determined by a law of the place where he purchased the instrument, or by that of the place where it is payable, see *Roe v. Jerome*, 18 Conn. 138; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Emanuel v. White*, 34 Miss. 56; *Miller v. Mayfield*, 37 Miss. 688; *Harrison v. Edwards*, 12 Vt. 648.

<sup>5</sup> See *Cooper v. Waldegrave*, 2 Beav. 282; *Allen v. Kemble*, 6 Moore, P. C. 314; *Don v. Lippmann*, 5 Clark & Finn. 1, 12, 13; *Gibbs v. Fremont*, 9 Exch. 31; *Trimbe v. Vignier*, 1 Hing. N. C. 151; s. c., 4 M. & S. 695, 6 C. & P. 25; *Potter v. Brown*, 5 East, 124; 1 Smith, Lead. Cas. 351.

<sup>6</sup> *Powers v. Lynch*, 3 Mass. 77; *Prentiss*



name to commercial paper, whether as maker, drawer, acceptor, or indorser, is liable thereon according to the *lex loci contractus*.<sup>1</sup>

It is said that a negotiable note or a negotiable acceptance, made payable generally, without any specified place, creates a debt payable anywhere, and is a promise to whoever shall be the holder of the note or bill.<sup>2</sup> But such a contract is governed by the law of the place where made.<sup>3</sup>

*c. Interest and Usury.*—Where a note made and dated in one State, and payable at a bank there, is negotiated in another State, the laws of the State where made and payable must govern as to the interest and usury;<sup>4</sup> but where a note is made in one country, and payable in another, it draws interest at the rate of the place where it was made, in the absence of any stipulation to the contrary.<sup>5</sup>

*v. Savage*, 13 Mass. 20; *Hazelhurst v. Kean*, 4 Yeates (Pa.), 19; *Hicks v. Brown*, 12 Johns. (N. Y.) 142; *Lee v. Selleck*, 33 N. Y. 615; *Artisans' Bank v. Park Bank*, 41 Barb. (N. Y.) 599; *Rose v. Thames Bank*, 15 Ind. 292; *Depau v. Humphreys*, 20 Martin (La.), 1; *Trabue v. Short*, 18 La. An. 257; *Carlisle v. Chambers*, 4 Bush (Ky.), 268; *Trabue v. Short*, 5 Cold. (Tenn.) 293; *Brabston v. Gibson*, 9 How. (U. S.) 263.

<sup>1</sup> See *Ory v. Winter*, 16 Martin (La.), 277; *Van Clef v. Therasson*, 3 Pick. (Mass.) 12; *Ellicott v. Early*, 3 Gil (Md.), 439; *The Emulous*, 1 Gall. C. C. 563; s. c., on appeal, *sub. nom.* *Brown v. United States*, 8 Cr. (U. S.) 110; *Burrows v. Jemino*, 2 Str. 733; s. c., *Eq. Bridge*, 525; *Wolff v. Oxholm*, 6 M. & S. 92.

It has been said that when the maker and indorser of a note reside in the same State where it is made, the liability of the indorser is to be determined by the law of such State, notwithstanding the fact that the indorsement was made in another State, where the indorser and indorsee (who resided in a third State) happened to be at the time on business. *Vanzant v. Arnold*, 31 Ga. 210.

And where the member of a Boston house, temporarily in England, accepted, while there, a bill drawn in England upon the Boston firm, it was held that the law governing the acceptance was the Massachusetts law. *Grimshaw v. Bender*, 6 Mass. 157; *Whart.*, Conf. L. § 450; and see, also, *Boyce v. Edwards*, 4 Pet. (U. S.) 111; *McCandlish v. Cruger*, 2 Bay. (S. C.) 377; *Bain v. Ackworth*, 1 Mills (Court Rep.) (S. C.), 107; *Lewis v. Owen*, 4 B. & Ald. 654; *Compare Foden v. Sharp*, 4 Johns. (N. Y.) 183; and *Story*, Conf. L. § 319.

<sup>2</sup> *Savoye v. Marsh*, 10 Met. (Mass.) 594; *Braynard v. Marshall*, 8 Pick. (Mass.) 194.

<sup>3</sup> *Peck v. Hibbard*, 26 Vt. 702; *Spowle*

*v. Legge*, 1 Barn. & Cress. 16; *Kearney v. King*, 2 Barn. & Ald. 301; *Don v. Lippmann*, 5 Clark & Finn. 1, 12, 13.

<sup>4</sup> *Jewell v. Wright*, 30 N. Y. 299; s. c., 9 Abb. (N. Y.) Pr. N. S. 399, n.; 27 How. (N. Y.) Pr. 481; reversing s. c., 12 Abb. (N. Y.) Pr. 55; *Bowen v. Bradley*, 9 Abb. (N. Y.) Pr. N. S. 395; *City Savings Bank v. Bidwell*, 29 Bard. (N. Y.) 325; *First National Bank v. Morris*, 1 Hun (N. Y.) 680; s. c., 4 T. & C. (N. Y.) 182; *Hull v. Wheeler*, 7 Abb. (N. Y.) Pr. 411. And see *Hallard v. Webster*, 9 Abb. (N. Y.) Pr. 404; *Tilden v. Blair*, 11 Alb. L. J. 220.

In an action upon a promissory note made in a foreign country, and payable in sugar, it was held, in conformity to the law or custom of such place, that interest was not recoverable before judgment. *Courtois v. Carpentier*, 1 Wash. C. C. 376.

After coupons have matured, they bear interest at the rate fixed by the law of the place where they are made payable. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Pana v. Bowler*, 107 U. S. 529; s. c., 2 Sup. Ct. Repr. 704.

In an action brought on a promissory note given at Canton, China, the court directed the jury to allow the interest customary at that place. *Cowqua v. Lauderbrun*, 1 Wash. C. C. 521. And where a promissory note was made in Canada, and indorsed in Vermont, in both of which places the rate of interest was six per cent, and was payable on a day certain in the State of New York, where the rate of interest was seven per cent, but was not paid when due; on suit brought, it was held that both the makers and indorsers were liable to pay seven per cent interest, as damage for such delay. *Peck v. Mayo*, 14 Vt. 33.

<sup>5</sup> *Bank of Georgia v. Lewin*, 45 Barb. (N. Y.) 340; *Allen v. Kemble*, 6 Moore, P. C. 314; *Gibbs v. Fremont*, 9 Exch. 25; s. c., 20 Eng. L. & Eq. 555.

*d. Demand, Protest, Notice of Dishonor, and Days of Grace.* — The law of the place where a bill, check, or note is made payable, governs as to the time and manner of demanding payment, days of grace, protest, and giving notice of dishonor.<sup>1</sup>

*e. Indorsement.* — Each indorsement of a bill or note is regarded as a new contract; and the rights and liabilities of an indorser are determined by the law of the place where the indorsement was made,<sup>2</sup> in the absence of affirmative proof that the undertaking is to be subject to other laws;<sup>3</sup> and by the law of the State or

1 *Allen v. Merchant's Bank*, 22 Wend. (N. Y.) 215; *Bowen v. Newell*, 13 N. Y. 290; *Blodgett v. Durgin*, 32 Vt. 361; *Thorp v. Craig*, 10 Iowa, 461; *Williams v. Wade*, 1 Metc. (Mass.) 82; *Musson v. Lake*, 4 How. (U. S.) 262; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Cook v. Litchfield*, 5 Seld. (9 N. Y.) 279; *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 30, 34; *Rothschild v. Currie*, 1 Ad. & El. (2 B., N. S.) 43; *Ballingalls v. Gloster*, 3 East, 481; *Hirschfeld v. Smith*, 12 Jur. (N. S.) 523; s. c., L. R. 1 C. P. 340; 35 L. J., C. P. 177; 1 H. & R. 284.

Where no place of payment is designated in a note, for the purpose of demand, etc., the place where made is to be deemed the place of payment. *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Savoie v. Marsh*, 10 Met. (Mass.) 594; *Blodgett v. Durgin*, 32 Vt. 361; *Peck v. Hibbard*, 26 Vt. 702; *Don v. Lippmann*, 5 Clark & Finn. 1, 12, 13; *Kearney v. King*, 2 Barn. & Ald. 301; *Sprowle v. Legge*, 1 Barn & Cress. 16.

2 *Burrows v. Hannegan*, 1 McL. C. C. 315; *Bank of Illinois v. Brady*, 4 McL. C. C. 268; *Dundas v. Bowler*, 3 McL. C. C. 397; *Orr v. Lacy*, 4 McL. C. C. 243; *Davis v. Clemson*, 6 McL. C. C. 622; *Kipka v. Gaddis* (cited in) 23 Pa. St. 140; *Cox v. Adams*, 2 Ga. 158; *Humphreys v. Powell*, 1 Ill. (Breese) 231; *Bernard v. Barry*, 1 Greene (Iowa), 388; *Carlisle v. Chambers*, 4 Bush. (Ky.) 268; *Briggs v. Latham* (Kan.), 24 Cent. L. J. 468; *Trabue v. Short*, 18 La. An. 257; *Dow v. Rowell*, 12 N. H. 49; *Lee v. Selleck*, 33 N. Y. 615; s. c., 32 Barb. (N. Y.) 522; 20 How. (N. Y.) Pr. 275; *Hatcher v. M'Morine*, 4 Dev. (N. C.) L. 122; *King v. Doolittle*, 1 Head (Tenn.), 77; *Raymond v. Holmes*, 11 Tex. 54; *Bailey v. Heald*, 17 Tex. 102; *Delvalle v. Plumer*, 3 Camp. 444; *Harrison v. Sterry*, 5 Cr. (U. S.) 289; *Le Roy v. Crowninshield*, 2 Mason, C. C. 15; *Van Reimsdyk v. Kane*, 1 Gall. C. C. 371. Compare *Everett v. Vendyres*, 19 N. Y. 436; *Reddick v. Jones*, 6 Ired. (N. C.) L. 107; *Rothschild v. Currie*, 1 Ad. & E. (N. S.) 43.

In a recent case, the defendant indorsed certain notes which she owned, and indorsed them to her husband to negotiate,

who carried them to St. Louis, Mo., and there disposed of them to D., all the parties to the transaction being residents of Illinois; but L., by whom the notes were sold, was a passenger-conductor on a railroad running into St. Louis, and had for several years made his headquarters in that city. D. also was a passenger-conductor on a railroad running through Illinois into St. Louis, and had for years made his headquarters in that city, and kept some of his valuable papers there. In an action upon the notes before disposed of by L. to D., it was held that the contract of indorsement was consummated in Missouri, and that the laws of Missouri must govern in determining the liability of the indorser. *Briggs v. Latham* (Kan.), 24 Cent. L. J. 468.

The general rules of commercial law do not apply to promissory notes in Illinois, but they are governed by a statute differing essentially from the statute of Queen Anne relating to promissory notes. Under the Illinois statute, no demand or notice of non-payment is necessary to bind the indorser; but suit must be brought against the maker, and prosecuted, to effect without unnecessary delay, unless such maker be insolvent or absent from the State. *Harding v. Dilley*, 60 Ill. 528; *Lusk v. Cook*, Breese (Ill.), 84; *Chalmers v. Moore*, 22 Ill. 359; *Saunders v. O'Briant*, 2 Scam. (Ill.) 369; *Hilborn v. Astors*, 3 Scam. (Ill.) 344; *Bledsoe v. Graves*, 4 Scam. (Ill.) 832; *Scuttler v. Platt*, 12 Ill. 417; *Pierce v. Short*, 14 Ill. 144; *Breton v. Walker*, 4 Gilm. (Ill.) 3.

3 *Dunn v. Adams*, 1 Ala. 527; *Levy v. Cohen*, 4 Ga. 1; *Yeatman v. Cullen*, 5 Blackf. (Ind.) 240; *Bank of Illinois v. Brady*, 3 McL. C. C. 268; *Holbrook v. Vibbard*, 3 Ill. (2 Scam.) 465; *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Rose v. Park Bank*, 20 Ind. 94; *Williams v. Wade*, 1 Metc. (Mass.) 82; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Nichols v. Porter*, 2 W. Va. 13.

Where a note payable at the Western Bank of Georgia was indorsed in Alabama, it was held that the indorsement was governed by the laws of Alabama, although the note and indorsement were made with

place where the indorsement is delivered, rather than of that where it is written.<sup>1</sup>

*f. Assignment.* — The liability of an assignor of a note assigned in one State, and sued in another, will be governed by the laws of the State where assigned.<sup>2</sup>

*g. Notes executed in One State, and made payable or indorsed in Another.* — If a negotiable instrument stipulates for payment in a different jurisdiction from the one within which it is made, the law of the place of payment governs the rights of the parties.<sup>3</sup>

*h. Rights of Action against Maker or Acceptor.* — Between the holder and the other parties to a note or bill, there is a privity on which *indebitatus assumpsit* may be brought.<sup>4</sup> But it has been

the intention that the note should be negotiated and paid in Georgia. *Lowry v. Western Bank of Georgia*, 7 Ala. 120.

Where a resident of Wisconsin contracted a debt in New York for which he there executed his note, dated in New York, but payable in Illinois, whither he sent it, and procured it to be indorsed by a resident of that State, and afterward sent it by mail to his creditor in New York; it was held that the contract of the indorser was to be performed in New York, and was governed by the laws of New York. *Lee v. Selleck*, 32 Barb. (N. Y.) 522; s. c., 20 How. (N. Y.) Pr. 275.

1 *Stamford v. Pruet*, 27 Ga. 243; *Young v. Harris*, 14 B. Mon. (Ky.) 556.

Although the law of the place where a promissory note or bill is indorsed, governs in regard to the liability of the indorser, yet the mere act of writing the name does not necessarily constitute an indorsement. There is no contract of indorsement until the note or bill is actually transferred to a third person with intent to enable him to enforce payment. The law of the place of this effectual transfer is the law that governs. Thus, where the maker and indorser of a note were residents of Michigan, and the note was there indorsed for the accommodation of the maker, and sent by the maker to his agent in New York to be delivered to a creditor of the maker in satisfaction of his debt, the court held that the indorsement, as a contract, was made in New York. *Cook v. Litchfield*, 9 N. Y. 279; s. c., 5 Sandf. (N. Y.) 330.

2 *Crouch v. Hall*, 15 Ill. 263.  
3 *Murray v. Gibson*, 2 La. An. 311; *Roberts v. Wilkinson*, 5 La. An. 370, 379; *Bacon v. Dahlgreen*, 7 La. An. 600; *Kuenzi v. Elvers*, 14 La. An. 392; *Coffman v. Bank of Kentucky*, 41 Miss. 212; *Ory v. Winter*, 16 Martin (La.), 277; *Fant v. Miller*, 17 Gratt. (Va.) 47; *Gaylord v. Johnson*, 5 McL. C. C. 448; *Pryor v. Wright*, 14 Ark. 189; *Smith v. Mead*, 3 Conn. 253;

*Tillotson v. Tillotson*, 34 Conn. 335; *Hunt v. Standart*, 15 Ind. 33; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306; *Bank of Orange Co. v. Colby*, 12 N. H. 520; *Peck v. Hibbard*, 26 Vt. 698; *Freeman's Bank v. Ruckman*, 16 Gratt. (Va.) 126. Compare *Raymond v. Holmes*, 11 Tex. 54.

Notes dated in Michigan, having been first negotiated by the maker in New York, where they were payable, with the defendant's indorsement, it was held that he was *prima facie* an accommodation indorser, and the contract of indorsement was made in New York, and governed by the laws of that State. *Cook v. Litchfield*, 9 N. Y. 279; s. c., 5 Sandf. (N. Y.) 330. And where two persons sent their signatures from their residence to another State, with the intention that the blanks should be filled up into a promissory note, to be used in the place where the paper was sent, it was held that, when perfected by the payee, and made payable in the latter place, the note was subject to the laws of that place. *Fant v. Miller*, 17 Gratt. (Va.) 47.

In determining the *lex loci contractus*, the engagement of the maker and indorser of a note are to be treated as independent contracts. If a note payable in another State be indorsed in New York, the liability of the indorser on his contract is to be determined by the New York laws. *Lee v. Sellick*, 33 N. Y. 615; s. c., 32 Barb. (N. Y.) 522; 20 How. (N. Y.) Pr. 275; *Artisans' Bank v. Park Bank*, 41 Barb. (N. Y.) 599.

4 *State Bank v. Hurd*, 12 Mass. 172; *Elsworth v. Brewer*, 11 Pick. (Mass.) 316; *Olcott v. Rathbone*, 5 Wend. (N. Y.) 490; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662; *Bridge v. Johnson*, 20 Johns. (N. Y.) 367; *Frazer v. Carpenter*, 2 McL. C. C. 235.

By the law of Illinois, a note payable to X. or bearer, cannot be transferred by delivery merely, so as to give the bearer a legal title; and even if the transfer was made in a State where a delivery has the effect to pass the title, the same rule will

said that where one of the makers of a joint note resides in the State of New York at the time of making the note, the assignee cannot maintain his action against the assignor in another State before he sues the makers, unless he shows that the suit would have been unavailing in the State where the note was made.<sup>1</sup>

The liability of the indorser of a note is governed by the law of the State where it is payable.<sup>2</sup>

It has been held that a negotiable note payable to bearer, transferred in a foreign country, entitles the holder to maintain a suit thereon, in the country where it was executed, against the other parties,<sup>3</sup> although by the laws of the country where the transfer was made, such note was non-negotiable;<sup>4</sup> and that where a negotiable note is made and indorsed in one country, according to the laws of that country, this confers upon the indorsee the right to maintain a suit in his own name upon such note in another country.<sup>5</sup> Also that where a promissory note is non-negotiable by the laws of the State where it is executed, but is negotiable by the laws of the State where transferred, the indorsee may maintain a suit upon it in the latter State.<sup>6</sup>

(1) *Suits by Administrators and their Assignees.*—An administrator who holds negotiable paper belonging to his deceased, which is payable to bearer, is said to become personally principal on such paper, and entitled to maintain a suit on it in a foreign jurisdiction in which the debtor resides, without taking out letters of administration in such jurisdiction;<sup>7</sup> and it has been said that the indorsee of an administrator may maintain a suit in a foreign

be applied in an action by the bearer in Illinois. *Roosa v. Crist*, 17 Ill. 450.

A promissory note was made and indorsed in blank in the State of New York, where it was payable. By the law of New York, no agreement different from that which the law infers from a blank indorsement can be proved by parol. In a suit on the note against the indorser in Connecticut, it was held that parol evidence of a special agreement different from that implied by law would be received. *Downer v. Chesebrough*, 36 Conn. 39.

<sup>1</sup> *Myers v. Miller*, 3 Mo. 586.

<sup>2</sup> *Gaylord v. Johnson*, 5 McL. C. C. 448.

An assignor is not liable as an indorser of paper not negotiable according to the laws of West Virginia, although it may have been negotiable under the laws of the place where it was made. In order to make an assignor liable for its payment, the holders must aver and show that the maker was insolvent at the time it became due, or at the time of the assignment, if assigned after it became due, or that due diligence has been used to collect it, or that it could not have been made by the use of due diligence; nor can there be a recovery under such circumstances, under the com-

mon counts in assumpsit. *Nichols v. Porter*, 2 W. Va. 13.

Upon a promissory note given in one State and payable in another, with interest and exchange, the exchange is to be calculated on the amount due at the maturity of the note. *Price v. Teal*, 4 McL. C. C. 201.

<sup>3</sup> See *Milne v. Graham*, 1 Barn. & Cress. 192. Compare *Carr v. Shaw*, Bayley on Bills (5th ed.), 16, note; *De la Chaumette v. Bank of England*, 2 Barn. & Ad. 385; *Trimbey v. Vignier*, 1 Bing. N. C. 151.

<sup>4</sup> *De la Chaumette v. Bank of England*, 2 Barn. & Ad. 385; s. c., 9 Barn. & Cress. 208.

<sup>5</sup> See *Trimbey v. Vignier*, 1 Bing. N. C. 151, 158-160; *O'Callaghan v. Thomond*, 3 Taunt. 82.

<sup>6</sup> *Warren v. Copelin*, 4 Metc. (Mass.) 594; *Foss v. Nutting*, 14 Gray (Mass.), 484; *Lodge v. Phelps*, 11 Johns. Cas. (N. Y.) 139; s. c., 2 Cain. Cas. (N. Y.) 321.

<sup>7</sup> *Stearns v. Burnham*, 5 Greenl. (5 Me.) 261; *Barrett v. Barrett*, 8 Greenl. (8 Me.) 353; *Robinson v. Crandall*, 9 Wend. (N. Y.) 425; *Thompson v. Wilson*, 2 N. H. 291; *McNeillage v. Holloway*, 1 Barn. & A. 216. *Vide infra*, 14, 1, c and (1) "SUITS BY AND AGAINST" (ADMINISTRATORS).

country, without the administrator's taking out ancillary letters of administration there.<sup>1</sup>

*i. Defences.*—The maker of a promissory note is entitled, if sued in another jurisdiction, to a discount against the payee by the *lex loci contractus*.<sup>2</sup>

The fact that a note is not stamped according to the law of the place where it was made, will not avail as a defence to a suit there.

The law of Mississippi, allowing to the maker of a promissory note the benefit of all defences of want of consideration, want of consideration, payments, discounts, and set-offs, against the indorser, which he had against the payee, previously to the date of the indorsement, applies to a suit brought in another State upon a note payable in Mississippi, and indorsed in Mississippi.<sup>4</sup>

In an action upon a note made in violation of the usury law of a foreign State, which do not avoid the contract, the defendant cannot avail himself of the penalty given by the foreign law by way of defence.<sup>5</sup>

The question whether the right of action on a note has become outlawed is governed, like other questions relative to the right of action, by the law of the State in which action is brought.<sup>6</sup>

The right of a surety to discharge his obligations by notifying the creditor to pursue the debtor, is part of the contract. The sufficiency of the notice is to be determined by the *lex loci contractus*.

<sup>1</sup> See *Petersen v. Chemical Bank*, 32 N. Y. 21; *Barrett v. Barrett*, 8 Greenl. (8 Me.) 353; *Rand v. Hubbard*, 4 Metc. (Mass.) 252, 258, 259; *Harper v. Butler*, 2 Pet. (U. S.) 239; *Trecothick v. Austin*, 4 Mass. C. C. 16; *Huthwaite v. Phaise*, 1 Man. & Gr. 159, 164; *Rawlinson v. Stone*, 3 Wilson, 1; 2 Str. 1260; *Trimbey v. Vignier*, 1 Bing. N. C. 151. Compare *Stearns v. Burnham*, 5 Greenl. (5 Me.) 261; *Thompson v. Wilson*, 2 N. H. 291; *Dixon v. Ramsay*, 3 Cr. (U. S.) 319; *Pond v. Makepeace*, 2 Metc. (Mass.) 114; *Harper v. Butler*, 2 Pet. (U. S.) 239. *Vide infra*, 14, 1, c (1), (2), "SUIT BY ASSIGNEE OF ADMINISTRATOR."

But this rule, it seems, does not apply to bonds. *Whyte v. Rose*, 3 Q. B. 507.

Where an administrator has obtained a judgment in a domiciliary court, such judgment may be made the basis of an action by such administrator in a foreign State, where the debtor resides or has assets. *Talmage v. Chapel*, 16 Mass. 71; *Smith v. Nicolls*, 5 Bing. N. C. 208.

Where the *lex fori* permits the assignee of a *chose in action* to sue in his own name, the assignee of an administrator may sue in his own name without the administrator taking out ancillary letters of administration in such place. See *Harper v. Butler*, 2 Pet. (U. S.) 239; *Talmage v. Chapel*, 16 Mass. 71; *Rand v. Hubbard*, 4 Metc. (Mass.) 252, 258, 259; *Trecothick v. Aus-*

*tin*, 4 Mass. C. C. 16; *Smith v. Nicolls*, 5 Bing. N. C. 208; *Trimbey v. Vignier*, 1 Bing. N. C. 151.

<sup>2</sup> *Gilman v. King*, 2 Cr. C. C. 151. Thus, a note made in Louisiana and indorsed in Mississippi, and there indorsed, if sued in the former State, is governed by the law of the latter. *Brabston v. Gibson*, 9 How. (U. S.) 263.

<sup>3</sup> *Ludlow v. Van Rensselaer*, 1 N. Y. 94; *Fant v. Miller*, 17 Gr. 47.

<sup>4</sup> *Brabston v. Gibson*, 9 How. (U. S.) 263. Where there is a partial failure of consideration, arising out of an infirmity contemporaneous with the execution of the contract in another State, by whose laws an accommodation indorsement is a defence in such case is reserved against subsequent *bona fide* holders. The maker can avail himself in Louisiana of the same equity against such holder as he can in Mississippi, notwithstanding the mere fact that the maker has made accommodation indorsements to the holder. This is not ground for allowing a set-off of the accommodation indorsement. *Newton v. Graham*, 10 An. 67.

<sup>5</sup> *Willis v. Cameron*, 12 Abb. Pr. 245.

<sup>6</sup> *Bank of United States v. Dimes*, 10 Pet. (U. S.) 361.

<sup>7</sup> Such notice on a contract in West Virginia must be in writing. *Tenant (Pa.)*, 1 Cent. Rep. 596.

2 **BILLS OF EXCHANGE, DRAFTS, CHECK, ETC. — a. Law governing.**—The operation of a bill of exchange is governed by the law of the State where it was made and is payable,<sup>1</sup> rather than by that of the State where suit is brought;<sup>2</sup> or that of the State in which the consideration may have arisen.<sup>3</sup>

b. *What a Foreign Bill.*—A bill of exchange drawn in one of the States of the Union on a person in another is a foreign bill, and to be treated as such. In this respect the States of the Union are to be considered as States foreign to each other, though they are otherwise as to the purposes of the federal constitution.<sup>4</sup>

c. *Bills drawn in One State, and accepted, indorsed, or discounted in Another.*—Bills are demand contracts of acceptance in the place where they are made, and where they are to be performed.<sup>5</sup>

1 But where an acceptance of a draft dated in one State, drawn by a resident of such State on the resident of another, and by the latter accepted without funds, and purely for the accommodation of the former, and then returned to him to be negotiated in the State where he resides, and the proceeds to be used in his business there, he to provide for its payment, is, after it has been negotiated, and is in the hands of a *bona fide* holder for value, and without notice of equities, to be regarded

another, are so far foreign bills as to render their notarial protests, made elsewhere, admissible in the courts of Louisiana without further proof; but notice to drawers or indorsers must be proved by ordinary evidence. *Schneider v. Cochrane*, 9 La. An. 235.

And it is said that a bill drawn in Mississippi, payable in New Orleans, is not subject to the statutes of Mississippi relative to bills of exchange, but is governed by the general principle of commercial law. *Fellows v. Harris*, 20 Miss. (12 Smede & M.) 462.

5 *Lewis v. Owen*, 4 Barn. & Ald. 654.

A bill of exchange drawn in one State, and accepted in another State for the accommodation of the drawer, and negotiated in the latter State, is to be governed by the law of the latter State; and if void by its usury laws, an action cannot be sustained against the drawer in the courts of the State in which the bill was drawn. *Davis v. Clemson*, 6 McL. C. C. 622. And a discharge under the insolvent law of the latter State will not discharge the obligation of the contract. *Springer v. Foster*, 2 Story, C. C. 383. *Vide supra*, § 11, "EFFECT OF FOREIGN BANKRUPT DISCHARGES," particularly c, e, f, and g.

Where a bill of exchange is drawn in the Chicago upon a firm in St. Louis, and is orally accepted by a member of such firm, then present in Chicago, the validity of the acceptance is to be determined by the law of Illinois, and by that law a parol acceptance is valid, and a parol promise to accept is an acceptance. *Scudder v. Union Nat Bank*, 91 U. S. 406. And where a bill of exchange was drawn by the defendant, (N. S.) abroad, on himself in Philadelphia, and was afterwards accepted by him at the latter place, and subsequently protested for non-payment, it was held that the bill was governed by the laws of Pennsylvania. *Golden v. Prince*, 3 Wash. C. C. 313.

Where a bill is made in one State, but by its terms or legal effect is payable in another, the law of the State where it is payable determines its effect, rather than that of the State where it is made;<sup>1</sup> but the liability of the drawer of a bill, payable in another State, is governed by the law of the place where it is drawn, by that of the place where it is payable.<sup>2</sup> And an acceptance is said to be governed by the law of the place of acceptance.<sup>3</sup>

If the acceptor and indorser reside in different States, the contract of the latter is governed by the law of his domicile; and that requires presentment to charge him, he is not liable without it, even if dispensed with by the law of the acceptor's domicile.

It is said, that, where a bill is drawn in a foreign country and indorsed by one who resides there, the indorser is answerable to the holder only, according to the laws of that country;<sup>4</sup> it seems that the indorsee of a bill, drawn in a French West India island, on a house in Bordeaux, payable a certain number of days after sight, and transferred in New York, need not present for payment after protest for non-acceptance, notwithstanding the provisions of the French Commercial Code.<sup>5</sup>

Bills drawn for discount are governed by the law of the place where they are discounted, for they had not validity until then.

*d. Acceptance.* — It has been said that the effect of an acceptance

A promise made in New York to accept a bill of exchange, is governed by the law of that State, notwithstanding it is to be performed abroad. *Scott v. Pilkington*, 15 Abb. (N. Y.) Pr. 280.

Where the drawee of a bill of exchange, residing in New York, writes a letter there to the drawer, who resides in Massachusetts, accepting the bill, which was drawn in Massachusetts, the contract of acceptance is made in New York, and is governed by the law of that State, and the bill must be presented there to the acceptor for payment. *Worcester Bank v. Well*, 8 Metc. (Mass.) 107.

<sup>1</sup> *Gaylord v. Johnson*, 5 McL. C. C. 448; *Pryor v. Wright*, 14 Ark. 189; *Smith v. Mead*, 3 Conn. 253; *Tillotson v. Tillotson*, 34 Conn. 335; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306; *Bank of Orange Co. v. Colby*, 12 N. H. 520; *Peck v. Hibbard*, 26 Vt. 698, 702; *Freeman's Bank v. Ruckman*, 16 Gratt. (Va.) 126; *Boyce v. Edwards*, 4 Pet. (U. S.) 111; *Hunt v. Standart*, 15 Ind. 33; *Frazier v. Warfield*, 17 Miss. (9 Smed. & M.) 220; *Cooper v. Waldegrave*, 2 Beav. 282; *Kearney v. King*, 2 Barn. & Ald. 301; *Spowle v. Legge*, 1 Barn. & Cress. 16; *Don v. Lippmann*, 5 Clark & Finn. 1, 12, 13. Compare *Raymond v. Holmes*, 11 Tex. 54.

But it has been held in New York that an action upon a bill of exchange payable in that State, but drawn and indorsed in a foreign country or another State, the law of that State controls the interpretation

and validity of the indorsement, as between the indorsee and the drawer. *E. Vendyres*, 19 N. Y. 436; s. c., 2 (N. Y.) 383; *Bright v. Judson*, 4 (N. Y.) 29. See, also, *Williams v. Metc.* (Mass.) 82; *Musson v. How.* (U. S.) 262.

And where bills were accepted, in London, on a promise to provide to meet them, the contract was held to be governed by the law of England. *Bridge v. Wilcocks*, Bald. C. C. 53.

<sup>2</sup> *Allen v. Merchants' Bank*, 22 (N. Y.) 215; *Cowperthwaite v. Sandf.* (N. Y.) 416; s. c., 3 N. Y. 221; *roll v. Upton*, 2 Sandf. (N. Y.), 171; *ford v. Branch Bank*, 6 Ala. 12; *T. Craig*, 10 Iowa, 461; *Hunt v. Star* Ind. 33.

<sup>3</sup> *Kelly v. Smith*, 1 Metc. (Ky.) 1.

Thus, where the law of the place of acceptance requires a notice of non-acceptance of a bill presented before maturity, an omission to notify will be excused, because, by the law of the place where the bill was presented, notice of acceptance is unnecessary. *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215.

<sup>4</sup> *Musson v. Lake*, 4 How. (U. S.) 262.

<sup>5</sup> *Powers v. Lynch*, 3 Mass. 77.

<sup>6</sup> Yet it is held that the payee must conform to the French law, in order to enforce his claims against the drawer. *Sheldon*, 12 Wend. (N. Y.) 439.

<sup>7</sup> *Orr v. Lacy*, 4 McL. C. C. 243.

ance is always to be determined by the laws of the place where it is made;<sup>1</sup> but the better doctrine appears to be, that the acceptance of a bill of exchange is governed by the laws of the State or place wherein the bill is made payable.<sup>2</sup>

*e. Transfer.*—The mode of transferring a bill of exchange, payable in a specific country or State, is governed by the laws of that country or State.<sup>3</sup>

*f. Protest and Notice of Dishonor.*—Bills of exchange, when dishonored, should be protested by the holder, and due notice thereof given to all parties interested. The common law requires the protest to be made and the notice given at the time, in the manner and by the persons prescribed in the place where the bill is payable.<sup>4</sup>

Protest is not necessary on the dishonor of a bill drawn in one State, payable in another, except to support the claim to statutory damages.<sup>5</sup>

*g. Days of Grace.*—It is almost an universal custom amongst civilized nations to allow some time beyond the period fixed for the payment of negotiable instruments. This period of indulgence is commonly known as "days of grace."<sup>6</sup> The law of a place

<sup>1</sup> See *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Rothschild v. Currie*, 1 Q. B. 43; *Hirschfeld v. Smith*, L. R. 1 C. P. 344. Compare *Hunt v. Standart*, 15 Ind. 33; *Short v. Trabue*, 4 Metc. (Ky.) 299; *Carlisle v. Chambers*, 4 Bush (Ky.), 273.

<sup>2</sup> *Frazier v. Warfield*, 17 Miss. (9 Smed. & M.) 220; *Bainbridge v. Wilcox*, 1 Baldw. C. C. 536. Compare *Mason v. Dousay*, 35 Ill. 424; *Grimshaw v. Bender*, 6 Mass. 157.

<sup>3</sup> *Everett v. Vendyres*, 25 Barb. (N. Y.) 382.

<sup>4</sup> See *Thorp v. Craig*, 10 Iowa, 461; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Cook v. Litchfield*, 5 Seld. (9 N. Y.) 279; *Hunt v. Standart*, 15 Ind. 33; *Short v. Trabue*, 4 Metc. (Ky.) 299; *Carlisle v. Chambers*, 4 Bush (Ky.), 273; *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103; *Boyce v. Edwards*, 4 Pet. (U. S.) 111; *Ticknor v. Roberts*, 11 La. 14; *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227; *Robinson v. Bland*, 1 Black. (U. S.) 258; *Emory v. Greenough*, 3 Dal. (U. S.) 370, note; *Smith v. Smith*, 2 Johns. (N. Y.) 235; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 190; *Harrison v. Sterry*, 5 Cr. (U. S.), 289; *Slocum v. Pomeroy*, 6 Cr. (U. S.) 221; *Lanusse v. Barker*, 3 Wheat. (U. S.) 101, 146; *Melan v. Fitz James*, 1 Bos. & P. 138; *Rothschild v. Currie*, 1 Ad. & El. (N. S.) 43; *Hirschfeld v. Smith*, L. R. 1 C. P. 344; *Ballingalls v. Gloster*, 3 East, 481.

But it is said that the necessity of a demand and protest, and the circumstances under which notice may be required or dis-

pensed with, are incidents of the original contract, which are governed by the laws of the place where the bill is drawn. See *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Carlisle v. Chambers*, 4 Bush. (Ky.) 273; *Short v. Trabue*, 4 Metc. (Ky.) 299; *Hunt v. Standart*, 15 Ind. 33; *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Hirschfeld v. Smith*, L. R. 1 C. P. 344; *Rothschild v. Currie*, 1 Ad. & El. N. S. 43. The reason is said to be, because they constitute implied conditions, upon which the liability of the drawer is to attach according to the *lex loci contractus*; and that if the bill is negotiated, the like responsibility attaches upon each successive indorser, according to the law of the place of his indorsement, each indorser being treated as a new drawer. See *Rothschild v. Currie*, 1 Ad. & El. N. S. 43; *Ballingalls v. Gloster*, 3 East, 481.

It is said that a note payable in France, though drawn in England, is, in English practice, a foreign bill; and that notice of dishonor according to the French law will be sufficient. See *Hirschfeld v. Smith*, 12 Jur. N. S. 523; s. c., L. R. 1 C. P. 344; 35 L. J. C. P. 177; 1 H. & R. 284.

Where a bill was drawn and dated in Philadelphia, by C. & H., residents of Montgomery, Alabama, upon a firm in Mobile, a protest of an Alabama notary under seal, stating that he had notified the drawers, was held not sufficient. *Fitler v. Morris*, 6 Whart. (Pa.) 406.

<sup>5</sup> *M'Murhey v. Robinson*, 10 Ohio, 496.

<sup>6</sup> The period allowed as "days of grace" is different in different nations, varying in



where a draft is made payable governs as to its being payable or without grace.<sup>1</sup>

*h. Action on.*—For purposes of jurisdiction, "the cause of action" upon a bill of exchange arises at the place where it is made payable, by the drawer and acceptor, though both reside in another jurisdiction.<sup>2</sup> It is not necessary, in order to sustain an action by an indorser, to recover the amount paid by him on the bill or to put up a bill of exchange, that the bill should be indorsed in blank or to the holder, to whom the payment was made.<sup>3</sup> But where the holder accepts a bill without funds of the drawer in his hands, he cannot sue the drawer until he has paid the bill, or has done some act equivalent to payment, or is in confinement under a *capias* or *isfaciendum* at the suit of the holder.<sup>4</sup>

The holder of a draft has been held entitled to recover a sum of money paid to the drawer for the express purpose of putting up said draft, notwithstanding the money had been transferred to the bank, though after a demand for payment, to the trustees of the bank for the drawer.<sup>5</sup>

If a bill single, executed in Tennessee, payable in New Orleans, is negotiable and negotiated in Tennessee, the holder is entitled to maintain an action thereon, without regard to its negotiability under the laws of Louisiana.<sup>6</sup>

The holder of a bill may sue the indorser in a federal court after protest for non-acceptance, though such suit be forbidden by the State law.<sup>7</sup>

(1) *Action by Indorsee.*—On a bill of exchange, payable in one country, order, drawn, accepted, and payable in one country, an indorsee can maintain an action against an acceptor on it in that country, though by the law of another State, where the indorser and acceptor were domiciled at the time of the indorsement, such action could not be maintained.<sup>8</sup>

duration from three to eleven days. Story, *Conf. L.* § 361, p. 446; Bayley on Bills (5th Am. ed.), 234, 235; Chitty on Bills, 407.

<sup>1</sup> Bowen v. Newell, 5 Sandf. (N. Y.) 326; s. c., 8 N. Y. 190; 2 Duer (N. Y.), 584; 13 N. Y. 290; Thorp v. Craig, 10 Iowa, 461; Thorne v. Watkins, 2 Ves. 35.

A bill of exchange payable at sight in New York was sued upon in Wisconsin; and the court held that since it was a bill which in Wisconsin would carry days of grace, in the absence of proof to the contrary, it must be presumed that it would do likewise in New York, and that protest of non-payment on the day of its first presentment was premature, and would not hold an indorser. Walsh v. Dart, 12 Wis. 635.

<sup>2</sup> Bank of Commerce v. Rutland and Washington Railroad Co., 10 How. (N. Y.) 17, 1.

<sup>3</sup> Palmer v. Blight, 2 Wash. C. C. 96.

<sup>4</sup> Parker v. United States, 1 Pet. 262.

<sup>5</sup> Seligman v. Wells, 17 Blat. s. c., 1 Fed. Rep. 302; 9 Repr. 57.

<sup>6</sup> Woods v. Ridley, 11 Humph. 194.

<sup>7</sup> Watson v. Tarpley, 18 How. 517.

<sup>8</sup> Robertson v. Burdekin, 1 Ro. Cas. 812; s. c., 6 Dunl. B. & M. la Chaumette v. Bank of England, C. 208; s. c., 2 B. & A. 385; Tucker, L. R. 3 Q. B. 77; s. c., 8 830.

The payee or indorser of a bill of exchange may maintain an action against the acceptor, the bill being taken to be for value received. From the nature of the engagement of acceptance there is a direct and immediate relation between the parties on acceptance, and not a collateral engagement to

The liability of the indorser of a foreign bill to the indorsee is governed by the law of the place where the contract of the indorsement was made, though by the law of the place where the instrument was drawn and made payable, he may have no recourse against the drawer, in consequence of the omission of the indorsee to comply with the requirements of the foreign law.<sup>1</sup>

*i. Interest.* — The drawer of a bill is liable only for the rate of interest fixed by the law of the place on which it is drawn,<sup>2</sup> unless it was drawn with a view to another place.<sup>3</sup>

The indorser of a bill of exchange is liable for interest, according to the law of the place on which it is drawn.<sup>4</sup>

*j. Damages.* — Damages on a bill are to be assessed according to the law of the place where the bill was drawn, unless it was drawn with a view to another place;<sup>5</sup> and each indorser on the bill is liable in damages thereon according to the law of the place where the indorsement was made.<sup>6</sup>

Where a bill is drawn payable out of the State, though all the

debt of another, but a direct and absolute engagement to pay the money to the holder of the bill. The liability of the acceptor of a bill is like that of the maker of a note; and if debt lies against the latter, there is no reason why it should be denied against the former. *Raborg v. Peyton*, 2 Wheat. (U. S.) 385; *Kirkman v. Hamilton*, 6 Pet. (U. S.) 20.

<sup>1</sup> *Armar v. Sheldon*, 12 Wend. (N. Y.) 439; and see *Cowperthwaite v. Sheffield*, 3 N. Y. 243.

<sup>2</sup> *Boyce v. Edwards*, 4 Pet. (U. S.) 111; *Lanusse v. Barker*, 3 Wheat. (U. S.) 101; *Bank of the United States v. Daniel*, 12 Pet. (U. S.) 33; *Andrews v. Pond*, 13 Pet. (U. S.) 65; *Bank of Illinois v. Brady*, 3 McL. C. C. 268.

<sup>3</sup> *Winthrop v. Pepon*, 1 Bay. (S. C.) 468; *Anon*, 2 Hayw. (N. C.) 280; *Schermerhorn v. Pelham*, Cam. & N. (N. C.) 452; *Foden v. Sharp*, 4 Johns. (N. Y.) 183; *Hazelhurst v. Kean*, 4 Yeates (Pa.) 19; *Boyce v. Edwards*, 4 Pet. (U. S.) 123; *Golden v. Prince*, 3 Wash. C. C. 316; *Price v. Page*, 24 Mo. 65; *Page v. Page*, 24 Mo. 595; *Bouldin v. Page*, 24 Mo. 594.

Where a contract to accept bills of exchange and the bills upon a person is made, it is held that the contract is governed by the law of the place where the bills were drawn. (U. S.) 111.

t. 85.

Bay. (S. C.)

280; *Scher-*

(N. C.) 452;

N. Y.) 183;

es (Pa.), 19;

(U. S.) 123;

C. C. 400;

*Potter v. Brown*, 5 East, 124

C. 316; *Price*

*Page*, 24 Mo. 65; *Page v. Page*, 24 Mo. 595; *Bouldin v. Page*, 24 Mo. 594.

Thus, where a bill was drawn in Nassau by a resident in Charleston, on another resident of that city, and by him accepted but not paid, it was held that neither the drawer nor acceptor was liable for damages beyond the interest, in a suit brought in Charleston. *Bain v. Ackworth*, 1 Treadw. (S. C.) Const. 107; *McCandlish v. Cruger*, 2 Bay. (S. C.) 377.

<sup>6</sup> See *Powers v. Lynch*, 3 Mass. 77; *Prentiss v. Savage*, 13 Mass. 20, 23, 24; *Williams v. Wade*, 1 Met. (Mass.) 82, 83; *Depau v. Humphreys*, 20 Martin (La.), 114, 15; *Hicks v. Brown*, 12 Johns. (N. Y.) 142; *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Slacum v. Pomery*, 6 Cr. (U. S.) 221; *Lenox v. Wilson*, 1 Cr. C. C. 170; *Trimbe v. Vignier*, 1 Bing. N. C. 151, 159, 160; *Hirschfeld v. Smith*, L. R. 1 C. P. 340; *Rothschild v. Currie*, 1 Q. B. 43. Compare *Hunt v. Standart*, 15 Ind. 33; *Short v. Trabue*, 4 Met. (Ky.) 399; *Carlisle v. Chambers*, 4 Bush (Ky.), 273.

This doctrine is said to be in entire conformity with the general rule that the law of the place of payment is to govern, because each successive indorser does not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and upon default of such acceptance and payment, upon due notice, to reimburse the holder in principal and damages at the place where they respectively contracted. See *Powers v. Lynch*, 3 Mass. 77; *Prentiss v. Savage*, 13 Mass. 20, 24; *Hicks v. Brown*, 12 Johns. (N. Y.) 142; *Dundas v. Bowler*, 3 McL. (U. S.) 123; C. C. 400; *Potter v. Brown*, 5 East, 124 C. 316; *Price*

parties thereon reside in the State, on protest for non-payment, the drawer is liable for damages as on a bill drawn on a payee resident out of the State.<sup>1</sup>

*k. Defences.* — Where the holder of a bill of exchange proves the debt against the estate of the acceptor under proceedings in insolvency, in another State, whereby the debtor is absolutely discharged, and receives a dividend thereon, he thereby discharges the drawer.<sup>2</sup> And it has been held, that, where a bill is drawn in Mississippi, no matter where it is payable, the drawer may set up, even against an innocent holder, that there was no consideration, as that defence is allowed by Mississippi Revised Code, art. 2, 355.<sup>3</sup>

3. CHECKS. — It seems that the execution of a check in the ordinary form, not describing any particular fund, does not operate as an assignment, equitable or otherwise, of funds in the hands of the drawee,<sup>4</sup> although a special designation of the fund will so oper-

It has been held also not to be a departure from the rule to hold that the time when the payment of such a bill is to accrue, is to be determined according to the law of the place where the bill is payable, because such is the proper interpretation of the contract, according to the rules of law, and the presumed intention of the parties. See *Vidal v. Thompson*, 11 Martin (La.), 23, 24.

Where a bill was drawn, accepted, and transferred in the State of New York, the acceptance of which was obtained by fraud, and without consideration, but the holder took *bona fide*, without any knowledge of the fraud; in an action brought in Connecticut on such bill, against the acceptor, it was held (1) that the rule of damages was to be in conformity with the law of New York; and (2) that, by the law of that State, the plaintiff was entitled to recover all that he had actually paid for the bill, but nothing more. *Roe v. Jerome*, 18 Conn. 138.

In a suit in New York against indorsers, on a bill drawn at Mobile, payable in London in sterling money, the indorsement having been made at Mobile, damages are recoverable according to the statutes of the State of Alabama; and in the absence of proof of those statutes, the court directed damages according to the law merchant, which simply gives re-exchange; and the rate of exchange, at the time of the service of the notice of protest, being at par, estimating the value of the pound sterling at the rate fixed by the act of Congress, the sum recoverable was turned into Federal currency at that rate. *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416.

<sup>1</sup> *State Bank v. Rodgers*, 3 Ind. 53.

The Kentucky statute of 1798, giving ten per cent damages on bills of exchange

drawn in Kentucky on persons out of that State, which were returned unpaid, has been held not to apply to a bill drawn in that State, all the parties to which are citizens and residents of that State, although made payable in New Orleans. *Clay v. Hopkins*, 3 A. K. Marsh. (Ky.) 485; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32.

The Tennessee act of 1827, ch. 14 (*Schermerhorn v. Pelham*, Cam. & N. (N. C.) 452), provides for the allowance of three per cent damages on bills of exchange "drawn or indorsed in this State on any persons, etc., of or in any other State." The mere fact that a bill is payable in another State has been held not to bring it within this statute. *Cox v. Bank of Tennessee*, 3 Sneed (Tenn.), 140.

<sup>2</sup> *Gardner v. Lee's Bank*, 11 Barb. (N. Y.) 558. *Vide infra*, 11, 11 a, "PARTICIPATION IN BANKRUPT PROCEEDINGS."

<sup>3</sup> *Wood v. Gibbs*, 35 Miss. 559.

<sup>4</sup> See *Attorney-General v. Insurance Co.*, 71 N. Y. 325; *Vreeland v. Blunt*, 6 Barb. (N. Y.) 182; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; reversing s. c., 6 Paige Ch. (N. Y.) 415; *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221; *Duncan v. Berlin*, 60 N. Y. 151, 153; *Tyler v. Gould*, 48 N. Y. 682; *Aetna National Bank v. Fourth National Bank*, 46 N. Y. 83; *Randolph & Co. v. Canby*, 11 Nat. Bankr. Reg. 296; *Burn v. Carvalho*, 4 Myl. & Cr. 690; *Malcolm v. Scott*, 3 Hare, 39; *Yeates v. Groves*, 1 Ves. Jr. 280.

A. collected \$11,072 for B., and sent B. a check therefor on a bank on the sixteenth day of the month, and charged himself with the amount in his account with the bank on that day, and on the 18th following A. had on deposit more than sufficient

ate.<sup>1</sup> However, it has been said, by the United States Circuit Court, for the eighth circuit, that the rule thus broadly stated seems to be applicable only to cases at law, and that such an order, as soon as notice is given to the drawee, works an assignment in equity.<sup>2</sup>

It was recently held that a check or draft, drawn upon a fund more than sufficient to pay it, operates, as between the drawer and payee, as an equitable assignment of the amount therein specified.<sup>3</sup>

An instrument is not the less a check because the fact is apparent on its face that the drawer and drawee are residents of different States.<sup>4</sup>

4. **LETTERS OF CREDIT.**—Where a person domiciled in one country, and having his place of business there, writes a letter of credit, addressed to a person or firm in another country, it being a contract to be executed in such other country, it must be governed by the laws of that country.<sup>5</sup> Thus, a letter of guaranty written in the United States, and addressed to a house in England, being an agreement to be executed in England, must be construed according to the laws of that country.<sup>6</sup> In *Scott v. Pilkington*,<sup>7</sup> a merchant domiciled in England, and having his place of business there, gave a letter of credit to parties in New York, whereby they were authorized to draw bills of exchange on his house in Liverpool, for a given amount, which letter was delivered to the defendant in New York. In a suit by a drawee for non-acceptance of the drafts, it was held to be a contract governed by the laws of New York.<sup>8</sup> And a letter of credit given in Boston, by the agent

money to meet the check. On the 18th A. made an assignment for the benefit of creditors to E. and F., who immediately accepted the trust. On the 19th the bank received notice of the assignment. On the same day B. received the check, and presented it to the bank after it had received the notice. Payment was refused. Thereafter the bank by bill of interpleader asked the decision of the court as to the disposition of the money. E. and F. claimed it all: B. claimed the amount called for by his check. The court held that as between A. and B., the check operated as an equitable assignment, and that the amount thereof should first be paid to B. out of the fund, and the balance, after payment of costs, should go to the assignees, and that, even if the check were not an equitable assignment of the fund, the same decree would be proper on the ground that A. held the fund for B. as the proceeds of a collection made as B.'s agent. *German Sav. Inst. v. Adae*, 1 *McC. C. C.* 501; s. c., 8 *Fed. Rep.* 106, 24 *Ala. L. J.* 234; 27 *Int. Rev. Rec.* 311; 12 *Repr.* 385; 15 *West Jur.* 467.

1 See *Hall v. City of Buffalo*, 1 *Keyes* (N. Y.), 193; *Harris v. Clark*, 3 *Comst.* (3 N. Y.) 119.

2 *Walker, Ass. v. Siegel* (U. S. D. C.), 2 *Cent. L. J.* 508. See, also, *Roberts v. Corbin*, 26 *Iowa*, 315; *Fogarties v. State Bank*, 12 *Rich. (S. C.) L.* 518; *Munn v. Burch*, 25 *Ill.* 35.

3 *German Sav. Inst. v. Adae*, 1 *McC. C. C.* 501; s. c., 24 *Alb. L. J.* 234; 27 *Int. Rev. Rec.* 311; 12 *Rep.* 381; 15 *West, Jur.* 467; 8 *Fed. Rep.* 106. See *Superintendent v. Heath*, 2 *McCafer* (N. J.), 22; *Overseers of the Poor v. Bank of Virginia*, 2 *Gratt. (Va.)* 544.

4 *Bank v. Coates*, 8 *Fed. Rep.* 540.

5 *Russell v. Wiggins*, 2 *Story, C. C.* 213; *Bell v. Bruen*, 1 *How. (U. S.)* 169; *Bank of U. S. v. Daniel*, 12 *Pet. (U. S.)* 54; *Bell v. Bruen*, 1 *How. (U. S.)* 169; s. c., 17 *Pet. (U. S.)* 169; *Scott v. Pilkington*, 8 *Jur. (N. S.)* 557; s. c., 2 *Best. & S.* 12.

6 *Bank of U. S. v. Daniel*, 12 *Pet. (U. S.)* 54; *Bell v. Bruen*, 1 *How. (U. S.)* 169; s. c., 17 *Pet. (U. S.)* 169.

7 8 *Jur. (N. S.)* 557; s. c., 2 *Best. & S.* 12.

8 On the same principle it has been held that where a person residing in one State, for the mere accommodation of a person residing in another, indorses a promissory note, not intended to be used except in a third State, in the purchase of goods, that

of a London banking-house, authorizing the party to draw on the principals, is governed by the law of Massachusetts, not by that of England.<sup>1</sup>

**10. Marriage and Divorce.** — I. MARRIAGE. — *a. Governed by Lex Loci.* — The validity of a marriage is to be determined by the law of the place where it was celebrated,<sup>2</sup> and all rights dependent on the nuptial contract are to be governed by the *lex loci contractus*;<sup>3</sup> but the mode of determining whether the *lex loci* was applied with, is necessarily regulated by the *lex fori*.<sup>4</sup>

the liability of the indorser on such note is to be determined by the laws of the State where the note was to be used, and not those of the State where the indorsement was made. See *Lee v. Selleck*, 33 N. Y. 615.

<sup>1</sup> *Russell v. Wiggin*, 2 Story, C. C. 213.

<sup>2</sup> *Phillips v. Gregg*, 10 Watts (Pa.), 158; *Crosby v. Berger*, 3 Edw. Ch. (N. Y.) 538; *Smith v. Woodworth*, 44 Barb. (N. Y.) 198.

Under the law of Wurtemberg a citizen cannot contract a valid marriage but with the consent of the king. Where A., a citizen of Wurtemberg, went to Illinois, and there married B., the marriage being a legal one in Illinois, and then returned to Wurtemberg with his wife, and became domiciled there, and subsequently the marriage was declared a nullity. A. died, leaving real estate in Illinois. In an action it was held that B. had no rights therein. *Roth v. Roth*, 104 Ill. 35; s. c., 44 Am. Rep. 81.

It has been said that a marriage contract made in France, and not repugnant to New York laws, will be recognized as a valid contract there, and interpreted according to the French laws. *Crosby v. Berger*, 3 Edw. Ch. (N. Y.) 538.

Where a foreign statute upon the subject of marriage is in direct conflict with the established policy of a State, it will not be regarded as binding in the courts of such State. *Philadelphia v. Williamson* (Pa.), 30 Leg. Int. 45; s. c., 5 Leg. Gaz. 42. Thus it was held during the days of slavery that a statute of a slave State, forbidding slaves to marry, would not be regarded by courts where the marriage was good at common law. *People v. Cooper*, 8 How. (N. Y.) Pr. 288.

<sup>3</sup> *Decouche v. Savatier*, 3 Johns. Ch. (N. Y.) 190.

Where parties marry in a State of the Union, but enter into an ante-nuptial contract with reference to the laws of France, as their intended domicile, those laws must govern in the construction of the contract so far as their rights of personal property are concerned. *Le Breton v. Miles*, 8 Paige Ch. (N. Y.) 261. See *Ordranax v. Rey*, 2 Sand. Ch. (N. Y.) 33.

A woman entitled to an estate in person-

alty married in Georgia before the passage of the act of 1866, giving married women a separate estate. After 1866 she moved to Alabama, not carrying the property with her, and her husband exercised marital rights over it. At her death intestate in Alabama, it was held that the property passed under the law of descents of that State, and not under a statutory trust under the Alabama law, as might have been the case had the property been carried into that State. *See Pace*, 71 Ga. 231.

The rights of a wife as creditor of her husband, under the law of France, where the marriage was contracted, continue to attach to the property of the husband where he abandons her, and dies domiciled in a State of the Union. *Bonati v. Vail*, 24 N. Y. 157. See *Vail v. Vail*, 24 N. Y. 226.

<sup>4</sup> *Coujolle v. Ferrie*, 26 Barb. 177; *Patterson v. Gaines*, 6 How. 550.

In New York marriage is simply a contract; and if a resident there contracts marriage *per verba de presentis* in a foreign country, with another person, with a view to a further ceremony in New York, the presumption is in favor of its validity. *Hynes v. McDermod*, 10 Abb. (N. Y.) Pr. N. C. 98.

II., a native-born citizen of the United States, went to England in the spring of 1871, and there, prior to May, 1871, commenced an illicit intercourse with a woman, an English subject. In May, 1871, he gave her a ring, saying that, if she would wear the ring and be true to him, he would consider her his wife as much as if she had been married in church, and he accepted the ring on these conditions. From that time until his death he lived and cohabited with her, in England, in the apparent relation of husband and wife, until his death in 1874, introducing her in society as his wife, and having children by her. In June, 1871, he returned temporarily to Paris, and there introduced her as his wife, and there cohabited with her. On these facts, in the absence of proof of a marriage in England

*b. Capacity to contract Marriage.* — As a general rule, the capacity or incapacity to marry depends on the law of the place where the marriage is contracted, and not on that of the domicile of the parties.<sup>1</sup>

There are three theories regarding capacity to contract marriage; to wit, —

*First*, That matrimonial capacity is determined by the *lex loci contractus*.<sup>2</sup>

*Second*, That marital capacity is to be determined by the *lex domicilii*.<sup>3</sup>

*Third*, That matrimonial capacity, in home marriages, is to be determined by the home law; and as to marriages abroad, by those general principles which concede marital capacity to all persons of puberty, excepting only those affected by the impediments of incest or polygamy.<sup>4</sup>

*c. Marriage of Persons divorced for Adultery.* — It has been held,

ing to the local law, and of the marriage-law of France, it was held, (1) that the illicit origin of the intercourse in England rebutted the presumption of marriage, which would otherwise have arisen from the cohabitation and its circumstance; but (2) that the jury were warranted in finding that there was the requisite consent in Paris to establish a valid marriage according to New York law, and that the children of such marriage were entitled to inherit their father's real estate in New York. *Hynes v. McDermott*, 91 N. Y. 431; 2 C., 43 Am. Rep. 677.

<sup>1</sup> *Ponsford v. Johnson*, 2 Blatchf. C. C. 51.

<sup>2</sup> *Ponsford v. Johnson*, 2 Blatchf. C. C. 51; Story, Conf. L. §§ 110-112; Bishop, Mar. & Div. ch. xxi.; Fergusson, Mar. & Div. 397-399.

To this theory Dr. Wharton interposes the following objections; to wit, (1) "that it is admitted to be subject to exceptions which destroy its applicability to the majority of litigated questions. Thus, marriages which by our laws are incestuous, are not validated by being performed in another land where they would be lawful; and so the converse is true, that the marriage in England of a man with his deceased wife's sister would be recognized as valid in such of our American States as hold such a marriage to be legal. Nor, notwithstanding the observations frequently thrown out, that a marriage bad by the *lex loci contractus* is bad everywhere, is it believed that an American court will ever hold a marriage contract abroad to be illegal, simply because the consent of the parents was withheld." (2) "The risk to which it exposes marriages, now not infrequent, of persons travelling abroad, some defect in the observance of local law, of

which the parties had no thought, would, if this view obtain, invalidate the marriage, and illegitimize the offspring. But a more serious objection would be the validity which would thus be given to Chinese and Mohammedan polygamy. To maintain the authoritativeness of the *lex loci contractus* in this respect, would be to license polygamy wherever Chinese and Mohammedan immigration exists." Whart., Conf. L. § 160.

<sup>3</sup> See Lawrence's Wheaton, 172; Westlake, Priv. Int. Law, § 346; Phillimore, Int. Law, iv. 284; Warrender v. Warrender, 9 Bligh, 89; 2 C., 2 Clark & Finn. 488; Brook v. Brook, 7 Jur. (N. S.) 422; 2 C., 9 H. L. Cas. 193; Le Breton v. Nouchet, 3 Martin (La.), 60. Compare *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Ponsford v. Johnson*, 2 Blatchf. C. C. 51.

There are said to be two serious objections to adopting this doctrine in the United States, because, "(1) it would make the validity of the marriages, in the United States, of natives of other countries, depend upon the question whether such persons had acquired a domicile in the United States; for if they had not, they would be governed by the laws of their foreign domicile, with which, especially in the case of minors, the difficulty in the way of a compliance would be almost insuperable. The mischief wrought by the adoption of such a principle would be very great. Few aliens who marry in this country could be sure that they were legally married; few descendants of such aliens could be sure of their legitimacy. (2) Another objection to such adoption of the law of domicile is, that it would internationally legalize in the United States polygamous marriages." Whart., Conf. L. § 164.

<sup>4</sup> Whart., Conf. L. § 10, 128-132, 165.

but on this point there is much conflict of opinion, that although a person divorced from a first wife for adultery is rendered by the law of the place incapable of contracting a second marriage, yet that, if he enters into a contract of marriage in another State where the same disability does not exist, the marriage will be valid.<sup>1</sup> And where the parties resident in one State, to avoid the laws of the place of domicile, go to another State and are married, the marriage is held valid, if so regarded in the country where celebrated, both in America<sup>2</sup> and England;<sup>3</sup> and if invalid there, it must be

<sup>1</sup> See *Webb's Estate*, 1 Tuck. (N. Y.) 372; *West Cambridge v. Lexington*, 1 Pick. (Mass.) 506; *Decouche v. Savatier*, 3 Johns. Ch. (N. Y.) 190; *Dickson v. Dickson*, 1 Verg. (Tenn.) 110; *Ponsford v. Johnson*, 2 Blatchf. C. C. 51; *Conway v. Beazley*, 3 Hagg. Eccl. 639.

The rule is different, however, where parties go abroad for the purpose of evading the domiciliary law. See *Williams v. Oates*, 5 Ired. (N. C.) L. 535, 585; *Marshall v. Marshall*, 2 Hun (N. Y.), 238; s. c., 4 T. & C. (N. Y.) 449; 48 How. (N. Y.) Pr. 57; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Dupre v. Boulard*, 10 La. An. 411.

In New York, where a former marriage has been dissolved for the adultery of the husband, he cannot contract a second marriage in that State during the lifetime of his former wife, no matter where the first marriage was contracted or dissolved. *Smith v. Woodworth*, 44 Barb. (N. Y.) 198. And where a husband who was divorced in New York on the ground of his adultery, goes into another State, although for the purpose of evading the New York laws, and there contracts a second marriage during the lifetime of his former wife, and immediately returns to and resides within that State, such second marriage is void. *Marshall v. Marshall*, 2 Hun (N. Y.), 238; s. c., 4 T. & C. (N. Y.) 449; 48 How. (N. Y.) Pr. 57. But see *Van Vorhis v. Brintnall*, 86 N. Y. 18; s. c., 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602; s. c., 43 Am. Rep. 189. But where a wife procured a divorce in New York for adultery, and the husband was prohibited by the decree from remarrying during her life, and the husband afterwards remarried in New Jersey, the statute of that State not prohibiting the remarriage of divorced parties, and with his second wife returned to and resided in New York; it was held that the children born in such marriage would inherit in New York. *Moore v. Hegeman*, 92 N. Y. 521; s. c., 44 Am. Rep. 408. And where a man obtained a divorce in Massachusetts for his wife's adultery, the law of that State prohibited her remarriage, and she remarried in New Hampshire, the law of

which State prohibits the marriage of one having a "former wife or husband living," the court held the marriage lawful, and that it should be so recognized in New York. *Roberts v. Ogdensburg & Lake Champlain R.R. Co.*, 34 Hun (N. Y.), 324.

<sup>2</sup> *Decouche v. Savatier*, 3 Johns. Ch. (N. Y.) 190; *Dickson v. Dickson*, 1 Verg. (Tenn.) 110; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *West Cambridge v. Lexington*, 1 Pick. (Mass.) 506; *Sutton v. Warren*, 10 Metc. (Mass.) 451; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Donnelli v. Donnelli*, 4 Bush (Ky.), 51; *Medway v. Needham*, 6 Mass. 157, 161; *Pearl v. Hansborough*, 9 Humph. (Tenn.) 426; *Phillips v. Gregg*, 10 Watts (Pa.), 158; *Morgan v. McGhee*, 5 Humph. (Tenn.) 13; *State v. Patterson*, 2 Ired. (N. C.) L. 346; *Ponsford v. Johnson*, 2 Blatchf. C. C. 51; *Von Vorhis v. Brintnall*, 86 N. Y. 18; s. c., 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602; s. c., 43 Am. Rep. 189; *Moore v. Hegeman*, 92 N. Y. 521; s. c., 44 Am. Rep. 408. Compare *Marshall v. Marshall*, 2 Hun (N. Y.), 238; s. c., 4 T. & C. (N. Y.) 449; 48 How. (N. Y.) Pr. 57.

The New York statute prohibiting the second marriage of one against whom a divorce has been granted for adultery, during the life of the other party to the divorce, and declaring such second marriage void, does not invalidate a second marriage entered into in Connecticut where it is valid, the act being in the nature of a penalty, and not in express terms showing the legislative intent to render such marriage entered into in another State, void; and this is the case although the parties, both being residents of New York, went to Connecticut for the purpose of evading the law of New York. *Van Vorhis v. Brintnall*, 86 N. Y. 18; s. c., 40 Am. Rep. 505; reversing s. c., 23 Hun (N. Y.), 260; *Thorp v. Thorp*, 90 N. Y. 602; s. c., 43 Am. Rep. 189.

<sup>3</sup> *Compton v. Bearcroft*, Bull. N. P. 114; *Conway v. Beazley*, 3 Hagg. 639; *Harford v. Morris*, 2 Hagg. Consist. 429, 430, 443, 444; *Robinson v. Bland*, 2 Burr. 1077-1080; *Steele v. Braddell*, 1 Milw. Consist. 1; *Simonin v. Mallac*, 2 Sw. & Tr. 67; *Rex v.*

regarded as invalid everywhere else.<sup>1</sup> There are exceptions to this general rule; to wit, (1) where the marriage is incestuous, (2) polygamous,<sup>2</sup> (3) prohibited by the positive law of a country,<sup>3</sup> and (4) where celebrated in foreign countries by subjects entitling them under special circumstances to the benefit of the laws of their own country.<sup>4</sup>

2. DIVORCE. — *a. Foreign Divorces.* — It has been said, that, to entitle a foreign court to render a decree of divorce, it must have domiciliary jurisdiction over the parties, and the proceedings must be in accordance with the rules of international law.<sup>5</sup>

(1) *In England.* — The English doctrine is, that a foreign

Lolley, 1 Russ. & Ryan, 237; Warrender v. Warrender, 9 Bligh, 89; Shaw v. Gould, L. R. 3 H. L. 55; Shaw v. The Attorney-General, L. R. 2 P. & D. 156; Brook v. Brook, 7 Jur. (N. S.) 422; s. c., 9 H. L. Cas. 193; Kent v. Burgess, 11 Sim. 361.

1 See Medway v. Needham, 16 Mass. 157; Putnam v. Putnam, 8 Pick. (Mass.) 433; West Cambridge v. Lexington, 1 Pick. (Mass.) 506; Ryan v. Ryan, 2 Phil. Ec. 332; Dalrymple v. Dalrymple, 2 Hagg. Consist. 54; Ruding v. Smith, 2 Hagg. Consist. 390, 391; Schrimshire v. Schrimshire, 2 Hagg. Consist. 395; Munro v. Saunders, 6 Bligh, 473; Ilderton v. Ilderton, 2 H. Black. 145; Middleton v. Janverin, 2 Hagg. Cons. 437; Lacon v. Higgins, 3 Stark. 178; Kent v. Burgess, 11 Sim. 361. See, also, *ante*, § 1, f, "VALIDITY OF CONTRACTS WHERE MADE."

2 Incest and polygamy being prohibited by Christianity, against the principles of good government and public morals, such marriages are recognized and enforced nowhere throughout Christendom. See Wall v. Williamson, 8 Ala. 48; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460; Sutton v. Warren, 10 Met. (Mass.) 451; Greenwood v. Curtis, 6 Mass. 378; Swift v. Kelly, 3 Knapp, 258, 579; Hyde v. Hyde, L. R. 1 P. & D. 130; 2 Kent, Comm. 81; 1 Bl. Comm. 436; 1 Burge, Comm. on Col. & For. Law, pt. 1, ch. 5, § 83, pp. 188-190; Paley, Moral Phil. b. 3, ch. 6; Grotius, b. 2, ch. 5, § 9; Huberus, lib. 1, tit. 3, § 8.

But this exception as to incestuous marriages is not to be applied, except to cases deemed incestuous by the universal consent of Christendom. Thus, in some countries a marriage between a man and his deceased wife's sister is deemed incestuous, in others not. If marriage is contracted between such persons in a place where it is recognized as valid, it will be so recognized everywhere else. See Medway v. Needham, 16 Mass. 157, 161; Greenwood v. Curtis, 6 Mass. 378, 379; Sutton v. Warren, 10 Metc. (Mass.) 451. Compare Brook v.

Brook, 7 Jur. (N. S.) 422; s. c., 3 Sm. & Gif. 481, 513; 9 H. L. Cas. 193.

3 These prohibitions apply only to the subjects of the country in which the laws are enacted. See 2 Kent, Comm. 93; 1 Black, Comm. 226; Code Civil of France, art. 170; Merlin, Répert. *Loi*, § 6, n. 1.

4 1 Burge, Comm. on Col. & For. Law, ch. 5, § 3, p. 188.

This class of exceptions prevails where marriage is contracted and celebrated in a foreign country, where, as Judge Story puts it, "there is a local necessity from the absence of laws, or from the presence of prohibitions or obstructions in a foreign country, not binding upon other countries, or from peculiarities of religious opinion and conscientious scruples, or from circumstances of exemption from the local jurisdiction, marriages will be allowed to be valid according to the law of the native or fixed actual domicile." Story, Conf. L. § 118, p. 161. See Loring v. Thorndike, 5 Allen (Mass.), 257; Lautour v. Teesdale, 8 Taunt. 830; s. c., 2 Marsh. 243; Ruding v. Smith, 2 Hagg. Consist. 371, 384, 385, 386; King v. Inhabitants of Bampton, 10 East, 282; Harford v. Morris, 2 Hagg. Consist. 432.

5 The parties must have had an actual and *bona fide* domicile within the jurisdiction of the court, and not by collusion of the parties for the mere purpose of maintaining and pursuing the suit for divorce. See Dorsey v. Dorsey, 7 Watts (Pa.), 349; s. c., 1 Boston L. Rep. 288, 289; Maguire v. Maguire, 7 Dana (Ky.), 181; Tovey v. Lindsay, 1 Dow. 117, 131, 135-137; s. c., 2 Clark & Finn. cited 498 & 562; Warrender v. Warrender, 9 Bligh, 141, 142; Conway v. Beazley, 3 Hagg. Eccl. 639, 645, 646; St. Aubyn v. O'Brien, Ferg. Mor. & Div. Appx. 276; Rex v. Lolley, 1 Russ. & Ryan, 237; McCarthy v. Decaix, 2 Russ. & M. 614, 620; s. c., 3 Hagg. Eccl. 642, n.; Shaw v. Gould, L. R. 3 H. L. 55; Dolphin v. Robins, 7 H. L. C. 390; Shaw v. Attorney-General, L. R. 2 P. & D. 156.



tribunal has no authority, so far as any legal consequences in England are concerned, to pronounce a decree of divorce *a vinculo* in the case of an English marriage between English subjects, unless such subjects are, at the time such decree is pronounced, *bona fide* domiciled within the jurisdiction of the foreign court, and the suit for divorce prosecuted without collusion.<sup>1</sup>

(2) *In America.*—In America questions respecting the nature and effect of foreign divorces upon domestic marriages, and *vice versa*, have frequently arisen, and been variously determined by the courts of the different States.<sup>2</sup>

(a) *Jurisdiction and Validity.*—A decree of divorce, recognized as valid and binding in the State where rendered, should be regarded as valid and binding elsewhere;<sup>3</sup> and a statute providing that "a divorce bars all claim to curtesy or dower," applies to all valid divorces, wherever obtained.<sup>4</sup>

The jurisdiction of a particular court to grant a divorce is determined (1) by the statutes of the State where the court is;<sup>5</sup> (2) by

<sup>1</sup> *Shaw v. Gould*, L. R. 3 H. L. 55; *Dolphin v. Robins*, 7 H. L. Cas. 390; *Shaw v. Attorney-General*, L. R. 2 P. & D. 156; *Brodie v. Brodie*, 2 Swab. & Tr. 259; *Pitt v. Pitt*, 4 Macq. 627; *McCarthy v. Decaix*, 2 Russ. & M. 614; *Warrender v. Warrender*, 2 Clark & Finn. 488; s. c., 2 S. & McL. 155; *Robins v. Dolphin*, 1 Swab. & Tr. 37, affd. in 7 H. L. Cas. 390; *Tollemache v. Tollemache*, 1 Swab. & Tr. 557.

The residence of the wife, where she sues for a divorce, it seems, is sufficient to confer jurisdiction on the court to hear and determine the cause. See *Yelverton v. Yelverton*, 1 Swab. & Tr. 591, approving *Harteau v. Harteau*, 14 Pick. (Mass.) 181; *Pitt v. Pitt*, 4 Macq. 627; *Shaw v. Attorney-General*, L. R. 2 P. & D. 156; *Shaw v. Gould*, L. R. 3 H. L. 55. See, also, *Laneville v. Anderson*, 2 Swab. & Tr. 24.

<sup>2</sup> The conflict of opinion in the American decisions is mainly due to the great diversity of statutory regulations in the different States.

<sup>3</sup> *Van Orsdal v. Van Orsdal*, 67 Iowa, 35; *Johnson v. Johnson*, 67 How. (N. Y.) Pr. 144; *Hawkins v. Ragsdale*, 80 Ky. 353; s. c., 44 Am. Rep. 483; *People v. Allen*, 40 Hun (N. Y.), 611.

It has been said (Story, Conf. L. § 230 c) that "the incidents to a foreign divorce are also naturally to be deduced from the law of the place where it is decreed. If valid there, the divorce will have, and ought in general to have, all the effects in every other country upon personal property locally situated there, which are properly attributable to it in the forum where it is decreed. In respect to real or immovable property, the same effects would in general be attributed to such divorce as would ordinarily belong to a divorce of the same sort by the

*lex loci rei sitæ*. If a dissolution of the marriage would there be consequent upon such divorce, and would there extinguish the right of dower, or of tenancy by courtesy, according to such local law, then the like effects would be attributed to the foreign divorce which worked a like dissolution of the marriage." See *Warrender v. Warrender*, 9 Bligh, 127.

A foreign decree of divorce cannot be impeached collaterally by showing a want of jurisdiction by reason of non-residence. *Waldo v. Waldo*, 52 Mich. 94.

Where, in a divorce suit, the libellee sets up a decree of divorce rendered by the court of another State, the record showing the jurisdiction, such decree is binding. *Johnson v. Johnson*, 67 How. (N. Y.) Pr. 144. Thus, a decree of the court of one State, granting a divorce and the custody of the children to the wife, is conclusive in another State, no new circumstances having arisen to justify a change in the custody of the children. *People v. Allen*, 40 Hun (N. Y.), 611.

Yet it is held in Pennsylvania that a foreign decree of divorce, obtained by the other party, pending a suit in that State, will not bar a decree there. *Rebstock v. Rebstock*, 2 Pitts. (Pa.) 124. Had the party appeared and defended in the foreign suit, however, the decree, it seems, would have been a bar. See *Jones v. Jones*, 36 Hun (N. Y.), 414.

<sup>4</sup> *Hawkins v. Ragsdale*, 80 Ky. 353; s. c., 44 Am. Rep. 483.

<sup>5</sup> *Trevino v. Trevino*, 54 Tex. 261, 264; *Standridge v. Standridge*, 31 Ga. 223, 224.

The State courts have no jurisdiction to grant decrees of divorce unless the same is given them by statute. See *Lovett v. Lovett*, 11 Ala. 763, 767; *Moyler v. Moyler*.

the clause of the federal constitution requiring "full faith and credit" to be given to the proceedings of courts of sister States;<sup>1</sup>

11 Ala. 620, 622; Bauman v. Bauman, 18 Ark. 320, 324; Conant v. Conant, 10 Cal. 249, 253; Steele v. Steele, 35 Conn. 48, 51; Jeans v. Jeans, 2 Harr (Del.) 38, 43; McGee v. McGee, 10 Ga. 477, 480; Hamaker v. Hamaker, 18 Ill. 137, 139, 140; Maguire v. Maguire, 7 Dana (Ky.), 181, 188; Thornberry v. Thornberry, 2 J. J. Marsh. (Ky.) 322; Butler v. Butler, 4 Lit. (Ky.) 201, 203; Wright v. Wright, 2 Md. 429, 448; Carson v. Carson, 40 Miss. 349, 351; Stokes v. Stokes, 1 Mo. 320, 322; Perry v. Perry, 2 Paige Ch. (N. Y.) 501, 506; Burtis v. Burtis, Hopkins Ch. (N. Y.) 557, 566; Williamson v. Williamson, 1 Johns. Ch. (N. Y.) 488, 491; Jarvis v. Jarvis, 3 Edw. Ch. (N. Y.) 462, 463; Klein v. Klein, 42 How. (N. Y.) Pr. 166; Crump v. Morgan, 3 Ired. (N. C.) Eq. 91, 98; Olin v. Hungerford, 10 Ohio, 268, 270; Northcut v. Lemery, 8 Oreg. 316, 322; Ristine v. Ristine, 4 Rawle (Pa.), 460, 461; Grant v. Grant, 12 S. C. 29-31; Wright v. Wright, 6 Tex. 3, 21; Nogeas v. Nogeas, 7 Tex. 538, 544; Cast v. Cast, 1 Utah, 112, 114; Almond v. Almond, 4 Rand. (Va.) 662, 666; LeBaron v. LeBaron, 35 Vt. 365, 367; Hopkins v. Hopkins, 39 Wis. 167, 171. Yet such jurisdiction need not necessarily be given in express words. Ellis v. Hatfield, 20 Ind. 101, 102. The statute must be strictly complied with as to service and the like. See Crossman v. Crossman, 33 Ala. 486, 487; Parish v. Parish, 32 Ga. 653, 655.

1 Cheever v. Wilson, 9 Wall. (U. S.) 108, 123.

It is provided by the federal constitution that "full faith and credit shall be given in such State to the public acts, records, and judicial proceedings of every other State," and that "Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Const. art. 4, § 1. Congress has provided that "the said records and judicial proceedings" "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." United States Stat. at Lar. 122, ch. 11; U. S. Rev. Stat. § 905.

These provisions apply to divorces granted by courts which had jurisdiction over the parties and the subject-matter. See Tolen v. Tolen, 2 Blackf. (Ind.) 407, 412; Hood v. State, 56 Ind. 263, 270; Wakefield v. Ives, 35 Iowa, 238, 240; Harding v. Alden, 9 Me. 140, 149; Barber v. Root, 10 Mass. 260, 264; Sewall v. Sewall, 122 Mass. 156, 161; People v. Dawell, 25

Mich. 247, 259-262; Gould v. Crow, 57 Mo. 200, 204; Doughty v. Doughty, 28 N. J. Eq. 581, 586; People v. Baker, 76 N. Y. 78, 83, 84; s. c., 32 Am. Rep. 274; Hunt v. Hunt, 72 N. Y. 217, 234 s. c. 28 Am. R. 129; Kinnier v. Kinnier, 45 N. Y. 535, 539; Borden v. Fitch, 15 Johns. (N. Y.) 121, 141; Van Fossen v. State, 37 Ohio St. 317, 320; Northcut v. Lemery, 8 Oreg. 316, 322; Colvin v. Reed, 55 Pa. St. 375, 378, 379; Ditson v. Ditson, 4 R. I. 87, 107; Cook v. Cook, 56 Wis. 195; s. c., 43 Am. Rep. 706; 14 N. W. Rep. 33, 36; Cheever v. Wilson, 9 Wall. (U. S.) 108, 123; Barber v. Barber, 21 How. (U. S.) 582, 591; Pennoyer v. Neff, 95 U. S. 714, 734, 735.

The decree of such a court, so far as it is *in rem*, acts upon such things as are within the jurisdiction of the court or State. See Ellison v. Martin, 53 Mo. 575, 578; Gould v. Crow, 57 Mo. 200, 204; but so far as it is *in personam*, it acts only upon a person duly summoned, or who voluntarily offers and submits himself to the jurisdiction. See Beard v. Beard, 21 Ind. 321, 323; Garner v. Garner, 56 Md. 127, 128.

If both parties are domiciled out of the State where suit is brought, the courts of such State, having no control of their *status*, have no right to render a decree of divorce. Hood v. State, 56 Ind. 263, 270, 271; Litowich v. Litowich, 19 Kan. 451, 454; Sewall v. Sewall, 122 Mass. 156, 162; and should they do so, other States will not be under any obligations to recognize the divorce as legal, even though there was full jurisdiction over the parties by the voluntary appearance of the defendant. See Maguire v. Maguire, 7 Dana (Ky.), 181, 183, 184, 185; People v. Dawell, 25 Mich. 247, 257, 265; Van Fossen v. State, 37 Ohio St. 317, 319.

But where one of the parties is domiciled in the State where suit is brought, the divorce will be valid in every other State, as to the domiciled party. Garner v. Garner, 56 Md. 127, 128; People v. Dawell, 25 Mich. 247, 257; People v. Baker, 76 N. Y. 78; s. c., 32 Am. Rep. 274; Cook v. Cook, 56 Wis. 195; s. c., 43 Am. Rep. 706; 14 N. W. Rep. 33. Though not as to the other party. People v. Dawell, 25 Mich. 247, 257; People v. Baker, 76 N. Y. 78; s. c., 32 Am. Rep. 274; Cook v. Cook, 56 Wis. 195; s. c., 43 Am. Rep. 706; 14 N. W. Rep. 33.

Where both parties are domiciled in the State where the suit is brought, every other State in the Union must give full faith and credit to the decree of divorce so far as the dissolution of the *status* is concerned. Barber v. Root, 10 Mass. 260, 264. And this

and by the principles of international law<sup>1</sup> federal courts have jurisdiction to grant divorces,<sup>2</sup> though in the exercise of their chancery powers they may entertain a suit for alimony against her husband residing in a different State.<sup>3</sup>

To be valid, a divorce must be without fraud<sup>4</sup> according

to the law of the State where it is granted. It is true even though there may have been no personal service or appearance. See *Beard v. Beard*, 21 Ind. 321, 323; *Garner v. Garner*, 56 Md. 127, 128; *Pennoyer v. Neff*, 95 U. S. 714, 733.

But even where both parties are domiciled in the State where suit is brought, and there is neither personal service nor appearance of the defendant, so much of the decree of divorce as is *in personam* will have no extra-territorial force or effect. *Turner v. Turner*, 44 Ala. 437, 450; *Lytle v. Lytle*, 48 Ind. 200, 202; *Garner v. Garner*, 56 Md. 127, 128; *Prosser v. Warner*, 47 Vt. 667, 670, 673.

<sup>1</sup> *Harvey v. Farnie*, L. R. 5 P. Div. 153, 157.

Jurisdiction to grant divorces is in all cases statutory. See *Lovett v. Lovett*, 11 Ala. 763, 767; *Moyler v. Moyler*, 11 Ala. 620, 622; *Bauman v. Bauman*, 18 Ark. 320, 324; *Conant v. Conant*, 10 Cal. 249, 253; *Steele v. Steele*, 35 Conn. 48, 51; *Jeans v. Jeans*, 2 Harr. (Del.) 38, 43; *McGee v. McGee*, 10 Ga. 477, 480; *Hamaker v. Hamaker*, 18 Ill. 137, 139, 140; *Maguire v. Maguire*, 7 Dana (Ky.), 181, 188; *Thornberry v. Thornberry*, 2 J. J. Marsh. (Ky.) 322; *Butler v. Butler*, 4 Litt. (Ky.) 201, 203; *Wright v. Wright*, 2 Md. 429, 448; *Carson v. Carson*, 40 Miss. 349, 351; *Stokes v. Stokes*, 1 Mo. 320, 322; *Perry v. Perry*, 2 Paige Ch. (N. Y.) 501, 506; *Burtis v. Burtis*, *Hopkins, Ch.* (N. Y.) 557, 566; *Williamson v. Williamson*, 1 Johns. Ch. (N. Y.) 488, 491; *Jarvis v. Jarvis*, 3 Edw. Ch. (N. Y.) 462, 463; *Klein v. Klein*, 42 How. (N. Y.) Pr. 166; *Crump v. Morgan*, 3 Ired. (N. C.) Eq. 91, 98; *Olin v. Hungerford*, 10 Ohio, 268, 270; *Northcut v. Lemery*, 8 Oreg. 316, 322; *Ristine v. Ristine*, 4 Rawle (Pa.), 460, 461; *Grant v. Grant*, 12 S. C. 29-31; *Wright v. Wright*, 6 Tex. 3, 21; *Nogees v. Nogees*, 7 Tex. 538, 544; *Almond v. Almond*, 4 Rand. (Va.) 662, 666; *Cast v. Cast*, 1 Utah 112, 114; *Le Barron v. Le Barron*, 35 Vt. 365, 367.

No court, though having jurisdiction of the parties, can grant a decree of divorce except for causes provided by statute. See *Cook v. Cook*, 56 Wis. 195; s. c., 43 Am. Rep. 706; 14 N. W. Rep. 33, 34.

Marriage is a *status*, or domestic relation which every State has a right to control so far as its own citizens are concerned. See *Noel v. Ewing*, 9 Ind. 37; *Askew v. Dupree*, 30 Ga. 173, 176; *Ellison v. Martin*, 53 Mo. 575, 578; *Ditson v. Ditson*, 4 R. I.

87; *Lonas v. State*, 3 Heisk. (Tenn.) 287, 288; *Frasher v. State*, 3 Tex. App. 263, 275; *Green v. State*, 58 Ala. 190, 195; *Gibson*, 36 Ind. 389, 395-400; *Sewall*, 122 Mass. 156, 161; *Hopkins*, 3 Mass. 158, 159; 11 N. Y. 217, 228; s. c., 28 Am. Rep. 706; 14 N. W. Rep. 33; *Harrison v. Harrison*, 20 Ala. 12, 13; *Thompson v. State*, 28 Ala. 12, 13; *Jenness*, 24 Ind. 355, 359; *Keiser*, 34 Md. 21, 26; *Dutcher v. Dutcher*, 651, 657; *Frost v. Knight*, 41 N. H. 78; *Niboyet v. Niboyet*, L. R. 2 P. Div. 153, 157; *Wilson v. Wilson*, L. R. 2 P. Div. 153, 157.

One country cannot change the *status* of the citizens of another, or in any way interfere with their domestic relations. *Thompson v. State*, 28 Ala. 12, 17; *Maguire v. Maguire*, 7 Dana (Ky.), 181, 186; *Harding v. Alden*, 150; *Barber v. Root*, 10 Mass. 582, 584, 602, 605; *Cheever v. Wall*, (U. S.) 108, 124; *ex parte Johnson*, 1 Wood, C. C. 537, 539. It is said that Congress cannot exercise jurisdiction in the federal courts over marriage is a domestic relation under the control of the States, and not a matter cognizable by Congress. *State v. State*, 58 Ala. 190, 195; *State v. State*, 36 Ind. 389, 395-440; *Sewall v. Sewall*, 122 Mass. 156, 161; *Hopkins v. Hopkins*, 3 Mass. 158, 159; *Hunt v. Hunt*, 72 N. H. 78; s. c., 28 Am. Rep. 129.

<sup>2</sup> See *Barber v. Barber*, 21 Iowa 582, 584, 602, 605; *Cheever v. Wall*, (U. S.) 108, 124; *ex parte Johnson*, 1 Wood, C. C. 537, 539.

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<sup>3</sup> *Barber v. Barber*, 21 Iowa 582, 584, 602, 605; *Cheever v. Wall*, (U. S.) 108, 124; *ex parte Johnson*, 1 Wood, C. C. 537, 539.

<sup>4</sup> *Ex parte Smith*, 34 Ala. 4, 5; *son v. State*, 28 Ala. 13, 18, 20; *Tolen*, 2 Blackf. (Ind.), 407, 408; *Litowich*, 19 Kan. 451, 452; *Sewall*, 122 Mass. 156, 161; *Dawell*, 25 Mich. 247, 259; *Goetz*, 57 Mo. 200, 203; *Hunt v. Hunt*, 72 N. H. 78; s. c., 28 Am. Rep. 129.

law,<sup>1</sup> and rendered by a court authorized by statute to grant divorces.<sup>2</sup>

Where, in a divorce proceeding, there is a direct adjudication upon the specific facts of the marriage or its dissolution, and there is no fraud or collusion, it is said to be binding, not only upon the tribunal in which rendered, in all collateral proceedings, but upon all other tribunals, in all proceedings, direct and collateral, whether between the same parties and their privies, or between strangers; not only in the country where rendered, but, the jurisdiction being unquestioned, in all foreign countries.<sup>3</sup>

(b) *Domicile gives Jurisdiction.*—The jurisdiction in divorce cases depends upon the domicile of the parties.<sup>4</sup> Where both

Rush v. Rush, 46 Iowa, 648, 649; Whitcomb v. Whitcomb, 46 Iowa, 437, 444; Graves v. Graves, 36 Iowa, 310; Comstock v. Adams, 23 Kan. 513, 523; Harding v. Alden, 9 Me. 140, 151; Holmes v. Holmes, 63 Me. 420, 426; Lord v. Lord, 66 Me. 265, 266, 270; Gechter v. Gechter, 51 Md. 187, 189; Edson v. Edson, 108 Mass. 590, 596, 597; True v. True, 6 Minn. 458, 465, 466; Young v. Young, 17 Minn. 181, 185; Adams v. Adams, 51 N. H. 388, 397, 398; Borden v. Fitch, 15 Johns. (N. Y.) 121, 141, 143; Boyd's Appeal, 38 Pa. St. 241, 245; Allen v. Maclellan, 12 Pa. St. 328, 331, 332; Crouch v. Crouch, 30 Wis. 667, 669, 670.  
1 McFarland v. McFarland, 40 Ind. 458, 460, 461; Hunt v. Hunt, 72 N. Y. 217, 234, s. c., 28 Am. R. 129.

2 See Turner v. Turner, 44 Ala. 437; Hood v. State, 56 Ind. 263; s. c., 26 Am. Rep. 21; Litowich v. Litowich, 19 Kan. 451; Garner v. Garner, 56 Md. 127; Sewall v. Sewall, 122 Mass. 156; s. c., 23 Am. Rep. 25; Mich. 247; 200; Doughty v. s. c., 27 N. J. n, 10 Abb. (N. Y.) ; People v. Baker, Rep. 274; Hunt c., 28 Am. Rep. ; 37 Ohio St. 317; t. 375; Ditson v. iser v. Warner, 47 rep. 132; Cook v. c., 43 Am. Rep. 443; Hopkins v. 171; Cheever v. 108; Pennoyer v. 5; Harvey v. Far. c., L. R. 6 P. D. L. R. 4 P. & D. 1; l, L. R. 2 P. & D. R. 3 H. L. 55. , 1 Verg. (Tenn.) ey, 7 Watts (Pa.), iss. 99; Clarke v. v. Pink, 9 Watts (Pa.), 336; Mansfield v. McIntyre, 10 Ohio,

27; Cooper v. Cooper, 7 Ohio, pt. 2, 238; Harding v. Alden, 9 Greenl. (Me.) 140; Barber v. Root, 10 Mass. 260; Patterson v. Gaines, 6 How. (U. S.), 550, 599; Roach v. Garvan, 1 Ves. Sr. 157, 159; Hillyard v. Grantham (cited), 2 Ves. Sr. 246; Meadows v. Kingston, Amb. 756; Prudham v. Phillips (cited), Amb. 763; Rex v. Roche, 1 Leach (4th ed.), 134; Meddowcroft v. Huguenin, 3 Curt. Eccl. 403; s. c., 7 Eng. Eccl. 438; s. c., on appeal in privy council, 4 Knapp, 386; Bunting v. Lepingwell, 4 Co. 29; s. c., Sir F. Moore, 169; Blackham's Case, 1 Salk. 290; Guest v. Shipley, 2 Hagg. Consist. 321; s. c., 4 Eng. Ecc. 548, 549; Clews v. Bathurst, 2 Str. 960; Dacosta v. Villa Real, 2 Str. 961; Kenn's Case, 7 Co. 42; Jones v. Bow, Carth. 225; Hatfield v. Hatfield, 2 Eq. Cas. Abr. 585, s. c., 15 Viners, Abr. Mar. G. 8; Morris v. Webber, 2 Leon. 169; s. c., Sir F. Moore, 225; Ryan v. Ryan, 2 Phillm. 332; s. c., 1 Eng. Ecc. 274; Conway v. Beazley, 5 Eng. Ecc. 242; Schrimshire v. Schrimshire, 2 Hagg. Eccl. 395; s. c., 4 Eng. Ecc. 562, 569; Sinclair v. Sinclair, 1 Hagg. Consist. 294; s. c., 4 Eng. Ecc. 412, 414; Goodin v. Smith, Milward, 236, 245.

4 Thompson v. State, 28 Ala. 12, 16, 19; House 1. House, 25 Ga. 473, 474; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 411; Hood v. State, 56 Ind. 263, 269, 271; Smith v. Smith, 4 Greene (Iowa), 266, 269; Maguire v. Maguire, 7 Dana (Ky.), 181; Harding v. Alden, 9 Me. 140, 143, 151; Keerl v. Keerl, 34 Md. 21, 26; Sewall v. Sewall, 122 Mass. 156, 162; Ross v. Ross, 103 Mass. 575, 576; Barber v. Root, 10 Mass. 260; People v. Dawell, 25 Mich. 247, 254; State v. Armington, 25 Minn. 29, 37; Leith v. Leith, 39 N. H. 20, 33; Coddington v. Coddington, 20 N. J. Eq. 263, 265; Yates v. Yates, 13 N. J. Eq. 280, 281; People v. Baker, 76 N. Y. 78, 82; s. c., 32 Am. R. 274; Mellen v. Mellen, 10 Abb. (N. Y.) N. C. 329, 331, 333, notes; Colvin v. Reed, 55 Pa. St. 375, 377-380, 382; Platt's Appeal, 80 Pa. St. 501, 504; Ditson v. Ditson,

parties are domiciled in the same State, the decree will be valid everywhere.<sup>1</sup> The domicile of at least one of the parties must be in the jurisdiction of the court rendering the decree, to invest it with jurisdiction to pass upon the case,<sup>2</sup> for the courts of a State where neither of the parties is domiciled have no jurisdiction.<sup>3</sup>

And it is said that the legislature of a State has no power to

4 R. I. 87, 102; *Hare v. Hare*, 10 Tex. 355, 357; *Cast v. Cast*, 1 Utah, 112, 114; *Shafer v. Bushnell*, 24 Wis. 372, 376, 377; *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 123, 124. *Strader v. Graham*, 10 How. (U. S.) 82, 93; *Pennoyer v. Neff*, 95 U. S. 714, 733; *Wilson v. Wilson*, L. R. 2 P. & D. 435, 443; *Brodie v. Brodie*, 30 L. J. Eq. Mat. Cas. 185; *Shaw v. Gould*, L. R. 3 H. L. 55, 85, 96, 98; *Shaw v. Attorney-General*, L. R. 2 P. & D. 156, 161, 162; *Dolphin v. Robins*, 7 H. L. Cas. 390, 414; *Niboyet v. Niboyet*, L. R. 4 P. Div. 1, 8, 12, 13; *Le Sueur v. Le Sueur*, L. R. 1 P. Div. 139; *Harvey v. Farnie*, L. R. 5 P. Div. 153, 162; s. c., L. R. 6 P. Div. 35, 47, 49, 51; *Briggs v. Briggs*, L. R. 5 P. Div. 163, 164; *Warrender v. Warrender*, 2 Clark & Finn. 488.

1 *Garner v. Garner*, 56 Md. 127, 128; *Barber v. Root*, 10 Mass. 260, 264; *Leith v. Leith*, 39 N. H. 20, 38; *Hunt v. Hunt*, 72 N. Y. 217, 240; s. c., 28 Am. R. 129; *Hubbell v. Hubbell*, 3 Wis. 662, 664.

2 See *Harteau v. Harteau*, 14 Pick. (Mass.) 181; *Hanover v. Turner*, 14 Mass. 227; *Barber v. Root*, 10 Mass. 260; *Harding v. Alden*, 9 Greenl. (Me.) 140; *Mansfield v. McIntyre*, 10 Ohio, 27; *Tolen v. Tolen*, 2 Blackf. (Ind.) 407; *Hull v. Hull*, 2 Strob. (S. C.) Eq. 174; *Powling v. Bird*, 13 Johns. (N. Y.) 192; *Jackson v. Jackson*, 1 Johns. (N. Y.) 424; *Bradshaw v. Heath*, 13 Wend. (N. Y.) 407; *Maguire v. Maguire*, 7 Dana (Ky.), 181; *White v. White*, 5 N. H. 476; *Freeman v. Freeman*, 3 West. L. Jour. 475.

A wife being entitled to sue for divorce in the county where she is a *bona fide* resident, the court has jurisdiction, though the offences charged were committed in other counties. *Jones v. Jones*, 60 Tex. 451.

It has been said that the courts of Massachusetts have jurisdiction of a libel for divorce, brought by a husband residing in another State, for adultery committed in Massachusetts when both parties resided there, the wife having since remained there. *Watkins v. Watkins*, 135 Mass. 83.

It is said that the courts of Louisiana have jurisdiction of the suit of a wife for a divorce, though the marriage, as well as the causes alleged for the divorce, took place in France, if the husband, a resident and citizen of Louisiana, was only temporarily staying in France when the mar-

riage and the acts complained of occurred. *D'Auvilliers v. DeLivaudais*, 32 La. An. 605. And it is held that the courts of Texas have jurisdiction of proceedings for divorce, though the defendant be permanently resident abroad, if the marriage was solemnized in Texas, and the act for which the divorce is demanded was committed there. *Trevino v. Trevino*, 54 Tex. 261.

A resident of C., becoming collector of internal revenue, was obliged to live at L., where he remained for five years, intending all the while to return to C. whenever he should cease to hold his office, and voting in C. After a three-years' stay in L. he married a woman who had never lived in Kansas, and lived with her in a boarding-house for eight months, and then in a furnished house for seven weeks, at the end of which time she left him and the State. In a suit for a divorce it was held that the court of the district in which the town of C. was situated had jurisdiction of the cause. *Carpenter v. Carpenter*, 30 Kan. 712.

3 *House v. House*, 25 Ga. 473, 474; *Hood v. State*, 56 Ind. 263, 270; *Whitcomb v. Whitcomb*, 46 Iowa, 437, 444; *Maguire v. Maguire*, 7 Dana (Ky.), 181; *Litowich v. Litowich*, 19 Kans. 451, 454; *Powling v. Bird*, 13 Johns. (N. Y.) 192; *Jackson v. Jackson*, 1 Johns. (N. Y.) 424; *Bradshaw v. Heath*, 13 Wend. (N. Y.) 407; *Hanover v. Turner*, 14 Mass. 227; *Barber v. Root*, 10 Mass. 260; *Sewall v. Sewall*, 122 Mass. 156, 162; *People v. Dawell*, 25 Mich. 247, 254; *White v. White*, 5 N. H. 476; *Freemon v. Freemon*, 3 West. L. Jour. 475; *State v. Armington*, 25 Minn. 29, 36, 37; *Leith v. Leith*, 39 N. H. 20, 33, 37; *Van Fossen v. State*, 37 Ohio St. 317, 319; *Platt's Appeal*, 80 Pa. St. 501, 504; *Hare v. Hare*, 10 Tex. 355, 357; *Harvey v. Farnie*, L. R. 6 P. Div. 35, 44; *Shaw v. Attorney-General*, L. R. 2 P. & D. 156, 162.

A State court will not recognize as valid a decree of divorce rendered by the court of a territory in which neither party resided. *Smith v. Smith*, 19 Neb. 706.

It was held by the Supreme Court of Ohio, in a recent case, that a divorce authorized by the statute of another State where neither party is domiciled, is of no effect in that State where they have their domicile. *Van Fossen v. State*, 37 Ohio St. 317; s. c., 41 Am. Rep. 507.

dissolve the marriage contract between parties only one of whom is resident within such State, so as to affect rights of property in another State.<sup>1</sup>

The courts will not take jurisdiction of a cause for divorce arising out of the State unless at the time the libellant had his domicile in the State.<sup>2</sup>

Where a defendant, against whom a divorce has been decreed, was a non-resident, and did not appear in the suit, the jurisdiction of the court was limited to the dissolution of the marriage, and that part of the decree prohibiting the defendant from marrying again will be invalid.<sup>3</sup>

(c) *Domicile of Wife.*—While it is true that the general rule is that the wife's domicile is merged in that of the husband on marriage,<sup>4</sup> and this merger continues until the marriage relation is dissolved,<sup>5</sup> and follows him wherever he may go,<sup>6</sup> although the misconduct of the husband may enable the wife to defend against a suit for the restitution of conjugal rights,<sup>7</sup> though it is certainly

<sup>1</sup> *Todd v. Kerr*, 42 Barb. (N. Y.) 317.

<sup>2</sup> *Foss v. Foss*, 58 N. H. 283; *Pate v. Pate*, 6 Mo. App. 49; *Ralston v. Ralston*, 13 Phila. (Pa.) 30; *Philadelphia v. Wetherby*, 15 Phila. (Pa.) 403; *Colvin v. Reed*, 55 Pa. St. 375; *Reel v. Elder*, 62 Pa. St. 308; *Love v. Love* (Pa.), 30 Leg. Int. 86; *Thomas v. Thomas*, 4 Leg. Opin. 440.

Thus, a non-resident wife cannot maintain a petition for a divorce, although the husband be a resident of Missouri, and the cause of action accrued therein. *Pate v. Pate*, 6 Mo. App. 49. And no jurisdiction can be had of a divorce suit brought by a husband who has removed from the State in which he and his wife lived, she remaining there. *Ralston v. Ralston*, 13 Phila. (Pa.) 30. Therefore, a divorce obtained by the husband in another State, the wife being a resident of Pennsylvania, does not effect her right of dower in lands within that State. *Colvin v. Reed*, 55 Pa. St. 375; *Reel v. Elder*, 62 Pa. St. 308; *Love v. Love* (Pa.), 30 Leg. Int. 86; *Thomas v. Thomas* (Pa.), 4 Leg. Opin. 440. And where, after having lived with his wife in Pennsylvania, a husband removed to St. Louis, and, claiming to have become a citizen of Missouri, obtained a divorce there, this divorce was held void in Pennsylvania as to the wife, the Missouri courts never having jurisdiction over her. *Philadelphia v. Wetherby*, 15 Phila. (Pa.) 403.

But in the District of Columbia, where the revised statutes (§ 740) declare that no divorce shall be granted for any cause occurring out of the District, unless the applicant shall have resided there for two years next preceding the application, in a suit under this statute it was held that a husband residing out of the District may apply to the court of the District for a

divorce from his wife, who resides there, the act of adultery charged as cause for divorce being alleged to have been committed there. *Smith v. Smith*, 4 Mackey (D. C.), 255.

<sup>3</sup> *Garner v. Garner*, 56 Md. 127.

<sup>4</sup> See *Dow v. Gould*, & C. S. Min. Co. 31 Cal. 629; *Sanderson v. Ralston*, 20 La. An. 312; *Hackettstown Bank v. Mitchell*, 4 Dutch. (N. J.) 516; *Cutler v. Cutler*, 2 Brews. (Pa.) 511, 513; *Smith v. Morehead*, 6 Jones (N. C.), Eq. 360; *Williams v. Saunders*, 5 Cold. (Tenn.) 60; *Yelverton v. Yelverton*, 1 Swab. & Tr. 574; *Dalhousie v. McDouall*, 7 Clark & Finn. 817; *Bremer v. Freeman*, 1 Dean & Swa. 212.

<sup>5</sup> But if a husband and wife are divorced *a mensa et thoro*, she may have her separate domicile. Overseers of Williamsport v. Overseer of Eldred, 84 Pa. St. 429, 432; *Barber v. Barber*, 21 How. (U. S.) 582, 588, 593; *Bennett v. Bennett*, Deady (U. S.), D. C. 299, 305; *Williams v. Dormer*, 2 Rob. Ecc. 505; s. c., 9 Eng. L. & Eq. 598, 600; *Dolphin v. Robins*, 7 H. L. Cas. 390, 416.

<sup>6</sup> *Hair v. Hair*, 10 Rich. (S. C.) Eq. 163, 175; *Bennett v. Bennett*, Deady (U. S.), D. C. 299, 305; *Barber v. Barber*, 21 How. (U. S.) 582, 584; *Greene v. Greene*, 11 Pick. (Mass.) 410, 415; *Hairston v. Hairston*, 27 Miss. 704, 722; *Smith v. Morehead*, 6 Jones (N. C.), Eq. 360, 364; *Williams v. Saunders*, 5 Cold. (Tenn.) 60, 79.

<sup>7</sup> *Yelverton v. Yelverton*, 1 Swab. & Tr. 574.

"Suits for the restitution of conjugal rights," that is, suits to enforce cohabitation on the part of the delinquent husband or wife (see *Mortimer v. Mortimer*, 2 Hagg. Consist. 310; s. c., 4 Eng. Ecc. 543, 544; *Bramwell v. Bramwell*, 3 Hagg. Ecc.

otherwise where he is guilty of conduct justifying her in leaving him,<sup>1</sup> and they are living apart and in different States; the wife may, where necessary, acquire a separate domicile from that of her husband for the purpose of a divorce, and carry her case thither to be redressed.<sup>2</sup> But it is held in New York that the courts of that State will not give effect to a decree of

618; s. c., 5 Eng. Ecc. 232, 233; *Denniss v. Denniss*, 5 Eng. Ecc. 138, n.; *Orme v. Orme*, 2 Add. Ecc. 382; 2 Eng. Ecc. 354, 356), though still brought in England (see 20 & 21 Vict. c. 85. Also *Firebrace v. Firebrace*, L. R. 4 P. Div. 63; *Brown v. Brown*, L. R. 7 Eq. 185; *Anquez v. Anquez*, L. R. 1 P. & D. 176), have never been known in this country. See *Coverdill v. Coverdill*, 3 Harr. (Del.) 13; *Logan v. Logan*, 2 B. Mon. (Ky.) 142; *Baugh v. Baugh*, 37 Mich. 59, 62; *Garland v. Garland*, 50 Miss. 694, 715; *Cruger v. Douglas*, 4 Edw. Ch. (N. Y.) 433, 506; *Rhame v. Rhame*, 1 McC. (S. C.) Ch. 197. Compare *Keerl v. Keerl*, 34 Md. 21, 26; and Tenn. Rev. Stat. (1873) § 2461.

<sup>1</sup> See *Bryan v. Bryan*, 34 Ala. 516, 519, 520; *Hardin v. Hardin*, 17 Ala. 250, 253, 254; *Kinsey v. Kinsey*, 37 Ala. 393, 395; *Pierce v. Pierce*, 33 Iowa, 238, 240; *Douglass v. Douglass*, 31 Iowa, 421, 424; *Logan v. Logan*, 2 B. Mon. (Ky.) 142; *Noulet v. Dubois*, 6 La. An. 403, 404; *Childs v. Childs*, 49 Md. 509, 514; *Gillinwaters v. Gillinwaters*, 28 Mo. 61, 62; *Black v. Black*, 30 N. J. Eq. 215, 221; *Meldowney v. Meldowney*, 27 N. J. Eq. 328, 398; *Cornish v. Cornish*, 23 N. J. Eq. 208, 209; *Boyce v. Boyce*, 23 N. J. Eq. 337, 349; *Laing v. Laing*, 21 N. J. Eq. 248; *Moores v. Moores*, 16 N. J. Eq. 275; *People v. Mercein*, 8 Paige Ch. (N. Y.) 47, 68; *Butler v. Butler*, 1 Pars. Cas. (Pa.) 329; *Eshbach v. Eshbach*, 23 Pa. St. 343, 345; *Caltison v. Caltison*, 22 Pa. St. 275; *Vanleer v. Vanleer*, 13 Pa. St. 211, 215; *Gordon v. Gordon*, 48 Pa. St. 226; *Colvin v. Reed*, 55 Pa. St. 375, 379; *Grove's Appeal*, 37 Pa. St. 443, 447.

<sup>2</sup> See *Maguire v. Maguire*, 7 Dana (Ky.), 181; *Hick v. Hick*, 5 Bush (Ky.), 670; *Velverton v. Velverton*, 1 Sw. & Tr. 574.

<sup>3</sup> See *Hanberry v. Hanberry*, 29 Ala. 719, 724; *Turner v. Turner*, 44 Ala. 437, 451; *Moffatt v. Moffatt*, 5 Cal. 280, 281; *Sawtell v. Sawtell*, 17 Conn. 284; *Jenness v. Jenness*, 24 Ind. 355-359; *Hinds v. Hinds*, 1 Iowa, 36, 39; *Brett v. Brett*, 5 Met. (Mass.) 233; *Fishli v. Fishli*, 2 Litt. (Ky.) 337; *Harding v. Alden*, 9 Me. 140, 150, 151; *Goodwin v. Goodwin*, 45 Me. 377, 378; *Sewall v. Sewall*, 122 Mass. 156, 162; *Burden v. Shannon*, 115 Mass. 438, 449; *Shaw v. Shaw*, 98 Mass. 158; *Harteau v. Harteau*, 14 Pick. (Mass.) 181, 185; *Wright v. Wright*,

24 Mich. 180, 181; *Hopkins v. Hopkins*, N. H. 474, 475; *Payson v. Payson*, 518; *Masten v. Masten*, 15 N. H. 61; *Frery v. Frery*, 10 N. H. 61; *Yates*, 13 N. J. Eq. 280; *People v. Hunt*, 76 N. Y. 78, 85, 87; s. c., 32 Am. Rep. 129; *Kinnier v. Kinnier*, 535, 544; *Mellen v. Mellen*, 10 Ab. N. C. 329, 331, 333, n.; *Smith v. Smith*, 6 Jones (N. C.) Eq. 360, 364; *Schlachter, Phill.* (N. C.) 520; *Hollister*, 6 Pa. St. 449, 452; *Calvin*, 55 Pa. St. 375, 379; *Ditson v. Ditson*, R. I. 87, 107; *Hull v. Hull*, 2 Stro. Eq. 174, 177; *Shreck v. Shreck*, 579, 588; *Republic v. Skidmore*, 261; *Hare v. Hare*, 10 Tex. 355; *Craven*, 27 Wis. 418; *Dutcher v. Dutcher*, 39 Wis. 651, 659; *Cook v. Cook*, 195; s. c., 43 Am. Rep. 706; 14 N. J. 33, 35, 37, 443; *Cheever v. Wilson* (U. S.) 108, 124. Compare *Neal v. Husband*, 1 La. An. 315.

It has been said that "the law recognizes a wife as having a separate person, and separate interests, and rights, in those cases where the object of the proceeding is to show that the relation itself ought to be dissolved, and modified as to establish separate and especially a separate domicile home. . . . Otherwise the parties, in respect, would stand upon very different grounds, it being in the power of the husband to change his domicile at will, and in that of the wife." *Harteau v. Harteau*, 14 Pick. (Mass.) 181. See, also, *Moffatt*, 5 Cal. 280; *Sawtell v. Sawtell*, 17 Conn. 284; *Jenness v. Jenness*, 24 Ind. 355-359; *Tolen v. Tolen*, 2 Blackf. (Ind.) 40; *Fishli v. Fishli*, 2 Litt. (Ky.) 337; *Harteau v. Alden*, 9 Greenl. (Me.) 140; *Brett v. Brett*, 5 Metc. (Mass.) 233; *Frery v. Frery*, 10 N. H. 61. Also that, if either husband or wife becomes domiciled in another State, their *status*, as effected by the marriage, may be adjudged upon and changed in accordance with the law of that State. *People v. Baker*, 76 N. Y. 85; s. c., 32 Am. R. 274; *Kinnier v. Kinnier*, 45 N. Y. 535; *Hunt v. Hunt*, 76 N. Y. 217; s. c., 28 Am. Rep. 129; *Ditson v. Ditson*, 4 R. I. 87, 101; *Pennoyer v. Pennoyer*, U. S. 714, 734; *Cheever v. Wilson* (U. S.) 108.

obtained by a wife in another State for a cause not there allowed, she having been married and domiciled in New York, and having obtained such divorce in fraud of its laws.<sup>1</sup>

(d) *Domicile must be Bona Fide.*—Where there is a change of domicile, it must be *bona fide*, and not made merely for the purpose of prosecuting the divorce suit.<sup>2</sup> There must exist a present intention to permanently change the home or place of abode.<sup>3</sup>

(e) *Place of Commission of Offence.*—In the absence of any statutory regulations to the contrary, the place of the commission of the offence, or where the cause of action accrued, is immaterial,<sup>4</sup> even though the offence was committed, or the cause

<sup>1</sup> Jackson v. Jackson, 1 Johns. (N. Y.) 424; Pawling v. Bird, 13 Johns. (N. Y.) 192. Compare Kinnier v. Kinnier, 45 N. Y. 535; s. c., 53 Barb. (N. Y.) 454, 58 Barb. (N. Y.) 424.

<sup>2</sup> See Thompson v. State, 28 Ala. 12; Loud v. Loud, 129 Mass. 14; Reed v. Reed, 52 Mich. 117; s. c., 50 Am. Rep. 247; Winship v. Winship, 1 C. E. Gr. (N. J.) 107; Brown v. Brown, 1 McC. (N. J.) 78; Smith v. Smith, 4 Greene (Iowa), 266; Leith v. Leith, 39 N. H. 20; Johnson v. Johnson, 4 Paige Ch. (N. Y.) 460; Greene v. Greene, 11 Pick. (Mass.) 410; Hanover v. Turner, 14 Mass. 227; Chase v. Chase, 6 Gray (Mass.), 157; Shannon v. Shannon, 4 Allen (Mass.), 134.

*Domicile.*—A person's domicile, for the purpose of divorce proceedings, may be defined as his home (see Warren v. Thompson, 43 Me. 406, 418, 419; Hairston v. Hairston, 27 Miss. 704, 718, 719; Crawford v. Wilson, 4 Barb. (N. Y.) 504, 518-520; Whicker v. Hume, 28 L. J. Ch. 396, 400; Attorney-General v. Rowe, 31 L. J. Ex. 314, 320), the place or country,—

*First*, In which the person resides with the intention of remaining; in other words, where the person has his home. See Hinds v. Hinds, 1 Iowa, 36, 39; Whitcomb v. Whitcomb, 46 Iowa, 437, 443, 444; Greene v. Greene, 11 Pick. (Mass.) 410, 415; Hairston v. Hairston, 27 Miss. 704, 718, 719; Leith v. Leith, 39 N. H. 20, 34; Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520; Dutcher v. Dutcher, 39 Wis. 651, 659; Laneville v. Anderson, 2 Sw. & Tr. 24; s. c., 22 Eng. L. & Eq. 641; Bell v. Kennedy, L. R. 1 H. L. Sc. 307, 319; Briggs v. Briggs, L. R. 5 P. Div. 163, 165; Wilson v. Wilson, L. R. 2 P. & D. 435, 443; Dolphin v. Robins, 7 H. L. Cas. 390, 414; Tollemache v. Tollemache, 1 Sw. & Tr. 557, 559; Shaw v. Gould, L. R. 3 H. L. 55, 96.

*Second*, In which having had his home, he continues to reside, though no longer retaining an intention of making such place his future residence or home. See cases above cited, and State v. Frest, 4 Harr.

(Del.) 558; Ringgold v. Barley, 5 Md. 186, 193; Hall v. Hall, 25 Wis. 600, 607.

*Third*, In which having resided or had his home, he still retains an intention of residing there for the future, and of making it his permanent home. See cases cited above, and D'Auvilliers v. Her Husband, 32 La. An. 605, 606; Leith v. Leith, 39 N. H. 20, 39; Briggs v. Briggs, L. R. 5 P. Div. 163, 164.

A State court will not recognize the decree of divorce of another State, the libellant having left the former State, and remained for a year in the other State for the purpose of obtaining such divorce. Reed v. Reed, 52 Mich. 117; s. c., 50 Am. Rep. 247. See, also, Hood v. Hood, 11 Allen (Mass.), 196; Shannon v. Shannon, 4 Allen (Mass.), 134.

But this rule does not apply, of course, where there was a *bona fide* change of residence from one State to another, a divorce there obtained, and a subsequent return to the State of the former domicile. See Hood v. Hood, 11 Allen (Mass.), 196; Shannon v. Shannon, 4 Allen (Mass.), 134.

<sup>3</sup> Moorhouse v. Lord, 10 H. L. Cas. 272. No matter how long a person may reside in a particular place, it does not confer domicile, unless there is a present intention to abide there permanently. See Munro v. Munro, 7 Clark & Finn. 842.

<sup>4</sup> Hanberry v. Hanberry, 29 Ala. 719, 723; Smith v. Smith, 4 Greene (Iowa), 266, 269; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 411; Harding v. Alden, 9 Me. 140, 143; Barber v. Root, 10 Mass. 260, 264; Clark v. Clark, 8 N. H. 21, 22; Leith v. Leith, 39 N. H. 20, 38; Holmes v. Holmes, 57 Barb. (N. Y.) 305, 307; Hubbell v. Hubbell, 3 Wis. 662, 664; Shafer v. Bushnell, 24 Wis. 372, 376; Cheever v. Wilson, 9 Wall. (U. S.) 108, 124; Duntze v. Levett, Ferg. Eccl. 63; s. c., 3 Eng. Eccl. 360, 379; Wilson v. Wilson, L. R. 2 P. & D. 435, 442. Compare Edwards v. Green, 9 La. An. 317, 318; Colvin v. Reed, 55 Pa. St. 375, 380. See, also, Rev. Stats. of Ark. 1874, § 2201; Colo. 1877, § 919; Conn. 1875,



of action arose, in a State where it is not a cause for divorce.<sup>1</sup>

(f) *Domicile of Parties at Time Offence committed.* — The domicile of the parties at the time the offence was committed, the cause of action arose, is immaterial, unless otherwise provided by statute.<sup>2</sup>

(g) *Place of Celebration of Marriage.* — Since the *lex loci* is not the *lex loci contractus* governs in all divorce proceedings, it is immaterial where the marriage was celebrated.<sup>3</sup>

(h) *Defendant must be personally served.* — In order to render a foreign decree of divorce valid and binding, the defendant must be personally served with process within the jurisdiction of the

<sup>1</sup> 4; Ill. 1880, p. 423; 1 La. Civ. Code, 1875, § 142; Md. 1878, art. 51, § 141, p. 480; Mass. 1881, p. 813; Mo. 1879, § 217.

<sup>2</sup> Harrison v. Harrison, 19 Ala. 499; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 411; Stokes v. Stokes, 1 Mo. 320; Hubbell v. Hubbell, 3 Wis. 662, 664; Shaw v. Attorney-General, L. R. 2 P. & D. 156, 161; Niboyet v. Niboyet, L. R. 4 P. Div. 1. Compare Edwards v. Green, 9 La. An. 317, 318; Duke v. Fulmer, 5 Rich. (N. C.) Eq. 121, 125; Hare v. Hare, 10 Tex. 355, 357.

<sup>3</sup> See Thompson v. State, 28 Ala. 12, 16; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 411; Becket v. Becket, 17 B. Mon. (Ky.) 370, 374; Barber v. Root, 10 Mass. 260, 264; Hopkins v. Hopkins, 35 N. H. 474, 475; Clark v. Clark, 8 N. H. 21, 22; Prosser v. Warner, 47 Vt. 667, 671; Shafer v. Bushnell, 24 Wis. 372, 376; Gleason v. Gleason, 4 Wis. 64, 65; Hubbell v. Hubbell, 3 Wis. 662, 664. Compare Dorsey v. Dorsey, 7 Watts (Pa.), 350; affd. McDermott's Appeal, 8 Watts & S. (Pa.) 256; Bishop v. Bishop, 30 Pa. (6 Casey) 416; Leith v. Leith, 39 N. H. 20; Edwards v. Green, 9 La. An. 317; Harman v. Harman, 1 Cal. 215, 216; Duke v. Fulmer, 5 Rich. (S. C.) Eq. 121, 125; Lolley v. Lolley, 2 Clark & Finn. 568.

<sup>4</sup> See Cheever v. Wilson, 9 Wall. (U. S.) 123; Standridge v. Standridge, 31 Ga. 223; White v. White, 5 N. H. 476; State v. Fry, 4 Mo. 120; Dorsey v. Dorsey, 7 Watts (Pa.), 349; Tolen v. Tolen, 2 Blackf. (Ind.) 407; Harteau v. Harteau, 14 Pick. (Mass.) 181; Thompson v. State, 28 Ala. 12, 16; Barber v. Root, 10 Mass. 260, 264; Clark v. Clark, 8 N. H. 21, 22; Hubbell v. Hubbell, 3 Wis. 662, 664; Shafer v. Bushnell, 24 Wis. 372, 376; Harvey v. Farnie, L. R. 5 P. D. 153; Wilson v. Wilson, L. R. 2 P. & D. 435, 442. Compare Duke v. Fulmer, 5 Rich. (S. C.) Eq. 121, 125; Harman v. Harman, 1 Cal. 215, 216; Lolley v. Lolley, 2 Clark & Finn. 568.

<sup>5</sup> See Crossman v. Crossman, 33 Ala. 486, 487; Parish v. Parish, 32 Ga. 653, 655;

Maguire v. Maguire, 7 Dana 187; Garner v. Garner, 56 Md. 187; Hunt v. Hunt, 72 N. Y. 217, 23 Am. Rep. 129; People v. Baxter, 78, 83, 84; s. c., 32 Am. R. 274; Root, 10 Mass. 260, 264; Colvill, 55 Pa. St. (5 P. F. Smith) 375; Turner, 44 Ala. 437; Commonwealth v. Blood, 97 Mass. 538; Borden v. Johns. (N. Y.) 121; Vischer v. Barb. (N. Y.) 640; McGiffert v. Barb. (N. Y.) 70; Hoffman v. Barb. (N. Y.) 269; Kerr v. N. Y. 272; Holmes v. Holmes, 57 Y.) 305; Irby v. Wilson, 1 Dev. (N. C.) 568; State v. Schlack, (N. C.) 520; Hood v. Hood, (Mass.), 196; Harding v. Alden, (Me.) 140.

Some of the States provide for service by publication, whenabouts of the defendant is unknown and personal service is impossible. field v. McIntyre, 10 Ohio, 27; Tolen, 2 Blackf. (Ind.) 407; Hunt, 2 Strob. (S. C.) Eq. 174; Cooper, 7 Ohio, pt. 2, 238; Harrison v. 19 Ala. 499; Gleason v. Gleason, 4 Wis. 64; Hubbell v. Hubbell, 3 Wis. 662, 664. Compare Thompson v. State, 28 Ala. 12, 16; land v. McFarland, 40 Ind. 458; Hare, 10 Tex. 355, 357; Shaw v. Attorney-General, L. R. 2 P. & D. 156, 161; also, Rev. Stats. Ind. 1881, § 1881, §§ 3599, 4180; Minn. 1873, § 216; Ohio, 1880, § 1882, p. 428.

It seems that where both parties are domiciled in the same State, the jurisdiction to render a decree of divorce without actual service of process on the defendant. See Barber v. Root, 10 Mass. 260, 264. Where the plaintiff is domiciled in the State, the jurisdiction of the court extends only to dissolve the marriage as to such an one. See Gould v. Mo. 200, 204; People v. Baker, 78; s. c., 32 Am. Rep. 274; Cooper

It has long been the law in New York and other States, that a divorce is void there when obtained in another State by a resident thereof according to its own laws, against a resident of New York who has neither appeared nor had due personal service of process upon him.<sup>1</sup>

(i) *Appearance*.—Voluntary appearance in the suit gives the court jurisdiction to pass upon the cause, and renders the decree binding elsewhere.<sup>2</sup>

56 Wis. 195; s. c., 43 Am. Rep. 706; 14 N. W. Rep. 33, 443.

When the defendant is not personally served with process, and does not voluntarily appear, any decree will be invalid against him for costs. See *Lytle v. Lytle*, 48 Ind. 200, 202, or alimony. See *Turner v. Turner*, 44 Ala. 437, 450; *Thompson v. State*, 28 Ala. 12, 17; *Sanford v. Sanford*, 5 Day (Conn.), 353, 358; *Beard v. Beard*, 31 Ind. 321, 323; *Madden v. Fielding*, 19 La. An. 505, 506; *Ellison v. Martin*, 53 Mo. 575, 578; *Gould v. Crow*, 57 Mo. 200, 204; *Leith v. Leith*, 39 N. H. 20, 39; *Jackson v. Jackson*, 1 Johns. (N. Y.) 424; *Prosser v. Warner*, 47 Vt. 667, 670, 673. And a decree prohibiting such unserved and non-appearing defendant from marrying again will be invalid. See *Garner v. Garner*, 56 Md. 127, 128, 129.

It has been said that "the injured party must seek redress in the forum of the defendant, except where the defendant has removed from what was before the common domicile of both." *Reel v. Elder*, 62 Pa. St. (12 P. F. Smith) 315. See also *Gray v. Hawes*, 8 Cal. 565.

<sup>1</sup> See *People v. Baker*, 76 N. Y. 78; s. c., 72 Am. R. 274; *Borden v. Fitch*, 15 Johns. (N. Y.) 121; *Bradshaw v. Heath*, 13 Wend. (N. Y.) 407; *Vischer v. Vischer*, 12 Barb. (N. Y.) 640; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30; s. c., 55 Barb. (N. Y.) 269; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37; *Shumway v. Stillman*, 4 Cow. (N. Y.) 292; s. c., 6 Wend. (N. Y.) 447; *Ferguson v. Crawford*, 70 N. Y. 253; *Kinnier v. Kinnier*, 45 N. Y. 535; *Hunt v. Hunt*, 72 N. Y. 217; s. c., 28 Am. Rep. 129; *McGiffert v. McGiffert*, 18 Barb. (N. Y.) 69; s. c., 17 How.

. 18; *Holmes v. Holmes*, 4 Lans. 38; reversing s. c., 57 Barb. (N. Y.) 20. Compare *Cheever v. Wilson*, U. S.) 108; *Kline v. Kline*, 57 Pa. St. 501; *Cook v. Cook*, 56 s. c., 43 Am. Rep. 706; 14 N. W. Rep. 33, 443.

here A. and his wife lived in New York, and his wife deserted him and went to Ohio, where he

obtained a divorce upon service by publication, constructive service being made sufficient under the Ohio law. On a suit brought in New York to annul a subsequent marriage of one of the parties, it was held that the New York courts would not recognize the Ohio divorce as valid. *O'Dea v. O'Dea*, 101 N. Y. 23. And a judgment of divorce granted in Michigan to a husband, from a wife resident in Wisconsin, without personal service or appearance, or her knowledge of the proceedings, the alleged cause of action being false, is no bar to an action by her for a divorce in Wisconsin, although the statute of Michigan made jurisdiction solely dependent upon the residence there of the complainant. *Cook v. Cook*, 56 Wis. 195; s. c., 43 Am. Rep. 706; 14 N. W. Rep. 33, 443. And a decree of divorce rendered in Wisconsin on service by publication is ineffectual to award the custody of minor children resident in Iowa. *Kline v. Kline*, 57 Iowa, 386; s. c., 42 Am. Rep. 47.

<sup>2</sup> *Garner v. Garner*, 56 Md. 127, 128; *Gould v. Crow*, 57 Mo. 200, 202; *People v. Baker*, 76 N. Y. 78, 83, 84; s. c., 32 Am. Rep. 274; *Kinnier v. Kinnier*, 45 N. Y. 535, 539; s. c., 58 Barb. (N. Y.) 424; *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 110, 111, 124. Thus where A., of New York, brought in a New York court a divorce suit against his wife, a resident of Texas, and she brought a similar suit against him in a Texas court, and he defended, contesting the jurisdiction of the Texas court, and on the merits, and she prevailed, the New York court held that her decree was a bar to the further maintenance of his suit, without regard to whether the Texas court had or had not jurisdiction of his person. *Jones v. Jones*, 36 Hun (N. Y.), 414. And where a husband obtained a decree of divorce in Maine, his wife appearing, subsequently, for a pecuniary consideration, executed a release, discharging all claims against him and his estate, the release reciting the decree; it was held that the wife could not, upon her libel in Massachusetts, impeach the decree of the Maine court for want of jurisdiction, without showing that the husband went to Maine for the purpose of procuring a divorce in violation of the Massachusetts

*j. Form of Proceedings in.* — To give a foreign divorce validity and force outside of the jurisdiction where decreed, the proceedings must have been conducted according to the rules of international law prescribed as to foreign judgments.<sup>1</sup>

*k. Collusion in Divorce Proceedings.* — All judgments in divorce are avoided by collusion, even in the jurisdiction where they were rendered, when the collusion is established.<sup>2</sup>

*l. Fraud in procuring Divorce.* — It is a well-recognized and well-established principle of law that fraud vitiates every thing it enters into;<sup>3</sup> and fraud vitiates a decree of divorce rendered in another State,<sup>4</sup> unless the same question of fraud has been tried in the

laws (Gen. Stat. ch. 107, § 54). *Loud v. Loud*, 129 Mass. 14.

And where a wife appeared by counsel in a divorce suit in Indiana, and received alimony in pursuance of the decree of divorce, she will be stopped subsequently to impeach the divorce in another State, on the ground that it was obtained by fraud. *Kirrigan v. Kirrigan*, 2 McC. (N. J.) 146.

1 No judgment has extra-territorial force unless pronounced by a court of competent jurisdiction, acting in conformity with the principles of international law. See *Bischoff v. Wethered*, 9 Wall. (U. S.) 812; *Mills v. Duryee*, 7 Cr. (U. S.) 481; *Tenton v. Garlick*, 8 Johns. (N. Y.) 194; *Borden v. Fitch*, 15 Johns. (N. Y.), 121; *DeWitt v. Burnett*, 3 Barb. (N. Y.) 90; *Bissell v. Briggs*, 9 Mass. 462; *Mowry v. Chase*, 100 Mass. 79; *Shaw v. Gould*, L. R. 3 H. L. 55; *Ferguson v. Mahon*, 3 Per. & Dav. 143; s. c., 11 Ad. & El. 179; *Buchanan v. Rucker*, 9 East, 192; *Smith v. Nicolls*, 5 Bing. N. C. 208; *Douglas v. Forrest*, 4 Bing. 686; *Don v. Lippmann*, 5 Clark & Finn. 1, 21; *Cranston v. Johnston*, 3 Ves 170; *Cavan v. Stewart*, 1 Stark. 525; *Becquet v. McCarthy*, 2 Barn. & Ad. 951; *Simpson v. Fogo*, 1 J. & H. 18; s. c., 1 H. & M. 195; 9 Jur. (N. S.) 403; *Schilby v. Westenholz*, L. R. 6 Q. B. 155; s. c., 40 L. J. (Q. B.) 73; 24 L. T. (N. S.) 93; *Lawrence's Wheaton*, 291 Whart., Conf. L. § 231; *Story*, Conf. L. § 546, p. 688; *Boullenois*, obs. 1, p. 610; *Wächter*, i. p. 308; *Bar*, Priv. Intern. L. § 125 and n. 14; *Fœlix*, Nos 321, 327.

2 *Hanover v. Turner*, 14 Mass. 227; *Kirrigan v. Kirrigan*, 2 McC. (N. J.) 146; *Jackson v. Jackson*, 1 Johns. (N. Y.) 424.

3 See FRAUD.

4 See *Thompson v. State*, 28 Ala. 13, 18, 21; *Ex parte Smith*, 34 Ala. 455; *Tolen v. Tolen*, 2 Blackf. (Ind.) 407, 409; *Whitcomb v. Whitcomb*, 46 Iowa, 437, 444; *Rush v. Rush*, 46 Iowa, 648, 649; *Graves v. Graves*, 36 Iowa, 310; *Comstock v. Adams*, 23 Kan. 513, 523; *Litowich v. Litowich*, 19 Kan. 451, 454; *Harding v. Alden*, 9 Me. 140, 151; *Holmes v. Holmes*, 63 Me. 420, 426; *Lord v. Lord*, 66 Me. 265, 266, 270; *Gechter*

*v. Gechter*, 51 Md. 187, 189; *Sewall v. Sewall*, 122 Mass. 156, 161; *Edson v. Edson*, 108 Mass. 590, 596, 597; *People v. Dawell*, 25 Mich. 247, 259, 265; *True v. True*, 6 Minn. 458, 465, 466; *Young v. Young*, 17 Minn. 181, 185; *Gould v. Crow*, 57 Mo. 200, 203; *Adams v. Adams*, 51 N. H. 388, 397, 398; *Hunt v. Hunt*, 72 N. Y. 217, 225-229; s. c., 28 Am. Rep. 129; *Borden v. Fitch*, 15 Johns. (N. Y.) 121, 141, 143; *Boyd's Appeal*, 38 Pa. St. 241, 245; *Allen v. Maclellan*, 12 Pa. St. 328, 331, 332; *Crouch v. Crouch*, 30 Wis. 667, 669, 670.

Thus, a divorce obtained by fraud in another State is void in the District of Columbia, the parties to the marriage residing there. *Strait v. Strait*, 3 McAr. (D. C.) 415. The Michigan courts will not recognize a decree of divorce rendered in another State, the libellant having left Michigan, and remained for a year in the other State for the purpose of obtaining such divorce. *Reed v. Reed*, 52 Mich. 117; s. c., 50 Am. Rep. 247. And the New York courts refuse to give effect to a decree of divorce obtained by a wife in another State for a cause not there allowed, she having been married and domiciled in that State, and having obtained such divorce in fraud of its laws. *Jackson v. Jackson*, 1 Johns. (N. Y.) 424; *Pawling v. Bird's Ex'rs*, 13 Johns. (N. Y.) 192. *Compare Kinnier v. Kinnier*, 45 N. Y. 535; s. c., 53 Barb. (N. Y.) 458; 58 Barb. (N. Y.) 424.

A divorce granted in another State, in favor of the husband, temporarily residing there, dissolving a marriage contracted in New York, on substituted service on the wife residing in New York, and for an alleged cause which did not exist in fact, was held invalid as against her. *Mellen v. Mellen*, 10 Abb. (N. Y.) N. C. 329. And if, after a decree for a divorce *a mensa et thoro*, and for alimony, made in one State, the defendant, without disclosing the fact of such a decree, obtains a decree for a divorce *a vinculo*, in a court of another State, he is not thereby released from his liability for the payment of alimony. *Barber v. Barber*, 21 How. (U. S.) 532.

case.<sup>1</sup> Thus, a foreign divorce will be void where the court procured jurisdiction by a fraudulent affidavit<sup>2</sup> or by fraudulent residence,<sup>3</sup> or where false charges are set out and a fraudulent case made,<sup>4</sup> and the proceedings concealed from the other party.<sup>5</sup>

However, if the jurisdiction is unquestioned, the parties to the suit cannot collaterally impeach a decree of divorce for fraud or collusion.<sup>6</sup>

**11. Bankrupt and Insolvent Laws.**—I. WHERE THE PARTIES ARE ALL SUBJECTS OF THE STATE IN WHICH THE ASSIGNMENT IS MADE.—As against citizens of other States, and especially as against citizens where the assignment was made, an assignment valid by the laws of the State in which it is made, is valid everywhere,<sup>7</sup>

The New Hampshire law (1883, ch. 14), to prevent fraudulent divorces, does not enlarge the jurisdiction of the court. *Kimball v. Kimball*, 63 N. H. 598.

<sup>1</sup> *Folsom v. Folsom*, 55 N. H. 78, 82; *Adams v. Adams*, 51 N. H. 388, 397, 398.

<sup>2</sup> See *Holmes v. Holmes*, 63 Me. 420, 424.

<sup>3</sup> See *Crossman v. Crossman*, 33 Ala. 486, 487; *People v. Peralta*, 4 Cal. 175, 176; *State v. Frest*, 4 Harr. (Del.) 558; *Strait v. Strait*, 3 McAr. (D. C.) 415, 417; *Way v. Way*, 64 Ill. 406, 414; *Powell v. Powell*, 53 Ind. 513, 516; *Maxwell v. Maxwell*, 53 Ind. 363, 364; *Hood v. State*, 56 Ind. 263, 270; *Hinds v. Hinds*, 1 Iowa, 36, 39, 40; *Whitcomb v. Whitcomb*, 46 Iowa, 437, 443; *Smith v. Smith*, 4 Greene (Iowa), 266, 271; *Warren v. Thomaston*, 43 Me. 406, 418-420; *Calef v. Calef*, 54 Me. 365, 366; *Sewall v. Sewall*, 122 Mass. 156, 162; *Hairston v. Hairston*, 27 Miss. 714, 718, 719; *Kruse v. Kruse*, 25 Mo. 68; *Pate v. Pate*, 6 Mo. App. 49, 51; *Leith v. Leith*, 39 N. H. 20, 41; *People v. Smith*, 20 N. Y. Sup. Ct. Rep. (13 Hun) 414, 417; *Broadman v. House*, 18 Wend. (N. Y.) 512; *In re Wrigley*, 8 Wend. (N. Y.) 134, 139; *State v. Casinova*, 1 Tex. 401; *Dutcher v. Dutcher*, 39 Wis. 651, 658; *Niboyet v. Niboyet*, L. R. 4 P. D. 1, 18, 19; *Shaw v. Gould*, L. R. 3 H. L. 55, 87; *Dolphin v. Robins*, 7 H. L. Cas. 390.

<sup>4</sup> *Graves v. Graves*, 36 Iowa, 310; *Baker v. Baker* 21 Hun (N. Y.), 179, 189.

<sup>5</sup> *Whitcomb v. Whitcomb*, 46 Iowa, 437, 444; *Doughty v. Doughty*, 27 N. J. Eq. 315, 325; *Crouch v. Crouch*, 30 Wis. 667, 670.

It seems, however, that where the defendant has been heard (see *Folsom v. Folsom*, 55 N. H. 78, 80, 81), or duly summoned, though by publication (see *Harrison v. Harrison*, 19 Ala. 499, 509, 510; *Parish v. Parish*, 9 Ohio St. 534, 538, 540, where the service was not procured by perjury; *Lord v. Lord*, 66 Me. 265, 266, 270), the decree of a foreign court cannot

be set aside on the ground of fraud. *Folsom v. Folsom*, 55 N. H. 78, 80.

<sup>6</sup> *Plummer v. Plummer*, 37 Miss. 185, 201; *Adams v. Adams*, 51 N. H. 388, 398.

But it seems that strangers to the divorce suit may (see *Carpentier v. Oakland*, 30 Cal. 439); although, on principle, such third party cannot apply directly to have a voidable decree of divorce avoided. See *Walton v. Walton*, 80 N. C. 26, 30; *Atkinson v. Allen*, 12 Vt. 619, 624.

<sup>7</sup> *Greene v. Sprague Manuf. Co.*, 52 Conn. 330; *Train v. Kendall*, 137 Mass. 366; *In re Waite*, 99 N. Y. 433; *Faulkner v. Hyman*, 142 Mass. 53; s. c., 2 N. Eng. Rep. 181; *Ockerman v. Cross*, 54 N. Y. 29; s. c., 40 Barb. (N. Y.) 465; *Moore v. Willett*, 35 Barb. (N. Y.) 663; *Smith's Appeal*, 104 Pa. St. 381; *Zuppann v. Bauer*, 17 Mo. App. 678; *Caskie v. Webster*, 2 Wall. Jr. C. C. 131; *Lamb v. Fries*, 2 Pa. St. 83; *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 460; *Hoyt v. Thompson*, 5 N. Y. 320; overruling s. c., 3 Sandf. (N. Y.) 416; *Hooper v. Tuckerman*, 3 Sandf. (N. Y.) 311; *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894; *In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136; *Van Winkle v. Armstrong*, 41 N. J. Eq. 402; s. c., 4 Cent. Rep. 53; *Varnum v. Camp*, 1 Gr. (N. J.) 326; *Moore v. Bonnell*, 2 Vr. (N. J.) 90; *Bird v. Caritat*, 2 John. (N. Y.) 342.

A voluntary assignment for creditors, valid at the assignor's domicile, will pass title to his personal estate wherever situated. *Smith's Appeal*, 104 Pa. St. 381; *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 460; *Hooper v. Tuckerman*, 3 Sandf. (N. Y.) 311. It has been held in New York that an assignment by the receiver of a foreign insolvent corporation of its *choses in action* in that State passes a good title to the same as against the debtors by whom they are owing. *Hoyt v. Thompson*, 5 N. Y. 320; overruling s. c., 3 Sandf. (N. Y.) 416. And in Massachusetts it has been held that an assignment is not void as against an attachment, because it gives preferences. *Train v. Kendall*, 137 Mass. 366.

so far as it deals with personalty,<sup>1</sup> even by the courts of the law of which makes such an assignment fraudulent in delays creditors.<sup>2</sup> And where such assignment does not

While the title of foreign assignees in bankruptcy will not be recognized in New York solely by virtue of the foreign statute, it will be recognized and enforced where it can be done without prejudice to creditors pursuing their remedies under New York statutes. *In re Waite*, 99 N. Y. 433; overruling, *Mosselman v. Caen*, 34 Barb. (N. Y.) 66. But a voluntary assignment made in New York, and valid there, has been held not to be valid in Massachusetts against an attachment, if such assignment is one which, were it made between citizens of that State, it would be inoperative for want of compliance with legal requisition. *Faulkner v. Hyman*, 142 Mass. 53; s. c., 2 N. Eng. Rep. 181.

It has been said that the insolvent laws of a State do not by their declaratory force solely, without any other investiture of title, the possession remaining in the debtor, remove the property of the debtor beyond the reach of a creditor who is a resident of another State, and who proceeds in the circuit court. *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Towne v. Smith*, 1 Woodb. & M. (U. S.) 136; *Gilman v. Lockwood*, 4 Wall. (U. S.) 411; *Mississippi Mills Co. v. Ranlett*, 19 Fed. Rep. 191.

The Canada Southern Railway Company, a Canadian corporation, became embarrassed. The Canadian Parliament passed an "arrangement act," patterned upon similar English and Canadian acts. These acts partake partly of the nature of a re-organization after foreclosure, and partly of the nature of proceedings in bankruptcy. The act in question, without providing for notice or hearing, sought to conclude the rights of bondholders. The Canadian parliament is not restricted from enacting laws impairing the obligation of contracts. The court held that the act was clearly binding upon Canadian bondholders, and that, the corporation being a Canada corporation, and the scheme partaking so largely of an adjudication in bankruptcy, it should be deemed binding upon bondholders within the United States as well. *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527.

Under the Alabama law a woman's property is her own, and not liable for her husband's debts. A man there converted his wife's property into money, thereby becoming her debtor. They then moved to Tennessee, where he contracted debts, and made an assignment for the benefit of creditors, in which he preferred

his wife as creditor. It was held Tennessee courts would respect title in accordance with the principles of international comity. *Columbia Bank v. Walker* (Tenn.), 299. It is the general principle among nations to give effect to the foreign assignees in bankruptcy. *Caritat*, 2 Johns. (N. Y.) 342; *Remsen*, 4 Johns. Ch. (N. Y.) 46.

The statutes of a foreign State have any force or effect in another State *ex proprio vigore*; hence it has been held in New York that the statutes recognizing foreign assignees in bankruptcy have no recognition solely by virtue of a foreign statute. But comity of nations gives no effect to such titles when they are not recognized and enforced without prejudice to the rights of creditors pursuing their rights under the State statutes, they are not in conflict with the public policy of the State. *Waite*, counting, 99 N. Y. 433; s. c., 1 C. C. 15; 2 N. E. Rep. 440.

<sup>1</sup> But the bankrupt law of one country cannot of itself operate a transfer of property in this country. *Rison v. Sterry*, 5 Cr. (U. S.) 28; *v. Saunders*, 12 Wheat. (U. S.) 213; a bankruptcy court has no jurisdiction over the property of the bankrupt in foreign countries, and cannot compel an assignment thereof by him. *Phelps v. McArthur*, (D. C.) 375; s. c., 16 B. & F. 217.

<sup>2</sup> *Greene v. Sprague Manuf. Co.*, Conn. 330; *Caskie v. Webster*, 2 C. C. 131.

Thus, a general assignment for the benefit of creditors will carry personalty, although situated in a State where it would not permit the assignment to be made therein. *Livermore v. How*, 21 How. (U. S.) 126.

Foreign assignments for the benefit of creditors are valid in Minnesota if not made in conformity to Minnesota statutes. *In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136.

An assignment made in another State for the equal benefit of all creditors of the assignor is operative on property in Missouri; and this is so, although the policy of such other State would not give a similar effect to an assignment made in Missouri. *Zuppann v. Bauer*, 17 Mo. 136.

The title acquired by an assignee for the benefit of creditors, although given to the property assigned, is, as to other States, whose policy is not notified, as against the claims of cr

with the law of the place where the personal property is situated, operates to transfer the title to the assignee as against process in favor of resident creditors.<sup>1</sup>

But a State law prescribing the effect of an assignment for the benefit of creditors can have no effect on an assignment made in another State, of an instrument executed in the former;<sup>2</sup> and where questions as to the extra-territorial property arise between foreign assignees and foreign creditors domiciled in the same State, the foreign laws to which such parties are subject will be upheld.<sup>3</sup>

The validity of an assignment for the benefit of creditors is governed by the laws of the State of the debtor's domicile, though it embraces real and personal property situate in other States.<sup>4</sup>

the assignor domiciled therein, the validity of general assignments with preferences, liable to be defeated by attachment sued out of the courts of such other States, by creditors domiciled therein, to recover their debts out of such assets. *Kimball v. Lee*, 40 N. J. Eq. 302; s. c., 4 Cent. Rep. 332.

It is said to be the understanding of the commercial world that the bankrupt's effects should follow his person, and be distributed in the place where the credit was given, and payment expected according to the laws thereof. *Holmes v. Reimsen*, 4 Johns. Ch. (N. Y.) 460; *Hunter v. Potts*, 4 T. R. 182, 192; *Sill v. Worswick*, 1 H. Black. 691, 693; *Philips v. Hunter*, 2 H. Black. 402, 405.

1 *Kelsadt v. Reilly*, N. Y. Daily Reg., Aug. 9, 1878, *Van Brunt, J.*; *Moore v. Willett*, 35 Barb. (N. Y.) 663; *Caskie v. Webster*, 2 Wall. Jr. C. C. 131; *Speed v. May*, 17 Pa. 91; *Law v. Mills*, 18 Pa. St. 185; *Bholen v. Cleveland*, 5 Mason, C. C. 174; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Parsons v. Lyman*, 20 N. Y. 103; *Greene v. Mowry*, 2 Bailey (S. C.), 163; *Smith v. Chicago & N. W. R.R. Co.*, 23 Wis. 267; *Forbes v. Scannell*, 13 Cal. 242.

However, there are decisions which seem to place foreign voluntary assignments upon the same basis with foreign bankrupt assignments. *Ingraham v. Geyer*, 13 Mass. 146; *Fox v. Adams*, 5 Greenl. (Me.) 245; *Borden v. Sumner*, 4 Pick. (Mass.) 265; *Blake v. Williams*, 6 Pick. (Mass.) 286; *Fall River Iron Works Co. v. Croade*, 15 Pick. (Mass.) 11; 2 Kent's Com. 407.

Other cases hold that foreign assignments for the benefit of creditors are not to be recognized as against claims of residents. *Van Winkle v. Armstrong*, 40 N. J. Eq. 402; s. c., 4 Cent. Rep. 53; *Varnum v. Camp*, 1 Gr. (N. J.) 326; *Moore v. Bonnell*, 2 Vr. (N. J.) 90.

2 *Dundas v. Bowler*, 3 McL. C. C. 397. The law of Ohio, which declares that an assignment by a debtor in failing circum-

stances to a part of his creditors in preference to others, shall be for the benefit of all creditors, can have no effect on an assignment made in another State of an instrument executed in Ohio. *Dundas v. Bowler*, 3 McL. C. C. 397.

3 *Bentley v. Whittemore*, 19 N. J. Eq. 462; revg. s. c., 18 N. J. Eq. 366; *Abraham v. Plestoro*, 3 Wend. (N. Y.) 540; s. c., 1 Paige Ch. (N. Y.) 236; *Sanderson v. Bradford*, 10 N. H. 260; *Hall v. Boardman*, 14 N. H. 38; *Thurston v. Rosenfield*, 42 Mo. 474; *Burlock v. Taylor*, 16 Pick. (Mass.) 335; *Moore v. Bonnell*, 2 Vr. (N. J.) 90; *Whipple v. Thayer*, 16 Pick. (Mass.) 25; *Burlock v. Taylor*, 16 Pick. (Mass.) 335; *Martin v. Potter*, 11 Gray (Mass.), 37.

Bishop says that it is not easy to say how far this doctrine was intended to be affected by the decisions in *Green v. Van Buskirk*, 7 Wall. (U. S.) 139. And Dr. Wharton distinguishes *Green v. Van Buskirk* upon the ground of the positive enactment of the State of Illinois in reference to the recording of chattel mortgages. He says, "If a State provide that no title shall pass to property within its borders except on certain conditions, such provisions cannot be overridden by any foreign law which parties domiciled abroad may choose to interpolate." Whart., Conf. L. § 371.

4 *D'Ivernois v. Leavitt*, 23 Barb. (N. Y.) 63; *Livermore v. Jenckes*, 21 How. (U. S.) 126; *Wickham v. Dillon*, 2 West. L. Mo. 511.

Thus, an assignment for the benefit of creditors, executed in another State, valid by its laws, need not be recorded under the Pennsylvania statute in order to be operative in that State. *Speed v. May*, 17 Pa. St. 91.

The validity of an assignment of personal property in New York for the benefit of creditors, made in Virginia by citizens of Virginia carrying on business in both States, signed and acknowledged in Virginia, and delivered and accepted in New

*a. Assignment of Real Estate.* — The validity of every disposition of lands, whether the disposition be absolute or qualified, whether it passes an estate or merely imposes a charge, depends exclusively upon the municipal law of the country or State in which the lands are situate.<sup>1</sup>

*b. Choses in Action.* — *Choses in action*, since they can have no locality, are said to follow the person, and pass by a general assignment, even though the persons owing the debts are foreign to the domicile of the assignor.<sup>2</sup>

*c. Property in Transitu and Ships at Sea.* — It is a familiar principle that property at sea, or *in transitu*, passes by any valid conveyance made by the owner.<sup>3</sup> And an assignment of a ship on the high seas passes a title to the assignees, if the assignment is valid at the place where it is made.<sup>4</sup>

2. ASSIGNMENTS WHICH CONTRAVENE THE LAW OF THE SITUS. — It is the general rule that voluntary assignments for the benefit of creditors, if valid according to the laws of the place of the domicile of the assignor, have the effect to pass all the personal property of the assignor, wherever situated, unless their operation

York, is to be determined by the law of New York. *Grady v. Bowe*, 11 Daly (N. Y.), 259.

1 *Nicholson v. Leavitt*, 4 Sandf. (N. Y.) 252, 276; *Bonati v. Welsch*, 24 N. Y. 157; *Slatter v. Carroll*, 2 Sandf. Ch. (N. Y.) 573; *Hutcheson v. Peshine*, 1 C. E. Gr. (N. J.) 167; *McGoon v. Scales*, 9 Wall. (U. S.) 23; *Osborn v. Adams*, 18 Pick. (Mass.) 247; *Loving v. Pairo*, 10 Iowa, 282; *Lucas v. Tucker*, 17 Ind. 41; *Rogers v. Allen*, 3 Ohio, 488; *Nelson v. Bridgeport*, 8 Bosw. (N. Y.) 547; *Brodie v. Barry*, 2 Ves. & B. 131; *Curtis v. Hutton*, 14 Ves. 537; *Birtwhistle v. Vardill*, 2 Clark & F. 571; s. c., 9 Bligh, 32; *Harrison v. Harrison*, 42 L. J. Ch. 495.

"It is of no consequence where the instrument containing the disposition is made or delivered, nor where the parties reside, since in all cases it is neither the *lex loci contractus* nor the *lex domicilii*, but solely the *lex loci rei sitæ*, that governs the construction; and so universal is the rule, that neither in the law of England nor in our own country (although it seems to be otherwise in some foreign countries) has a solitary exception ever been admitted." Story, Conf. L. § 428.

Bishop says, that, "while this rule is admitted in its full force, it does not follow, that because an assignment executed in this State (New York) covers real property situated in another State, that, therefore, it cannot be assailed here on the ground that the instrument was in fraud of citizens here, or that it was obtained fraudulently from the grantor." Bishop on Ins. Debt. 239, 240. See also *D'Ivernois v. Leavitt*,

23 Barb. (N. Y.) 63, 80; *Nicholson v. Leavitt*, 4 Sandf. (N. Y.) 252, 276, 277. It has been said that an assignment in insolvency, under the laws of another State, passes lands in Pennsylvania. *Lamb v. Fries*, 2 Pa. St. 83.

Under the West Virginia acts 1877, ch. 114, § 1, non-residents not being entitled to home exemptions, it was held that where a resident of Virginia was declared a bankrupt by a United States district court sitting in that State, he was not entitled to a homestead in land situated in West Virginia as against his creditors there, though the land had been so set apart by his assignee in Virginia, and confirmed by the bankrupt court there. *Gibbs v. Logan*, 22 W. Va. 208.

2 *Guillander v. Howell*, 35 N. Y. 657; s. c., 6 Am. L. Reg. (N. S.) 522; *Caskie v. Webster*, 2 Wall. Jr. C. C. 131; *Speed v. May*, 17 Pa. St. 91; *Noble v. Smith*, 6 R. I. 446; *Clark v. Connecticut Peat Co.*, 35 Conn. 303; *Smith v. Chicago & N. W. R.R. Co.*, 23 Wis. 267; *Whart.*, Conf. L. § 545.

The decision of an assignee as to the allowance of a claim made subsequent to a judgment rendered thereon in another State, the claim having been presented prior to the judgment, is a bar to recovery on that judgment in the State of the assignee's jurisdiction. *State v. Kansas Ins. Co.*, 32 Kan. 655.

3 *Whar.*, Conf. L. § 356; *Plestoro v. Abraham*, 1 Paige Ch. (N. Y.) 236.

4 *Moore v. Willett*, 35 Barb. (N. Y.) 663; *Southern Bank v. Wood*, 14 La. An. 561; *Crapo v. Kelly*, 16 Wall. (U. S.) 610.

is limited or restrained by some local law or policy of the State where the same is situated.<sup>1</sup> Thus, an assignment for the benefit of creditors, executed in New York, does not confer title to personal property in another State, in contravention of the laws of that State.<sup>2</sup>

When assignments giving preferences are declared to be fraudulent or invalid by the statute at the place where the property is situated, they will not be sustained, although valid by the law of the State where made;<sup>3</sup> but the preference will be disregarded, and the conveyance sustained.<sup>4</sup>

Statutes which regulate the mode of executing and administering assignments, are intended to affect only assignments executed within the State, or such as are made by residents of the State, and have no application whatever to assignments executed without the State by non-residents.<sup>5</sup>

<sup>1</sup> *Hanford v. Paine*, 32 Vt. 442, 456; *Mumford v. Canty*, 50 Ill. 370, 375.

<sup>2</sup> "What is injurious to the rights of citizens where the property is situated, should be the subject of positive legislation, and not left to the discretion of the courts." Story, *Conf. L.* § 390. See *Guillander v. Howell*, 35 N. Y. 657; *Zipcey v. Thompson*, 1 Gray (Mass.), 243; *Varnum v. Camp*, 1 Gr. (N. J.) 326; *Le Roy v. Crowninshield*, 2 Mason, C. C. 157; *Fox v. Adams*, 5 Greenl. (Me.) 245; *Olivier v. Townes*, 14 Martin (La.), 97.

<sup>3</sup> *Warner v. Jaffray*, 96 N. Y. 248; s. c., 30 Hun (N. Y.), 326; 48 Am. Rep. 616.

<sup>4</sup> Thus, in New Jersey, where assignments with preferences are prohibited by statute, an assignment executed under the laws of New York, where preferences are allowed, was held incompetent to pass title. *Varnum v. Camp*, 1 Gr. (N. J.) 329. See *Zipcey v. Thompson*, 1 Gray (Mass.), 243; *Boyd v. Rockport Mills*, 7 Gray (Mass.), 406.

The same is true in Missouri. *Bryan v. Brisbin*, 26 Mo. 423.

<sup>5</sup> *Kitchen v. Reinsky*, 42 Mo. 427; *Ma-berry v. Shisler*, 1 Harr. (Del.) 349; *Stricker v. Tinkham*, 35 Ga. 177; *United States v. United States Bank*, 8 Rob. (La.) 262; *Southern Bank v. Wood*, 14 La. An. 561; *Olivier v. Townes*, 14 Martin (La.), 93.

In *Fuller v. Steiglitz*, 27 Ohio St. 355, a New York assignment giving preferences, invalid under the laws of Ohio, was held to confer a sufficient title upon the assignee to sue to recover assets belonging to the estate in that State. While the court recognized the exception to the general rule of comity, they held that it applied only when there was a conflict of rights growing out of a conflict of laws of the two States. But if, by attachment or otherwise, the property had been seized, and a lien or

charge created against it under the Ohio law, the decision might have been different.

Where an assignment was made in New York, containing preferences, and the assignors had certain personal property in New Jersey covered by the assignment, which property was attached by the defendants, who were creditors residing in New Jersey, and sold in satisfaction of their claims, in an action brought in New Jersey against the defendants for the detention and conversion of the property, it having been shown that an assignment giving preferences was void in New Jersey by the laws of that State; it was held that the assignment was ineffectual to convey the personal property situated in New Jersey, although valid under the laws of the State where made. *Guillander v. Howell*, 35 N. Y. 657; s. c., 6 Am. L. Reg. (N. S.) 522. See, also, *Van Buskirk v. Warren*, 34 Barb. (N. Y.) 457; s. c., 13 Abb. (N. Y.) Pr. 145; *affid.* 2 Keyes (N. Y.), 119; 4 Abb. (N. Y.) App. Dec. 457; s. c., *rev'd.* on appeal to Supreme Court of United States, *sub nom.*, *Green v. Van Buskirk*, 5 Wall. (U. S.) 307; s. c., 7 Wall. (U. S.) 139, 38 How. (N. Y.) Pr. 52.

<sup>5</sup> *Ockerman v. Cross*, 54 N. Y. 29; *Hanford v. Paine*, 32 Vt. 442; *Wilson v. Carson*, 12 Md. 54.

In *Philson v. Barnes*, 50 Pa. St. 230, it was held that an assignment, executed by a non-resident, but not recorded as required by the Pennsylvania statute, was invalid as against an attaching creditor in Pennsylvania. But Bishop says that this case "is exceptional, and turns upon the phraseology of the Pennsylvania statute." Bishop, *Ins. Debt.* 246.

In a case where an assignment was made in Rhode Island by persons residing there, conveying property, a portion of which was situated in New York, and the deed of



3. CONVEYANCES UNDER FOREIGN BANKRUPT AND INSOLVENT LAWS. — Regarding conveyances under foreign bankrupt or insolvent laws, there is in the United States some difference of opinion; but it seems to be pretty well settled that a conveyance by operation, of proceedings under foreign bankrupt and insolvent laws, cannot affect property outside of the State or country in which the law is enacted, and the title acquired under the bankrupt or insolvent proceedings<sup>1</sup> will not prevail against the rights of attaching creditors where the property is situated.

4. RELATION OF FOREIGN BANKRUPT TO ATTACHING CREDITORS. — It seems that in the United States a foreign bankruptcy or assignment is ineffective to transfer property, whether movable or immovable, as against attaching creditors, until it is either confirmed by domestic process, or the property has been realized and assigned to an assignee.<sup>2</sup> But the title of assignees in bankruptcy, appointment

of an assignee contained reservations, which, although valid in Rhode Island, would have rendered the conveyance void if made in New York, in a creditor's action brought in the circuit court of the United States in New York, it was held that the assignment, being valid in Rhode Island, was sufficient to sustain the title in the assignees in New York. *Livermore v. Jenckes*, 21 How. (U. S.) 126.

And where an assignment was made in Virginia, by a corporation of that State, containing provisions which, under the statute of frauds, as expounded in the State of Maryland, would have rendered it void, but which were valid under the laws of the State of Virginia, the assignment was sustained in Maryland. *Baltimore & Ohio R. R. v. Glenn*, 28 Md. 287. See, also, *Frazier v. Fredericks*, 24 N. J. L. (4 Zab.) 162; *Mowry v. Crocker*, 6 Wis. 326; *Law v. Mill*, 18 Pa. St. 185; *Caskie v. Webster*, 2 Wall. Jr. C. C. 131; *Fuller v. Steiglitz*, 27 Ohio St. 355.

Where the assignment was made in North Carolina, and contained a clause allowing the assignees to sell on credit, and also to continue the business at their election, provisions which would render the assignment, if executed in New York, fraudulent and void, in an action brought by the assignees in New York to recover the possession of a portion of the assigned property levied upon by the sheriff under an execution on a judgment obtained by a creditor in that State, it was held that the provisions in the assignment, good where it was executed, but rendering it void in New York, did not impair its validity there, and the title of the assignee was sustained. *Moore v. Willett*, 35 Barb. (N. Y.) 663.

But where an assignment was made in New York, and was valid under the laws of that State, a portion of the property

covered by it was in Vermont, and there was no change of possession of the property, such as is required by the laws of Vermont, it was held that the assignment was invalid as against an attaching creditor in Vermont. *Rice v. Rice*, 32 Vt. 460.

Where an assignment made in Massachusetts was valid under the common law of Massachusetts, the Massachusetts court refused to sustain it against a resident attaching creditor. *Ingraham v. Geyer*, 146; *Fall River Iron Works v. Pick*, (Mass.) 11; *Fox v. Adams*, (Me.) 245. See *Rhode Island v. Danforth*, 14 Gray (Mass.), 12.

In Massachusetts an assignment assented to by creditors is void as against a creditor under the common law. *Edwards v. Mitchell*, 1 Cr. 239; *Russell v. Woodward*, 10 Pick. 408.

1 The courts of a State will not recognize or enforce a right or title acquired under a foreign bankrupt law. *Johnson v. Caen*, 34 Barb. (N. Y.) 66; *see also* (N. Y.) Pr. 248.

2 *Harrison v. Sterry*, 5 Cr. (1841); *Ogden v. Saunders*, 12 Wheat. 273; *Prestoro v. Abraham*, 1 Paige C. 236; *Holmes v. Remsen*, 20 John. 229; *Hoyt v. Thompson*, 5 N. Y. 226; *Hoyt v. Thompson's Exr's*, 19 John. 226; *Crapo v. Kelly*, 16 Wall. (1853) reversing s. c., 45 N. Y. 86; *Adams*, 18 Pick. (Mass.) 245, 246; *Bugbee*, 48 Me. 9; 2 Kent's Com. 100.

The rule has been extended so as to permit even a resident of a foreign country to obtain an attachment which will prevail against a subsequent bankruptcy in his own State. *Boston v. Boston Locomotive Works*, 5 Wend. 339; *See Johnson v. Hunt*, 23 Wend. 339.

3 See *Upton v. Hubbard*, 28 Ch. 408.

a sister State, will prevail over that of a subsequent attaching

Beasley v. Whittemore, 3 C. E. Gr. 18 N. J. Eq. 366; Stricker v. Tinkham, 35 Ga. 176; Johnson v. Parker, 4 Bush (Ky.), 149; Olivier v. Townes, 14 Martin (La.), 93, 97-100; Very v. McHenry, 29 Me. 208; Blake v. Williams, 6 Pick. (Mass.) 286; Fiske v. Foster, 10 Metc. (Mass.) 597; Scribner v. Fisher, 2 Gray (Mass.), 43; Goodwin v. Jones, 3 Mass. 517; Dunlap v. Rogers, 47 N. H. 281; Kidder v. Tufts, 48 N. H. 125; Hutcheson v. Peshine, 1 C. E. Gr. (N. J.) 167; Frazier v. Fredericks, 4 Zab. (N. J.) 166; Mosselman v. Caen, 34 Barb. (N. Y.) 66; Holmes v. Remsen, 4 John. Ch. (N. Y.) 460; s. c., 20 John. (N. Y.) 248; McCullough v. Rodrick, 2 Ohio, 234; Rogers v. Allen, 3 Ohio, 489; Milne v. Moreton, 6 Binn. (Pa.) 353; Ward v. Morrison, 25 Vt. 593; Devisme v. Martin, Wythe (Va.), Ch. 133; Blane v. Drummond, 1 Brock. C. C. 63; Betton v. Valentine, 1 Curt. C. C. 168; The Watchman, 1 Ware (U. S.), D. C. 232; Aspden v. Nixon, 4 How. (U. S.) 467; Stacey v. Thrasher, 6 How. (U. S.) 44; Oakley v. Bennett, 11 How. (U. S.) 33; Booth v. Clark, 17 How. (U. S.) 322; Green v. Van Baskirk, 7 Wall. (U. S.) 139.

Wharton says that this doctrine is sometimes based on the proposition that compulsory conveyances in bankruptcy are the creatures of local law, and should not be extra-territorially extended, and sometimes on the priority, which every State, in case of collusion, should give to its own subjects; but that the true ground is that property, personal as well as real, is subject to all the *lex loci rei sitæ*; that if the owner locally incurs obligations on the faith of such property, it is but fair that it should primarily bear the burden of such debt; and that the forced application of the law of *lex domicilii* would operate to extend oppression and fraud. See Whart., Conf. L. §§ 392, 845-850.

Thus, it is held in New York that a statutory transfer, under the insolvent laws of another State, will not prevail over the lien of an attaching creditor upon property seized in that State. Kelly v. Crapo, 45 N. Y. 86; reversing s. c., 41 Barb. (N. Y.) 603. And in Maine, a general assignment for the benefit of creditors, by a debtor domiciled in another jurisdiction, will not protect his property found in that State, from the attachment of a resident creditor. The Watchman, 1 Ware (U. S.), D. C. 232. But this rule only applies to such property as is found within the jurisdiction of the State at the time of the assignment. The Watchman, 1 Ware (U. S.), D. C. 232. Under the Louisiana Revised Statute, 1791, providing that "from and after such cession

an acceptance (by the syndic) all the property of the insolvent debtor mentioned in the schedule shall fully vest in his creditors,"—was held not to, by its declaratory force only, with no other investiture of title, remove the property, possession remaining in the debtor, beyond the reach of a creditor who is resident of another State, and who proceeds in the United States circuit court. Mississippi Mills Co. v. Ranlett, 19 Fed. Rep. 191.

It is held by the New York courts that, where the charter of a corporation of another State provides that upon its committing an act of insolvency all its property shall forthwith vest in receivers, such receivers take the assets in another State, subject to the claims of attaching creditors who have attached subsequently to the act of insolvency. Willits v. Waite, 25 N. Y. 577; s. c., 13 How. (N. Y.) Pr. 34.

G. in Boston, dealing with J. in Naples, arranged thus: J. to send goods to G. and to draw on B. in London for payment, B. to accept the drafts, and G. to place funds with L. in Boston, B.'s agent. In pursuance of the arrangement, B. accepted drafts and became bankrupt. G. had placed funds with L. to meet these drafts, and these funds had been commingled with other moneys of L. and B. The drafts were taken up by J. from purchasers for value, G. paid J. for the goods sent, L. became bankrupt, G. attached B.'s money in Rhode Island, B. had given to L. an irrevocable power of attorney to collect this money. In a suit in equity between the English assignee in bankruptcy of L. and G., the court held that G. could claim the money by virtue of his attachment. Goodsell v. Benson, 13 R. I. 225.

A ship owner applied to the insolvent court of Massachusetts for the benefit of the insolvent laws of that State; his ship was at the time at sea, and bound for New York; her registry was in Massachusetts. The application to the Massachusetts court was granted, and the assignee in insolvency received from the court a transfer of all the debtor's property, which he could have lawfully sold, assigned, or conveyed. Subsequently a creditor of the ship owner, residing in New York, sued the former in the courts of that State, and upon the arrival of the ship she was seized by the sheriff under attachment. The court held that the ship was in Massachusetts territory, and subject to the jurisdiction of the courts of that State, and that the assignee in insolvency had a prior right to the New York creditor. Crapo v. Kelly, 16 Wall. (U. S.) 610.

creditor.<sup>1</sup> And an assignment, valid in the domicile of the owner, prevails over an attachment of personal property in another State, made with notice of the assignment, there being nothing in the laws of that State declaring such an assignment invalid.<sup>2</sup>

5. COLLISION WITH LOCAL LIEN.—The rights and priorities between local lien creditors and assignees in bankruptcy are to be determined by the *lex rei sitæ*; and where those liens attach prior to the actual arrest under local process, they take precedence.<sup>3</sup>

<sup>1</sup> *Camley v. Tuckerman*, 10 West. L. J. 513; *Askew v. La Cygne Exchange Bank*, 83 Mo. 366; s. c., 53 Am. Rep. 590.

Thus a voluntary assignment by a debtor in New York for the benefit of creditors gives the assignee a better title to a debt due the debtor from a resident in Georgia than the title acquired by a Georgia creditor of the assignor under a garnishee process, the assignment not being repugnant to the laws of Georgia. *Princeton Manuf. Co. v. White*, 68 Ga. 96.

A Missouri life-insurance company which did business in Virginia, and had debts due it from citizens of Virginia, was adjudged insolvent in Missouri, and its assets, by order of court, under a statute, were adjudged vested in an assignee for the benefit of creditors. It was held that the claim of the assignee to the debts due from citizens of Virginia was paramount to the claim of a creditor seeking by attachment to subject these debts, regardless of the proceedings in Missouri. *Bockover v. Life Association of America*, 77 Va. 85.

An adjudication of insolvency vesting the insolvent's assets in his trustee is a bar to an attachment issued subsequent to the insolvency proceedings, even by the citizens of another State. *Pinckney v. Lanahan*, 62 Md. 447. And money in the hands of the trustee of the estate of one insolvent is not subject to attachment by a non-resident creditor of the insolvent. The United States circuit court follows the decision of the United States Supreme Court upon this point, rather than the decisions of the supreme court of a State. *Torrens v. Hammond*, 4 Hughes, C. C. 596.

It has been said that an attachment of property in New Hampshire by a citizen of Massachusetts against a debtor, insolvent under the laws of the latter State, will, on the principle of comity, be discharged that the assignee may make proper provision for the benefit of all the creditors. *Eddy v. Winchester*, 60 N. H. 63.

Yet it is held that an assignment by commissioners of a bankrupt, in England, will not prevail against an attachment of the bankrupt's effects by an American creditor. *Milne v. Moreton*, 6 Binn. (Pa.)

353.

<sup>2</sup> *J. M. Atherton Co. v. Ives*, 20 Fed.

Rep. 894; *Caskie v. Webster*, 2 Wall. Jr. C. C. 131.

A foreign attachment, issued in any country where the property of a non-resident is situated, after the execution in another State of an assignment for the benefit of creditors, but before the assignment, is recorded in the county, has priority over the assignment. *Steel v. Goodwin*, 113 Pa. St. 288; s. c., 4 Cent. Rep. 659. And where proceedings in insolvency are pending in another State, and a provisional trustee has been there appointed, a creditor residing in the foreign forum cannot attach a debt due to the insolvent in this State. *Mulliken v. Aughinbaugh*, 1 P. & W. (Pa.) 117.

Where deeds of assignment for the benefit of creditors, void in Rhode Island, conveying land in Missouri, where such assignments were valid, were delivered in Rhode Island before an attachment was levied in Missouri at the instance of a Massachusetts creditor, and were recorded in Missouri before execution and sale under judgment following such attachment, it was held that the rights under the assignments were superior to those under the sale. *Attleboro Bank v. Hughes*, 10 Mo. App. 7.

<sup>3</sup> See *Ex parte Soldiers' Business Co.*, 2 U. S. Bankr. Reg. 162; *Ex parte Manley*, 3 U. S. Bankr. Reg. 75; *Ex parte Coxart*, 3 U. S. Bankr. Reg. 126.

It has been held, under the United States bankrupt law, that no lien was obtained against equitable interests by judgment and execution, but that such interests go to the assignee unburdened by such lien. See *Ex parte Hinds*, 3 U. S. Bankr. Reg. 91; *Ex parte Joslyn*, 3 U. S. Bankr. Reg. 118; s. c., 2 Chicago Leg. News, 137.

Where creditors at the *rei sitæ* have secured prior liens on assets of a bankrupt's estate, and have been satisfied, the residue, it seems, in those cases where a foreign assignee and foreign creditor have intervened, is to be sent, for distribution, to the domiciliary court of the bankrupt. See *Ex parte Ray*, 2 Ben. (U. S.) D. C. 53.

The courts of New York have refused to recognize the claim of an assignee under foreign bankruptcy proceedings, as against a person who has obtained an equitable lien upon the assets of the foreign bankrupt. *Ex parte Bristol*, 16 Abb. (N. Y.)

6. RECIPROCAL RELATION OF CREDITORS. — As the interests of the several creditors, both foreign and domestic, in the estate of a bankrupt are conflicting, each is entitled to appear as an intervener in suits by other creditors against the assignee.<sup>1</sup>

7. GENERAL RULES AS TO PRIORITIES. — An attaching creditor is entitled to hold against an involuntary assignee in insolvency, or a receiver appointed in a foreign State. It is immaterial whether he be citizen or alien, provided he be not a citizen of the State in which the assignee or receiver was appointed.<sup>2</sup>

A court, in adjusting the affairs and portioning out the estate of a bankrupt, will not regard the barring of a debt by the law of the bankrupt's domicile as extinguishing the debt, if it is not barred by the law of the place of bankruptcy.<sup>3</sup>

8. QUESTIONS BETWEEN LOCAL BANKRUPTCIES. — In case of bankruptcy, foreign creditors are entitled to come in *pari passu* with domestic creditors;<sup>4</sup> but where a series of particular or ancillary bankruptcies are opened in different States, the various creditors will have a right to appear in each particular bankruptcy, unless cause be shown why each creditor's claim should be restricted to a particular jurisdiction.<sup>5</sup>

9. BANKRUPT'S PRIOR TRANSACTIONS. — Where the business transactions are impeached by the assignees, the *lex loci rei sitæ* governs, except as to those articles which are *in transitu*, or those which are carried about by the owner.<sup>6</sup>

Pr. 184; *Mosselman v. Caen*, 1 Hun (N. Y.), 647. And also that an assignment to trustees of the property of an absconding debtor will not prevail against a citizen of the State who has pursued and prosecuted the fugitive in another State, and there obtained from him a transfer of the property in satisfaction of his judgment. *Johnson v. Hunt*, 23 Wend. (N. Y.) 87.

Also, that the creditors of a dissolved insolvent corporation have an equitable lien upon its assets in the hands of a third person in that State, which its courts will enforce, though the holder of the fund be accountable to a foreign jurisdiction in reference thereto. *Tinkham v. Borst*, 31 Barb. (N. Y.) 407; reversing s. c., 15 How. (N. Y.) Pr. 204.

<sup>1</sup> See *Bonnaffe's Case*, 23 N. Y. 169; *Ex parte Murray*, 3 U. S. Bankr. Reg. 187.

<sup>2</sup> *Lichtenstein v. Gillett*, 37 La. An. 522.

The holder of a protested draft of a bank is not entitled to priority over other creditors merely because the drawee has funds of the drawer in his hands at the time of refusing to accept the draft. *Bank of Commerce v. Russell*, 2 Dill. C. C. 215.

In insolvency proceedings in Pennsylvania, trustees were vested with all a debtor's estate. Creditors residing in that State brought suit in Illinois against per-

sons indebted to the debtor. It was held that the lien of the creditors so suing in Illinois should be enforced to the exclusion of such trustees. *Rhawn v. Pearce*, 110 Ill. 350; s. c., 51 Am. Rep. 691.

<sup>3</sup> *Ex parte Ray*, 2 Ben. (U. S.) D. C. 53; *Ex parte Melbourn*, L. R. 6 Ch. App. 64; s. c., 23 L. T. (N. S.) 578.

<sup>4</sup> And it would seem that, in the United States, a claim valid by the *lex loci contractus*, but void by the law of the debtor's domicile, may be proved in a domiciliary bankruptcy against the bankrupt's estate. See *Ex parte Murray*, 3 U. S. Bankr. Reg. 187; *Bonnaffe's Case*, 23 N. Y. 169.

<sup>5</sup> This is on the theory that the debt has not been paid by the assets in the first particular bankruptcy; however, if it be shown that such is not the case, then of course the party will have no rights in any other jurisdiction. As to administrative distribution, see *Wheelock v. Pierce*, 6 Cush. (Mass.) 288; *Fay v. Haven*, 3 Metc. (Mass.) 109; *Dowes v. Head*, 3 Pick. (Mass.) 145; *Hays v. Hibbard*, 3 Redf. (N. Y.) 30; *Car-michael v. Ray*, 5 Ired. (N. C.) Eq. 365; *Mackey v. Cox*, 18 How. (U. S.) 100.

<sup>6</sup> Thus, where the bankrupt is alleged to have made a collusive transfer of foreign assets, the question of the collusiveness of such transfer must be determined by the law of the place where the assets were.

**BANKRUPTCY UPON SUBSEQUENT EXECUTION.**—A law regulating a bankruptcy prohibits subsequent executions, foreign executions will also be prohibited.

**FOREIGN BANKRUPT DISCHARGES.**—Foreign bankrupt discharges in bankrupt proceedings have no force.<sup>2</sup>

Cases hold that a State insolvent law, discharge applies to all contracts there made, wherever made.

Other cases hold, and this seems to

Chicago Leg. News, T. 188; *Ex parte* Reg. 113; *Ex parte* Reg. 5; Smith v. S.) 518. See, also, Business Co., 2 U. S. *Ex parte* Manley, 3; *Ex parte* Cozart, 5. assignee of an in-made a sale in the ore the assignment, Hampshire, affirms the purchaser and of a the goods in New res fraud, may be Hampshire as though nment. Harvey v. 848. land an execution uit court, is entitled itate insolvent law. hants' Bank v. Bay- h. 356; 1 Brummer (N. H.), 2 N. Eng. fason (N. H.), 2 N. Reimsdyk v. Kane, 1 s. c., 9 Cr. (U. S.) od, 4 Wall. (U. S.) & Newbury, 1 Wall. Borden, 67 Cal. 7; ld, 2 Mason, C. C. oster, 2 Story, C. C. 07; Riston v. Con- 5; Banks v. Green- 261; s. c., 6 Call. r. Claudius, Pet. C. 1 N. Y. Leg. obs. tt, 11 How. (U. S.) 3 Wash. C. C. 17; ark's Ex'rs v. Van . 153; s. c., 1 Gall. . McNeill, 4 Wheat. Borland, 103 N. Y. 431; 24 Cent. L. J. (N. Y.), 366; Van 3 Cai. (N. Y.) 154; . (N. Y.) 235; Sicard N. Y.) 194; Whitte- . (N. Y.) 626; Pratt reversing; s. c., 29 How. (N. Y.) Pr. 296; 19 Abb. (N. Y.) 150; Ballard v. Webster, 9 Abb. Pr. 404; Lester v. Christalar, 1 Monroe v. Guillaume, 3 Keyes 30; s. c., 3 Abb. App. Dec. (N. Hills v. Carlton, 74 Me. 156; N. Hagerman, 22 Fed. Rep. 525; Alexander, 108 Ill. 385; Moore v. 32 Hun (N. Y.), 393; White v. C. Johns. (N. Y.) 117; Whittemore v. 2 Cow. (N. Y.) 626; McDougall 55 Vt. 187; s. c., 45 Am. Rep. 602; Hull v. Wagner, Bald. C. C. 296; Baldwin, 1 Cliff. C. C. 511; s. c. (U. S.) 223; Davidson v. Smith C. C. 346; s. c., 9 Am. L. Hinkley v. Marean, 3 Mason, C. Titus v. Hobart, 5 Mason, C. Webster v. Massey, 2 Wash. C. Fisher v. Hyde, 3 Yeates (Pa.), 29 v. Nourse, 5 Hinn. (Pa.) 381; Creagh, Ing. Ins. 384; Hillard : leaf, 2 Yeates (Pa.), 533; Jeffries : son, 2 Yeates (Pa.), 482; Russell ing, 12 N. Y. Leg. obs. 216; De Corbett, 7 N. Y. 500; Soule v. N. Y. 342; reversing s. c., 1 Rob 222; Cook v. Moffatt, 5 How. (U. Clark v. Van Reimsdyk, 9 Cr. (U. Suydam v. Broadnax, 14 Pet. (U. Towne v. Smith, 1 Woodb. & M. s. c., 9 L. Rep. 12; Byrd v. Badg All. C. C. 263; Kendall v. Badg All. C. C. 523; Webster v. Wash. C. C. 157. *Compare* Storey, 1 Paine, C. C. 79; s. c., 6 474; Babcock v. Weston, 1 Gall. Banks v. Greenleaf, 6 Call. (V. Springer v. Foster, 2 Story, C. Wray v. Reily, 1 Cr. C. C. 513. Thus, a decree in bankruptcy in court of the United States cannot the title of the debtor to land wi United States. Real estate can conveyed under the local law, and that the territory within which the in question lay was afterward ar the United States cannot alter Oakley v. Bennett, 11 How. (U. S. 3 Shieffelin v. Wheaton, 1 Ga 441; Towne v. Smith, 1 Woodb. & 115; Davidson v. Smith, 9 Am. L. s. c., 2 West. L. Mo. 566.

better and prevailing opinion, that State insolvent laws cannot discharge the obligations of any contract made in the State, except those made between citizens of that State.<sup>1</sup>

*a. Participation in Bankrupt Proceedings.* — However, a discharge under a State insolvent law is valid, against a creditor residing in another State, if such creditor voluntarily becomes a party to and participates in the bankruptcy proceedings, and receives dividends.<sup>2</sup>

*b. Power of States to pass Bankrupt Laws.* — Whatever may formerly have been thought, it is now well settled that each State has the power, under the federal constitution, to pass insolvent laws in the nature of bankrupt laws, which will discharge all contracts made or existing between citizens of the State which enacted the law, and whose tribunals granted the discharge.<sup>3</sup>

*c. Foreign Discharge no Defence against Creditor not domiciled in Country granting the Discharge.* — A discharge under a foreign bankrupt law is no defence, in our courts, to an action by a creditor who was not a subject or domiciled resident of the foreign country at the time it was granted, and did not become a party to the proceedings or receive a dividend thereunder.<sup>4</sup>

<sup>1</sup> Ogden v. Saunders, 12 Wheat. (U. S.) 213; Boyle v. Zacharie, 6 Pet. (U. S.) 348; Braynard v. Marshall, 8 Pick. (Mass.) 194; Agnew v. Platt, 15 Pick. (Mass.) 417; Springer v. Foster, 2 Story, C. C. 383; s. c., 6 L. Repr. 10.

<sup>2</sup> Woodhull v. Wagner, Bald. C. C. 296; Clay v. Smith, 3 Pet. (U. S.) 411; Phelps v. Borland, 103 N. Y. 406; s. c., 5 Cent. Rep. 421; 24 Cent. L. J. 86; affirming, 30 Hun (N. Y.), 366; *Ex parte* Coates, 3 Abb. App. Dec. (N. Y.) 231; reversing, 13 Barb. (N. Y.) 452; Perley v. Mason (N. H.), 2 N. Eng. Rep. 297; Carbee v. Mason (N. H.), 2 N. Eng. Rep. 299.

One who has proved his debt in bankruptcy proceedings in England, and accepted his share of a composition, cannot sue in New York. Phelps v. Borland, 30 Hun (N. Y.), 366.

If a debtor be discharged, and the creditor receives his dividend, in bankruptcy proceedings under the law of the State where both are domiciled, and where the debt had its origin, the claim is discharged, and the debtor cannot assert it in another State. *Ex parte* Coates, 3 Abb. App. Dec. (N. Y.) 231; reversing s. c., 13 Barb. (N. Y.)

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<sup>3</sup> Stone v. Tibbetts, 26 Me. 110; Brigham v. Henderson, 1 Cush. (Mass.) 430; Stoddard v. Harrington, 100 Mass. 87; Einer v. Beste, 32 Mo. 240; Stevens v. Norris, 10 Foster (N. H.), 466; Smith v. Smith, 2 Johns. (N. Y.) 241; Smith v. Parsons, 1 Ohio, 236.

<sup>4</sup> Munroe v. Guilleaume, 3 Keyes (N. Y.), 30; s. c., 3 Abb. App. Dec. (N. Y.) 334; Moore v. Horton, 32 Hun (N. Y.), 393; Newton v. Hagerman, 22 Fed. Rep. 525; Woodhull v. Wagner, Bald. C. C. 296; Byrd v. Badger, 1 McAll. C. C. 263; Russell v. Harding, 12 N. Y. Leg. obs. 216; Donnelly v. Corbett, 7 N. Y. 500; Soule v. Chase, 39 N. Y. 342; reversing s. c., 1 Rob. (N. Y.) 222; Green v. Sarmiento, 3 Wash. C. C. 17; s. c., 1 Pet. C. C. 74; Hills v. Carlton, 74 Me. 156; Smith v. Gardner, 4 Bosw. (N. Y.) 54; Phelps v. Borland, 30 Hun (N. Y.), 366; s. c., 24 Cent. L. J. 86.

Thus, a discharge under the insolvent law of the State of the forum does not exempt a defendant from arrest, in an action by a citizen of another State, for a debt payable there. Woodhull v. Wagner, Bald. C. C. 296; Byrd v. Badger, 1 McAll. C. C. 263. And a discharge in bankruptcy does not preclude a citizen of Canada from recovering in a State court the amount of his debt, although, were he a citizen of the United States, the discharge would bar it. Moore v. Horton, 32 Hun (N. Y.), 393.

The holder of a negotiable note, residing in another State, who received it before maturity, is not affected by the maker's discharge under the insolvent law of the State in which it was made and originally

*d. Contracts made and to be performed in State of Discharge.* The discharge of a debtor, under the insolvent laws of one State will not bar an action by a citizen of another State, though the debt was contracted in the former State, and by its terms there payable.<sup>1</sup>

A discharge obtained under the insolvency law of one State is not a bar to an action on a note given in and payable in the same State, the party to whom the note was given being a citizen of a different State, and not having in any manner been a party to the proceedings,<sup>2</sup> even though the action is brought in courts of the State granting the discharge.<sup>3</sup>

*e. Contracts made and to be performed out of State granting discharge.* — A discharge under the insolvent or bankrupt law of one country will not be a bar to an action on a contract made and to be performed in another country, the plaintiff not having come under the proceedings in insolvency.<sup>4</sup>

negotiated, not having been a party to the proceedings. *Smith v. Gardner*, 4 Bos. (N. Y.) 54.

Where a judgment was obtained in this country upon a foreign contract, and subsequently the defendant was discharged under the bankrupt law of the place of the original contract, such discharge was held not to bar an action on the judgment. *Green v. Sarmiento*, 3 Wash. C. C. 17; *a. c.*, 1 Pet. C. C. 74. And where a citizen of Maine there obtained a discharge in insolvency, it was held no bar to an action brought in a Maine court by a creditor, a citizen of another State, not a party to the insolvency proceedings. *Hills v. Carlton*, 74 Me. 156.

<sup>1</sup> *Hale v. Baldwin*, 1 Cliff. C. C. 511; *a. c.*, 1 Wall. (U. S.) 223.

<sup>2</sup> *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *a. c.*, 1 Cliff. C. C. 511; *Worthington v. Jerome*, 5 Blatchf. C. C. 279.

<sup>3</sup> *Pratt v. Chase*, 44 N. Y. 597; reversing *a. c.*, 29 How. (N. Y.) Pr. 296, 19 Abb. (N. Y.) Pr. 150. And see *Ballard v. Webster*, 9 Abb. (N. Y.) Pr. 404.

It has been held in New York that a discharge under the insolvent law of that State does not affect the remedy of a non-resident creditor upon a judgment obtained in one of the courts of that State. *Lester v. Christalar*, 1 Daly (N. Y.), 29.

The English doctrine that the discharge of a bankrupt, shall be effectual against contracts of the State that gives the discharge, is discussed, and the contrary rule of reciprocity adopted in other countries is explained in *Ogden v. Saunders*, 12 Wheat. (U. S.) 213.

<sup>4</sup> *Van Raugh v. Van Arsdaln*, 3 Caine, (N. Y.) 154; *Smith v. Smith*, 2 Johns. (N. Y.) 235; *Banks v. Greenleaf*, 6 Call.

(Va.) 271; *Babcock v. Weston*, 1 C. C. 168; *Byrd v. Badger*, 1 McAll. C. 263; *Kendall v. Badger*, 1 McAll. C. 523; *Wray v. Reily*, 1 Cr. C. C. 513; *Green v. Sarmiento*, 3 Wash. C. C. 17; *Banks v. Greenleaf*, 1 Hughes, C. C. 261; *a. c.*, 6 Call. (Va.) 271; *Springer v. Foster*, 2 Story, C. 383; *a. c.*, 6 L. Rep. 107; *Clark v. Reimsdyk*, 9 Cr. (U. S.) 153; *Snyder v. Broadnax*, 14 Pet. (U. S.) 67; *Van Raugh v. Kane*, 1 Gall. C. C. 371; *Townsend v. Smith*, 1 Woodb. & M. C. C. 115; *Webster v. Massey*, 2 Wash. C. C. 157. Compare *Adams v. Storey*, 1 Paine, C. C. *a. c.*, 6 Am. L. J. 474.

Thus, where a debt was payable in New York, and the plaintiffs were citizens of that State, it was held that the discharge of the defendant by the insolvent law of Pennsylvania did not discharge the contract, and could have no operation on the remedies to enforce performance. *Wheeler v. Wagner*, Bald. C. C. 296. A contract made and payable in Canada, by a person resident in Vermont, to a person resident in Canada, is not barred by a discharge under the United States bankrupt act, when the foreign resident neither was a party to the proceedings, nor had notice thereof. *McDougall v. Page*, 55 Vt. *a. c.*, 45 Am. Rep. 602.

Where a citizen of Maryland gave a bond in Virginia to a citizen of Virginia, and afterward became bankrupt in Maryland, by the laws of that State, under which he was duly discharged by a competent tribunal, under a general discharge with respect to his creditors, it was held that this did not discharge him in Virginia. *Banks v. Greenleaf*, 1 Hughes, C. 261; *a. c.*, 6 Call. (Va.) 271. And where



*f. Discharge in One State no Bar to an Action on a Contract made in Another State.* — But such discharge will not be a bar to an action by a citizen of another State, where the contract was not, by its express terms, made payable or to be performed in the State granting the discharge;<sup>1</sup> or where no place of payment is named.<sup>2</sup>

*g. Discharge in One State no Bar to Action in Another.* — An assignment for the benefit of creditors will not prevent a creditor in another State from enforcing his debt against land in that State, although such land is embraced in the deed of assignment.<sup>3</sup> And an insolvent discharge, obtained in another State, whose courts do not respect discharges granted under the laws of the forum, will not be regarded so as to entitle the party to a discharge on common bail.<sup>4</sup>

*h. Discharge no Bar to Suit by Creditor of Another State in the Federal Courts.* — A discharge granted under the insolvent law of a State cannot be pleaded in bar of an action brought by a citizen

tin bills of exchange were drawn in Pennsylvania on a citizen in Massachusetts, and were accepted by him in Massachusetts, it was held that it was not competent for the legislature of Massachusetts, by the insolvent act of 1838, to discharge the obligation of these contracts. *Springer v. Foster*, 2 Story, C. C. 383; s. c., 6 L. Rep. 107.

The discharge of a citizen from his debts under the insolvent laws of the State is no discharge of a contract made and to be executed in a foreign country. The law of the place where a contract is made is to govern as to its validity, nature, and construction, but the remedy on such contract is to be pursued according to the law of the place where the remedy is sought. *Van Reimsdyk v. Kane*, 1 Gall. C. C. 371, 630; modified on appeal, 9 Cr. (U. S.) 153.

<sup>1</sup> See *Ory v. Winter*, 16 Martin (La.), 277; *Palmer v. Goodwin*, 32 Me. 535; *Savoie v. Marsh*, 10 Metc. (Mass.) 594; *Fiske v. Foster*, 10 Metc. (Mass.) 597; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103; *Donnelly v. Corbett*, 3 Seld. (N. Y.) 500; *Munroe v. Guillaume*, 3 Keyes (N. Y.) 30; overruling, *Parkinson v. Scoville*, 19 Wend. (N. Y.) 150; *Poe v. Duck*, 5 Md. 1; *Frey v. Kirk*, 4 Gill & J. (Md.) 509; *Potter v. Kerr*, 1 Md. Ch. 275; *Anderson v. Wheeler*, 25 Conn. 603; *Easterly v. Goodwin*, 35 Conn. 273; *Felch v. Bugbee*, 48 Me. 9; *Very v. McHenry*, 29 Me. 206; *Pugh v. Bussel*, 2 Blackf. (Ind.) 394; *Brighton Bank v. Merick*, 11 Mich. 405; *Banks v. Greenleaf*, 6 Call. (Va.) 271; *Urton v. Hunter*, 2 W. Va. 83; *Worthington v. Jerome*, 5 Blackf. C. C. 279; *Towne v. Smith*, 1 Woodb. & M. C. C. 115; *Springer v. Foster*, 2 Story, C. C. 387; *Woodhull v. Wag-*

*ner*, Bald. C. C. 300; *Byrd v. Badger*, 1 McAll. C. C. 263; *Cook v. Moffat*, 5 How. (U. S.) 295; *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Gilman v. Lockwood*, 4 Wall. (U. S.) 409; *Hilliard v. Greenleaf*, 2 Yeates (Pa.), 532; *Stevenson v. King*, 2 Cliff. C. C. 1; *Farmers' & Mechanics' Bank v. Smith*, 6 Wheat. (U. S.) 131; *Clark's Exr's v. Van Riemadyk*, 9 Cr. (U. S.) 153; s. c., 1 Gall. C. C. 371; *McMillan v. McNeill*, 4 Wheat. (U. S.) 209; *Green v. Sarmiento*, Pet. C. C. 74.

A discharge as a bankrupt in a foreign country is not deemed here a bar to any action that may be brought in another jurisdiction. The discharge is considered as local; and although an assignee of an individual declared a bankrupt in a foreign country would be allowed to sue as such assignee, yet our courts would not recognize the discharge as a bar to debts contracted in this country, or due to citizens of this country, but a discharge under our laws operates on debts due to citizens of any country. *Zarega's Case*, 1 N. Y. Leg. Obs. 40, note.

<sup>2</sup> *Scribner v. Fisher*, 2 Gray (Mass.), 43; *Clark v. Hatch*, 7 Cush. (Mass.) 455; *Ilisley v. Mirriam*, 7 Cush. (Mass.) 242; *Green v. Sarmiento*, 3 Wash. C. C. 17.

Where a note specifying a place of payment was executed in California after the enactment of the insolvent law of that State, in favor of a citizen and resident of another State, it was held that a discharge under the insolvent law did not bar an action on the note. *Rhodes v. Borden*, 67 Cal. 7.

<sup>3</sup> *Heyer v. Alexander*, 108 Ill. 385.

<sup>4</sup> *Fisher v. Hyde*, 3 Yeates (Pa.), 256; *Walsh v. Nourse*, 5 Binn. (Pa.) 381; *Hayden v. Creagh*, Ing. Ina. 384.



of another State in the courts of the United States, it appears that the creditor in some way became a party to the proceedings. The insolvent laws of one State cannot discharge contracts of citizens of other States, because such laws have no extra-territorial operation.<sup>1</sup>

*i. Where Foreign Discharge may be pleaded.* — Although insolvent laws have no force beyond the limits of the State to which such as may be given them by comity,<sup>2</sup> yet where a contract was made between parties resident in a State in the shape of a promissory note on which a judgment was obtained in the same State by the indorser against the maker, which judgment was affirmed by the United States court for another State by the same parties who were citizens of the last-mentioned State, and a judgment was rendered thereon, and afterwards the defendant was discharged under the insolvent laws of the State of the contract, it was held that the discharge might be pleaded in bar of an action upon the last judgment.<sup>3</sup>

A discharge from the debt under the bankrupt law of the State of the contract is good in every other place, when pleaded in bar of the extinction of the debt; but a like discharge under the law of another place where the contract was not made cannot be so pleaded in the tribunals of any other nation.<sup>4</sup>

The discharge in bankruptcy of the acceptor of a bill of exchange, under the law of his domicile, is available against the holder, though a citizen and a resident of another country at the same time of its passage.<sup>5</sup>

<sup>1</sup> *Gilman v. Lockwood*, 4 Wall. (U. S.) 409; *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234; *Rhodes v. Borden*, 67 Cal. 7; *Springer v. Foster*, 2 Story, C. C. 383; *Towne v. Smith*, 1 Woodb. & M., C. C. 115; *Hobblethwaite v. Batturs*, 7 Miles (Pa.), 82.

A discharge under a State insolvent law will not dissolve an attachment issued out of a federal court, though it would have such effect on State process. *Springer v. Foster*, 2 Story, C. C. 383; *Towne v. Smith*, 1 Woodb. & M., C. C. 115. And a certificate of discharge granted under insolvent laws passed by a State, cannot be pleaded in bar of an action brought by a citizen of another State, in the courts of the United States, or of any other State than the one where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some other manner became a party to the proceedings. *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234; *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Gilman v. Lockwood*, 4 Wall. (U. S.) 409.

A discharge under the insolvent law of another State, which acts upon the con-

tract, does not bar an action by the federal court of the district where the discharge was granted. *Hobblethwaite v. Batturs*, 1 Miles (Pa.), 82.

<sup>2</sup> *Cook v. Moffat*, 5 Howe (U. S.) 150; *Davidson v. Smith*, 1 B. & C. 346; a. c., 9 Am. L. Reg. 217.

<sup>3</sup> *Parkinson v. Scoville*, 19 W. & A. 151; *Le Roy v. Crowninshield*, C. C. 151, 175.

<sup>4</sup> *Ritchie v. Garrison*, 10 Ab. Pr. 246.

A discharge in bankruptcy under the act of 1841, operated upon a debt of a resident of a foreign country, at the time of its passage. *Ritchie v. Garrison* (N. Y.) Pr. 246. It has been held in Pennsylvania that where a contract is made in another State between residents of that State, and is executed there, upon which a judgment is obtained in such other State, the Pennsylvania courts will give the same effect to a discharge in insolvency in that State as though the judgment was obtained in Pennsylvania. See *Bradford v. Miles* (Pa.), 17; *Miles v. Bradford*, 2 Miles (Pa.), 17; *Miles v. Bradford*, 1 Dall. (U. S.) 229; *Thompson v. Miles*, 1 Dall. (U. S.) 294; *Donaldson v. Miles*, 2 Dall. (U. S.) 100; *Hare v. Miles*, 2 Dall. (U. S.) 100.

The discharge of a bankrupt or insolvent operates on the contract according to the *lex loci* where it was made, or is to be performed,<sup>1</sup> where no act of Congress controls it.<sup>2</sup>

A discharge under the insolvent law of the place of the contract may be pleaded to an action on the judgment, brought in a federal court sitting in another State.<sup>3</sup>

*j. Effect of Foreign Discharge on Note indorsed to Bona Fide Holder before Maturity.* — Where a note or bill is indorsed by an insolvent debtor, and transferred *bona fide* to a citizen of another State, before maturity, and before proceedings instituted in insolvency, this is a new contract, and a suit on it is not barred by a discharge in bankruptcy.<sup>4</sup>

*k. Effect of Foreign Discharge of Person from Arrest.* — A discharge of the person under a State insolvent law will not avail in another State: the *lex fori* governs as to remedies.<sup>5</sup>

The court will not quash a *ca. sa.*, on the ground that the defendant has applied for the benefit of the insolvent laws in another jurisdiction, and is there protected from arrest.<sup>6</sup>

12. RIGHTS OF FOREIGN BANKRUPT ASSIGNEE TO SUE. — Under the general principles of comity, assignees of a foreign bankrupt

<sup>1</sup> Yeates (Pa.), 435; Hilliard v. Greenleaf, 2 Yeates (Pa.), 533. And a discharge in insolvency has been held to be a defence to a suit on a note made in California to a citizen there, and indorsed by him to a citizen of another State after the discharge in California. Thomas v. Crow, 65 Cal. 470.

<sup>2</sup> Hicks v. Brown, 12 Johns. (N. Y.) 142; Sherrill v. Hopkins, 1 Cow. (N. Y.) 103; Parkinson v. Scoville, 19 Wend. (N. Y.) 150.

<sup>3</sup> Perry Manufacturing Co. v. Brown, 2 Woodb. & M., C. C. 449; Adams v. Storey, 1 Paine, C. C. 79.

The bankrupt law of the United States, on going into operation, *ipso facto*, suspended the operation of the State insolvent laws as to persons within its purview. *Ex parte Eames*, 2 Story, C. C. 322; *Ex parte Holmes*, 5 Law Rep. 360.

<sup>4</sup> Davidson v. Smith, 9 Am. L. Reg. 217; *n. c.*, 2 W. L. Mo. 566.

<sup>5</sup> Anderson v. Wheeler, 25 Conn. 603; Baucher v. Fisk, 33 Me. 316; Houghton v. Mayard, 5 Gray (Mass.), 552; Towne v. Smith, 7 Woodb. M., C. C. 115.

<sup>6</sup> Hinkley v. Marcan, 3 Mason, C. C. 88; Titus v. Hobart, 5 Mason, C. C. 378; Webster v. Massey, 2 Wash. C. C. 157; Secard v. Whale, 11 Johns. (N. Y.) 194; Whittemore v. Adams, 2 Cow. (N. Y.) 626; White v. Canfield, 7 Johns. (N. Y.) 117; Whittemore v. Adams, 2 Cow. (N. Y.) 629; Jeffries v. Thompson, 2 Yeates (Pa.), 482.

The provisions of the insolvent law of Rhode Island, empowering the supreme court of the State in its discretion to grant

a stay of proceedings against the insolvent debtor, is addressed exclusively to the State court, and cannot be executed by the United States circuit court. And that part of this law which relieves a discharged debtor from imprisonment on execution, having been in operation at the date of the process act of May 19, 1828 (4 Stat. 278), is adopted by section three of that act, so far that a person so discharged cannot be imprisoned under final process of the United States court for debts contracted prior to the filing of his petition. *Matter of Hopkins*, 2 Curt. C. C. 567.

In the case of British subjects, a discharge under the bankrupt law of England will protect the person of the bankrupt, in Pennsylvania. *Harris v. Mandeville*, 2 Dall. (U. S.) 256; *n. c.*, 2 Yeates (Pa.), 99.

A discharge of a defendant under the insolvent law of Pennsylvania will not discharge his person from a debt contracted in another State. *Riston v. Content*, 4 Wash. C. C. 476.

Where the debt has been contracted, and made payable out of the State, the circuit court will not discharge a defendant arrested for such debt on common bail, notwithstanding his discharge by the insolvent laws of the State where the suit is brought. *Campbell v. Claudius*, Pet. C. C. 404, 484. The court refused to quash a writ of *capias* issued against a defendant for a debt contracted in the State, he having been discharged by the State insolvent law, but discharged the defendant on common bail. *Read v. Chapman*, Pet. C. C. 404.

<sup>8</sup> Mattingly v. Smith, 2 Cr. C. C. 158.

are entitled to sue for and recover debts due to the bankrupt in another State, except when the claim of the assignees comes into conflict with creditors in that State claiming under attachment against the bankrupt's property.<sup>1</sup>

*a. The Remedy is governed by the Forum.*—With regard to the remedies, the methods of procedure, and all the machinery of the law in bankruptcy or insolvency proceedings, the place of trial governs.<sup>2</sup> And where by the *lex fori* an assignee is permitted to sue in his own name, he may do so, although forbidden by the foreign law by which the obligation is governed,<sup>3</sup> and *vice versa*. Objections to the capacity of a foreign bankrupt to sue cannot be taken for the first time on appeal.<sup>4</sup>

*b. Assignee Representative of Assignor.*—Where there is no conflict with his assignor, nor with the creditors, the assignee of a foreign bankrupt may be recognized as the representative of the assignor; but such assignee, as such, has no standing in foreign courts.<sup>5</sup> But where there are claims on the property adverse to

<sup>1</sup> Bird v. Pierpont, 1 Johns. (N. Y.) 118; Bird v. Caritat, 2 Johns. (N. Y.) 342; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460; s. c., 20 Johns. (N. Y.) 229, 267.

But since the case of Abraham v. Ples-toro, 3 Wend. (N. Y.) 538, this doctrine has been doubted, if not denied. Raymond v. Johnson, 11 Johns. (N. Y.) 488; Mossel-man v. Caen, 34 Barb. (N. Y.) 66; Hoyt v. Thompson, 5 N. Y. 320, 351; Willetts v. Waite, 25 N. Y. 577; s. c., 13 How. (N. Y.) Pr. 34.

Though Shipman, J., in Hunt v. Jackson, 5 Blackf. C. C. 349, expressed the opinion that these decisions do not go to the extent of prohibiting assignees, under foreign bankrupt laws, from suing in the courts of the State. See Hooper v. Tuckerman, 3 Sandf. (N. Y.) 311.

<sup>2</sup> Lodge v. Phelps, 1 Johns. Cas. (N. Y.) 139; Ruggles v. Keeler, 3 Johns. (N. Y.) 263; Scoville v. Canfield, 14 Johns. (N. Y.) 338; Andrews v. Herriot, 4 Cow. (N. Y.) 508, and note; Speed v. May, 17 Pa. St. 95; Jones v. Taylor, 30 Vt. 48; Harrison v. Sterry, 5 Cr. (U. S.) 289; Smith v. Atwood, 3 McL. C. C. 545.

<sup>3</sup> Foss v. Nutting, 14 Gray (Mass.), 484.

While the right of a foreign assignee in bankruptcy as respects the assets of the bankrupt, must yield to the claims of creditors of the bankrupt, seeking the aid of those courts, such foreign assignee may, as the representatives of the bankrupt, maintain a suit where the bankrupt could have sued had no bankruptcy proceedings been instituted. Hunt v. Jackson, 5 Blackf. C. C. 349; s. c., 6 Am. L. Reg. N. S. 169.

The assignee of an insolvent debtor, appointed under a State law, cannot avoid a conveyance of personal property in another

State, which is good against the insolvent but fraudulent as to creditors, by the law of the latter State. Belton v. Valentini, 1 Curt. C. C. 168. And an assignee in insolvency may sue for money paid in fraud of creditors, notwithstanding the pendency of bankruptcy proceedings, and although no creditors proved their claims other than such as existed prior to the adjudication in bankruptcy. Bull v. Houghton, 65 C. 422.

The aid of equity will be extended to the receiver of a foreign corporation seeking to obtain possession of property of such corporation in New Jersey as against the officers of the company, who may be endeavoring by fraud to withhold it. Black v. Mason, 11 C. E. Gr. (N. J.) 230.

<sup>4</sup> Orr v. Amory, 11 Mass. 25; Murrell v. Jones, 40 Miss. 565; Fisk v. Brackett, 32 Vt. 798; Caskie v. Webster, 2 Wall. C. C. 131; Folliott v. Ogden, 1 H. Black. 131; Innes v. Dunlop, 8 T. R. 595; Jeffery v. McTaggart, 6 Maule & S. 126.

<sup>5</sup> Mosselman v. Caen, 34 Barb. (N. Y.) 66; s. c., 21 How. (N. Y.) Pr. 248.

<sup>6</sup> See Upton v. Hubbard, 28 Conn. 27; Goodwin v. Jones, 3 Mass. 517; Orr v. Amory, 11 Mass. 25; Ingraham v. Geyer, 13 Mass. 146; Blake v. Williams, 6 Pick. (Mass.) 305; Murrell v. Jones, 40 Miss. 565; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 485; Milne v. Moreton, 6 Biss. (Pa.) 363, 374; Fisk v. Brackett, 32 Vt. 799; Perry v. Barry, 1 Cr. C. C. 204; Hunt v. Jackson, 5 Blackf. C. C. 349; s. c., 6 Am. L. R. 169; Blane v. Drummond, 1 Brod. C. C. 62; Caskie v. Webster, 2 Wall. C. C. 131; Wolff v. Oxholm, 6 Maule & S. 99; Folliott v. Ogden, 1 H. Black. 131; Innes v. Dunlop, 8 T. R. 595; Jeffery

the assignment, the foreign assignee cannot sue in his own name; <sup>1</sup> but that, when there is no conflict with the assignor or with the creditors, he will be permitted to do so.<sup>2</sup>

*c. Suit by Assignee in his own Name.* — Foreign assignees in bankruptcy cannot maintain an action at law in their own name, against a debtor of a bankrupt in the courts of this country; and the action is only maintainable in the name of the bankrupt himself, though the right to personal property may be regulated by the laws of the domicile, as in the case of the bankrupt laws of England: and, though the equitable rights of the assignees acquired under those laws will be respected in our courts, yet the right of action must be regulated by the law of the forum in which the suit is brought; and the transfer of a bankrupt's effects, being an assignment merely by operation of law, and not by the act of the party, is not such an assignment of the legal title to the assignees as will enable them to maintain an action in their own name in the courts of this country.<sup>3</sup>

*d. Substitution of Assignee.* — The assignee in bankruptcy may be substituted as a party, but he cannot in any other manner interfere with the prosecution of a pending suit.<sup>4</sup>

*e. Suit against Assignee in Federal Court.* — A receiver appointed by a State court is not liable to be sued in a United States circuit court of another State.<sup>5</sup>

13. FEDERAL BANKRUPT LAWS AND DISCHARGE. — The bankrupt law of the United States, on going into operation, *ipso facto*, suspended the operations of the State insolvent laws, as to persons within its purview.<sup>6</sup> But the court of bankruptcy has no power

McTaggart, 6 Maule & S. 126; *Alivon v. Furnival*, 1 Comp. M. & R. 296.

<sup>1</sup> *Upton v. Hubbard*, 28 Conn. 274.

<sup>2</sup> See *Blake v. Williams*, 6 Pick. (Mass.) 35; *Ingraham v. Geyer*, 13 (Mass.) 146; *Goodwin v. Jones*, 3 Mass. 517; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 485; *Milne v. Moreton*, 6 Binn. (Pa.) 363; *Hunt v. Jackson*, 5 Blackf. C. C. 349; s. c., 6 Am. L. R. 169; *Blane v. Drummond*, 1 Brock. C. C. 62; *Perry v. Barry*, 1 Cr. C. C. 204.

But, it seems, this practice of allowing an assignee to sue in his own name is purely a matter of comity, which the forum exercises entirely at its own discretion. Whart., Conf. L. § 735, n. x.

<sup>3</sup> *Blane v. Drummond*, 1 Brock. C. C. 62. See *Perry v. Barry*, 1 Cr. C. C. 204.

<sup>4</sup> *Clark v. Binninger*, 39 How. (N. Y.) Pr. 363.

Where, pending a suit upon a promissory note by a citizen of New York against a citizen of Massachusetts, the defendant was adjudged an insolvent under the law of the latter State, and his assignees thereupon defended, and subsequently submitted to have the case defaulted, it was held that the action should be dismissed against the

assignees without costs, unless plaintiff should elect to take judgment for the purpose of proof in insolvency, in which case that election was to be expressed in the judgment, and no execution should issue. *Lean v. Durfee*, 5 Fed. Rep. 256.

<sup>5</sup> *Peale v. Phipps*, 14 How. (U. S.) 368. The court is justified in summarily removing an assignee, for the benefit of creditors, whose irresponsibility is not denied, and who has not filed the inventory and bond required by the Pennsylvania statute, it not appearing that the assignor is a citizen of New York, and the assignee's claim to be exempt from removal being based on the fact that a part of the assigned property is in New York, and the requirements of the New York law have been complied with. *Weiskettle's Appeal*, 103 Pa. St. 522.

<sup>6</sup> *Ex parte Eames*, 2 Story, C. C. 322; *Ex parte Holmes*, 5 Law Rep. 360; *Torrens v. Hammond*, 4 Hughes, C. C. 596; s. c., 10 Fed. Rep. 900.

An assignment was made for the benefit of creditors under New Hampshire General Statute 1867, ch. 126, while the United States bankrupt act of 1867 was in force,

to arrest the proceedings of a State court in the ordinary and legitimate administration of justice.<sup>1</sup> Yet it was held that, under the bankrupt act of 1867, the bankruptcy court could direct the seizure, by the marshal, of goods belonging to the bankrupt, but in the possession and claimed by another, irrespective of State laws.<sup>2</sup>

The insolvent law, suspended in part by a bankrupt act of Congress, may suffice to pass title by an assignor under it to his assignees in the absence of mistake on proceedings taken in bankruptcy.<sup>3</sup>

Property set aside by the bankruptcy court as the bankrupt's exemption cannot be levied on by process from a State court,<sup>4</sup> and a wrongful allowance by a bankrupt court of the exemption claimed by the bankrupt cannot be remedied in the State courts.<sup>5</sup>

**12. Wills and Testaments. — I. PERSONAL CAPACITY.** — Regarding the capacity of a person to make a will, the general doctrine of the English common law, as held both in the United States and England, is, that testamentary capacity, as to personalty, is governed by the law of the last domicile, as to realty by the *lex rei sitæ*.<sup>6</sup>

*a. Of Movable Property.* — The validity of the execution of a will of personal property depends upon the law of the place where the testator was domiciled at the time of his death, not at the

and a creditor proved his claims, and received a dividend thereon; it was held that, if the effect of the New Hampshire statute was to bar an action upon the claim, it was an insolvent law, the operation of which was suspended by the bankrupt act. *Lyman v. Bond*, 130 Mass. 291.

Where an assignee in bankruptcy was appointed after an assignee under State law had taken possession of the estate, the court held that he was entitled, upon demand, to all assets in the hands of the latter, and that it was not necessary to apply for an injunction to restrain the assignee, under the State law, from disposing of them. *Ostrander v. Meunch*, 2 McC. C. C. 267.

A State court will not absolutely direct a sheriff to disregard an injunction issued by the court of bankruptcy, commanding him not to pay over moneys collected on execution, if there be any question whether the money may not be the property of the debtors within the meaning of the bankrupt law; if it may be, the injunction should be obeyed. *Mills v. Davis*, 3 J. & S. (N. Y.) 355.

While the United States bankrupt act was in force, A. of New Jersey made a general assignment for the benefit of creditors. The assignee deposited money in a New York bank, and a creditor in New York sued A., recovered judgment, and ob-

tained, in proceedings supplementary to execution, the appointment of a receiver, who brought suit in the New York court against the assignee for the purpose of satisfying the execution from the deposit; the court held that the suit could not be maintained. *Boese v. King*, 108 U. S. 379.

<sup>1</sup> *Clark v. Binninger*, 38 How. (N. Y.) Pr. 341; s. c., 39 How. (N. Y.) Pr. 363; *Tenth National Bank v. Sanger*, 42 How. (N. Y.) Pr. 179.

<sup>2</sup> *Feibelman v. Packard*, 109 U. S. 421.

<sup>3</sup> *Boese v. King*, 108 U. S. 378.

<sup>4</sup> *Brady v. Brady*, 71 Ga. 71. Compare *Gibles v. Logan*, 22 W. Va. 208, where a homestead in lands in West Virginia was assigned by a United States bankrupt court setting in Virginia, was held to be invalid as against West Virginia creditors. See also *supra*, this title, "1, a."

<sup>5</sup> *Brengle v. Richardson*, 78 Va. 406.

<sup>6</sup> *Lawrence v. Kitteridge*, 21 Conn. 582; *Schultz v. Dambmann*, 3 Bradf. (N. Y.) 379; *Cherry v. Speight*, 28 Tex. 503; *Westlake, Priv. Inter. L. arts. 8 & 9*; 4 *Burge, Comm. on Col. & For. L.* 577; *Story, Conf. L.* § 465; *Whart., Conf. L.* §§ 296-329, 569.

The *lex domicilii* governs as to testamentary capacity; in which is included, not only the general capacity to make a will, but also the disposable power over the estate. *Schultz v. Dambmann*, 3 Bradf. (N. Y.) 379.

time of the execution of the will.<sup>1</sup> But it has been observed that it is the actual domicile, not allegiance nor residence, that forms the test.<sup>2</sup> It is a well-settled principle in the English law regard-

1 *Dupuy v. Wurtz*, 53 N. Y. 556; *Lawrence v. Kitteridge*, 21 Conn. 582; *Dannelli v. Dannelli*, 4 Bush (Ky.) 61; *Johnson v. Copeland*, 35 Ala. 521; *Abston v. Abston*, 15 La. An. 137; *Gilman v. Gilman*, 52 Me. 165; *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 460; *Robert's Will*, 8 Paige Ch. (N. Y.) 519; *Moultrie v. Hunt*, 23 N. Y. 394; *Bascom v. Albertson*, 34 N. Y. 584; *Knox v. Jones*, 47 N. Y. 389; *Suarez v. Mayor*, 2 Sandf. Ch. (N. Y.) 173; *Swearingen v. Morris*, 14 Ohio St. 424; *Pretto's Will*, 4 Phila. (Pa.) 380; *Desesbats v. Berquier*, 1 Binn. (Pa.) 336; *Flannery's Will*, 24 Pa. St. 502; *Carey's Appeal*, 75 Pa. St. 201; *Dixon v. Ramsey*, 3 Cr. (U. S.) 319; *Ennis v. Smith*, 14 How. (U. S.) 400; *Harrison v. Nixon*, 9 Pet. (U. S.) 483; *Kerr v. Moon*, 9 Wheat. (U. S.) 565; *Grattan v. Appleton*, 3 Story, C. C. 755; *Potter v. Brown*, 5 East, 130; *Price v. Dewhurst*, 4 Myl. & C. 76; s. c., 8 Sim. 279, 299, 300; *Sill v. Worswick*, 1 H. Black. 690; *De Bonneval v. De Bonneval*, 1 Curt. Ecc. 856; *Robbins v. Dolphin*, 1 Sw. & Tr. 37; *Thomas' Estate*, 13 Phila. (Pa.) 375; *Boyes v. Bedale*, 1 Hem. & M. 803; *Enohin v. Wylie*, 10 H. L. C. 1; *Laneville v. Anderson*, 2 Sw. & Tr. 26; *Yates v. Thomson*, 3 Clark & Finn. 544, 570; *Trotter v. Trotter*, 4 Bligh, N. S. 502; s. c., 3 Wills & S. 407.

2 Whart., Conf. L. § 555; Bar, Priv. Inter. L. § 127, n. 22a.

The law of the place of the testator's domicile governs in relation to a will of personal property, though made in another State or country, where a different law prevails. *Grattan v. Appleton*, 3 Story, C. C. 755.

As to the movable property in Louisiana of a non-resident testator, its disposition by will must be governed by the law of the State where the will was made and the testator resided. *Lewis' Estate*, 32 La. An. 385.

A resident in New Jersey made a conveyance in trust, embracing real estate in New Jersey and New York and all his personal estate, to take effect after his death, subject to a power of revocation; and upon a contest as to the title to personal property embraced in it, the court held that the validity of the conveyance should be tested by the laws of New Jersey, and that, the instrument being invalid at the common law, the law of New Jersey should not be presumed to be identical with that of New York. *Sullivan v. Babcock*, 63 How. (N. Y.) Pr. 120.

Where it appeared that a testator's

domicile was in New Jersey, and his will was not executed in accordance with the laws of that State, it was held that such will could not be regarded as a valid will of personal property in Pennsylvania. *Thomason's Estate*, 13 Phila. (Pa.) 376.

A will of personal property must be executed according to the law of the testator's domicile at the time of his death, or it will not pass personal property in a foreign country, though executed with all the formalities required by the laws of that country. *Desesbats v. Berquier*, 1 Binn. (Pa.) 336; *Guier v. O'Daniel*, 1 Binn. (Pa.) 349, n.; *Flannery's Will*, 24 Pa. St. 502; *Carey's Appeal*, 75 Pa. St. 201.

Lease-held property in one State, owned by a resident of another State, will be deemed personal property, and as such, as to its transmission by will, controlled by the law of the testator's domicile. *Despard v. Churchill*, 53 N. Y. 192.

Rights to personal property are regulated by the law of the testator's domicile, but the remedies are governed by the law of the forum. *Dixon's Ex'r's v. Ramsay's Ex'r's*, 3 Cr. (U. S.) 319; *Kerr v. Moon*, 9 Wheat. (U. S.) 565; *Ennis v. Smith*, 14 How. (U. S.) 400; *Atkinson v. Robbins*, 5 Cr. C. C. 312.

Dr. Wharton says this view is generally accepted among modern civilians, particularly in Germany, and may now be held, so far as concerns German jurists and courts, to be a settled law; citing *Wächter, Collision der Privatrechte*, li. 192-193; *Glück, Intestaterbfolge*, § 42; *Martini, Rechtsgelächten der Heidelberger Fakultät*, b. 1, s. 175; *Eichhorn, Deutsches Recht*, § 35; *Mittermaier, Deutsches Recht*, § 32.

Thus, if, by the law of the place of his original domicile, a person cannot make a will of his property before he is twenty-one years of age, he cannot make a valid will under that age, even if such property as is situated in a place where the law allows persons of a different age to make a will of like property. *Merlin, Répert. Stat.*; *Id.* Majorité, § 5; *Id.* Autorisation Maritale, § 10. The like rule is maintained by *Burgundus*, *Stockmans*, and *D'Argentre* as to personal property and covenants. See *Liverm.*, Diss. pp. 34, 35, 50.

And if by the law of her original domicile a married woman cannot dispose of her property by will, except with the consent of her husband, she cannot dispose of property situated in another place where no such consent is required. *Ibid.*, *Henry on For. L.* § 1, p. 31; *Story, Conf. L.* § 52.

ing wills of personal or movable property, that if they are registered and made according to the forms and solemnities required by the law of the testator's domicile, they are sufficient to pass such movable or personal property in every other country in which they are situated.<sup>1</sup> The same doctrine is firmly established in the American courts.<sup>2</sup>

Where a person domiciled in one State, being abroad, but having lost his domicile in his native State, executes a will of personal property in such foreign State, such will is valid if executed according to the laws of his domicile, although not executed in accordance with the law of the place of its execution.<sup>3</sup>

But it seems that a will made while on a temporary visit to a foreign country, executed in conformity with the laws of such temporary residence, but contrary to the law of the domicile, will be invalid in the place of the domicile; and the admission of such will to probate in the place of execution, and the transmission of a copy to the place of domicile, cannot have any effect there in the absence of some statute giving it such force.<sup>4</sup>

Yet, if a will made in one State conflicts with the prohibitory laws of the State in which the property is situated, such will will be inoperative in the latter State, because it contravenes the public policy of the State, as declared by its express statute, and is not embraced in the general rule of comity regarding the law of domicile.<sup>5</sup>

*b. Of Immovable Property.*—The *lex loci rei sitæ* governs as to

<sup>1</sup> *Bruce v. Bruce*, 2 Bos. & P. 229, n.; *Potter v. Brown*, 5 East, 130; *Ferraris v. Hertford*, 3 Curt. Ecc. 468; s. c., 7 Eng. Jur. (Apr. 1, 1843) 262; *Somerville v. Somerville*, 5 Ves. 750; *Balfour v. Scott*, 6 Brown, P. C. 550; s. c., 2 Add. Ecc. 15, n.; *Curling v. Thornton*, 2 Add. Ecc. 1, 21; s. c., 8 Sim. 310, 311; *Moore v. Darell*, 4 Hagg. Ecc. 346, 352; *Bremet v. Freeman*, 10 Moore, P. C. 358; *Pipon v. Pipon*, Amb. 25; *Burn v. Cole*, Amb. 415; *Thorne v. Watkins*, 2 Ves. 35; *Phillips v. Hunter*, 2 H. Black. 402; *Drummond v. Drummond*, 6 Bro. P. C. 601; *Hunter v. Potts*, 4 T. R. 182; 4 Burge, Comm. on Col. & For. L. pt. 2, pp. 588-590; *Robertson*, Succ. 99, 191, 214, 215, 235, 290, 297; *Ersk.*, Inst. b. 3, tit. 9, § 4; *Kames*, Princ. Eq. b. 3, ch. 8, § 4. See, also, *Vattel* b. 2, ch. 8, § 110; *Denizart*, Voce Domicile, §§ 3, 4; *Voet*, lib. 38, tit. 17, § 34; *Vinnius*, Select. Quest. lib. 2, ch. 19; *Van Leevuen*, Cusura For. lib. 3, ch. 12; *Hub.* par. 1, lib. 3, tit. 13, § 20; *Id.* par. 2, lib. 1, tit. 3, § 15; *Bynkershoek*, Quest. Priv. Juris. lib. 1, ch. 16, 334, 335.

<sup>2</sup> This doctrine, though now formally established, was for a time much discussed in England. See *Bempde v. Johnston*, 3 Ves. 198, 200; *Brodie v. Barry*, 2 Ves. & B. 127, 131; *Price v. Dewhurst*, 8 Sim. 279, 299,

300; s. c., 4 Myl. & Cr. 76, 80, 82; *M. v. Darell*, 4 Hagg. Ecc. 346, 352; *Benbow Case*, Mon. L. Mag. (Sept. 1840) 264; *v. Worswick*, 1 H. Black. 690; *Omnium v. Bingham*, 5 Ves. 757; s. c., 3 Hagg. 414, n.; *Stanley v. Bernes*, 3 Hagg. 377; *Hogg v. Lashley*, 3 Hagg. Ecc. 4

<sup>3</sup> *Goodwin v. Jones*, 3 Mass. 514; *Ards v. Dutch*, 8 Mass. 506; *Dawson v. Boylston*, 9 Mass. 337; *Guier v. O'Donoghue*, 1 Binn. (Pa.) 349, n.; *Grattan v. Appleton*, 3 Story, C. C. 755; *Harvey v. Richardson*, 3 Mason, C. C. 381; *Armstrong v. Lee*, Wheat. (U. S.) 160; *Dixon's Ex'rs v. Lee*, 10 U. S. 100; *sey's Ex'rs*, 3 Cr. (U. S.) 319; *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 460; *Deasbats v. Berquier*, 1 Binn. (Pa.) 349, n.; *Rue High App.* 2 Doug. (Mich.) 522.

<sup>4</sup> *Rue High App.* 2 Doug. (Mich.) 522.

<sup>5</sup> *Caulfield v. Sullivan*, 85 N. Y. 153. A will executed in France by a citizen of New York, temporarily residing in France, is to be construed according to the law of New York. *Caulfield v. Sullivan*, 85 N. Y. 153.

<sup>6</sup> *Morris v. Morris*, 27 Miss. 847; *Stewart v. Neill*, 27 Miss. 157; *Wallace v. Wallace*, 2 Gr. (N. J.) Ch. 616.

<sup>7</sup> *Mahorner v. Hooe*, 9 Smed. & M. (Miss.) 247; *Harper v. Stanbrough*, 2 An. 377; *Harper v. Lee*, 2 La. An. 38

capacity or incapacity of the testator to make a will, and as to the extent of his power to dispose of the property, and the forms and solemnities to be observed to give the will its due attention and effect;<sup>1</sup> and also in all that concerns the descent and distribution of real estate.<sup>2</sup>

*c. Trusts and Execution of Powers.* — The validity of the trusts declared by a will is to be determined by the law of the testator's domicile.<sup>3</sup>

A will, in execution of a power, must be executed in conformity to the law of the domicile of the donor of the power; the will creating the power, and the one executing it, form but a single instrument;<sup>4</sup> and where a testator executes a testamentary power, according to the law of his domicile, it does not relate back to a will of a prior testator domiciled elsewhere, conferring such power.<sup>5</sup>

<sup>1</sup> *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 460; s. c., 20 Johns. (N. Y.) 229; *Wills v. Cowper*, 2 Ohio, 124; *Flannery's Will*, 24 Pa. St. 502; *Carey's Appeal*, 75 Pa. St. 201; *United States v. Crosby*, 7 Cr. (U. S.) 115; *McCormick v. Sullivan*, 10 Wheat. (U. S.) 192, 202; *Darby v. Mayer*, 10 Wheat. (U. S.) 465; *Copin v. Copin*, 2 P. Will. 291, 293; *Curtis v. Hurton*, 14 Ves. 537, 541; *Birtwhistle v. Vardill*, 5 Barn. & C. 438; s. c., 9 Bligh, 32; *Henry on For. L.* 13, 15; *Burge, Comm. on Col. & For. L.* pt. 2, pp. 576-580; *Id.*, pt. 2, ch. 4, § 5, pp. 169, 170; *Id.*, pt. 2, ch. 5, p. 217; *Story, Conf. L.* §§ 428, 434, 474.

<sup>2</sup> *Lucas v. Tucker*, 17 Ind. 41; *Dunbar v. Dunbar*, 5 La. An. 159; *Augusta Ins. Co. v. Morton*, 3 La. An. 418; *Harper v. Hampton*, 1 Harr. & J. (Md.) 622, 687; *Goodwin v. Jones*, 3 Mass. 514, 518; *Cutler v. Davenport*, 1 Pick. (Mass.) 81, 83; *Blake v. Williams*, 6 Pick. (Mass.) 286; *Holmes v. Remsen*, 4 John. Ch. (N. Y.)

32; *Elliott v. Minto*, 6 Madd. 16; *Cockerell v. Dickens*, 3 Moore, P. C. 98, 131, 132; *Tulloch v. Hartley*, 1 Young & C. (N. R.) 114.

By a will made in Massachusetts, a testator devised land in Rhode Island to his wife. Other land passed under a residuary clause. Had the will been construed according to the law of Massachusetts, the widow would have had no dower in the residue. It was held that the law of Rhode Island must prevail, the land being there situated, and that the widow was entitled to claim dower in the residue. *Atkinson v. Staagg*, 13 R. I. 725.

A Scotch deed of disposition and settlement, duly executed as a testamentary disposition according to the laws of Scotland, in the presence of two witnesses, is a valid will of the testator's real and personal property in New York. *Easton's Will*, 6 Paige Ch. (N. Y.) 183.

A will executed in another State, and attested by a less number of witnesses than is required to give validity to a devise of lands in Florida, whose law requires three witnesses, is inoperative in Florida. *Crolley v. Clark*, 20 Fla. 849.

It has been held that if one would derive title through a Virginia will to land in the District of Columbia, he must show that the will was so executed as to pass real estate in the District: if this is not done, it is immaterial that the will was sufficient to pass the title of real estate in Virginia. *Robertson v. Pickrell*, 109 U. S. 608.

<sup>3</sup> *Wood v. Wood*, 5 Paige Ch. (N. Y.) 596; *Bascom v. Albertson*, 34 N. Y. 584; s. c., 1 Redf. (N. Y.) 340; *Ward v. Starr* (Pa.), 11 Pitts. L. J. 155.

<sup>4</sup> *Bingham's Estate* (Pa.), 1 Leg. Gaz. Rep. 3191.

<sup>5</sup> See *Bingham's Appeal*, 64 Pa. St. 346; *Tatnall v. Hankey*, 2 Moore, P. C. 342.

Johns. (N. Y.) 229, 254; *Att. 4 Sandf.* (N. Y.) 276; *Als*, 1 Paige Ch. (N. Y.) *v. Smith*, 31 Mo. 161; *Wertson*, 6 Paige Ch. (N. Y.) *v. Cowper*, 2 Ohio, 124; *Holman v. Hopkins*, 27 States v. Crosby, 7 Cr. *Clark v. Graham*, 6 Wheat. *v. Moon*, 9 Wheat. (U. S.) *Clark v. Sullivan*, 10 Wheat. *by v. Mayer*, 10 Wheat. *is v. Smith*, 14 How. (U. S.) *v. Woody*, 4 McL. C. C. *wick*, 1 H. Black. 665; *4 T. R.* 182; *Philips v. Hunter*, 2 H. Black. 402; *Selkirk v. Davis*, 2 Rose, Bank. Cas. 97; s. c., 2 Dow. 230; *Copin v. Copin*, 2 P. Will. 290, 293; *Brodie v. Barry*, 2 Ves. & B. 130; *Birtwhistle v. Vardill*, 5 Barn. & Cress. 438; s. c., 9 Bligh,



Thus, where a power of appointment was given to a pa enabling him to dispose by will of personal property situated one country, and such party was domiciled in another coun and he executed the power and complied with all the requis thereof, making a will according to the law of the country wh the power was created and the personal estate was situated, which was not made in accordance with requisites prescribed the place of his domicile, it has been held that such execution the power is valid.<sup>1</sup>

2. EXECUTION AND REVOCATION OF WILLS. — It is a w established doctrine, both in England<sup>2</sup> and in America,<sup>3</sup> t the *lex domicilii* is to govern the formalities and execution o will of personalty; but that in regard to real property or imm ables, the *lex rei sitæ* governs as to all that concerns the will the solemnities by which it is to be attested.<sup>4</sup>

In England the courts will give effect to a foreign will, v where executed, though invalid as to execution by the Eng law;<sup>5</sup> but where an Englishman is domiciled abroad, in the c

1 Tatnell v. Hankey, 2 Moore, P. C. 342.

Where a married woman domiciled in Maryland, having a power of appointment over real estate in Massachusetts, devised by her father, who was domiciled there, died, leaving a will devising to her husband all the real and personal estate to which she should be entitled in law or equity at the time of her decease, but making no mention of the power of appointment, which by the law of Maryland was not a good execution of the power, though it was otherwise by the laws of Massachu- setts, it was held that the law of the lat- ter State must govern, and that the power was well executed. Sewall v. Wilmer, 132 Mass. 131.

2 Bruce v. Bruce, 2 Bos. & Pull. 229, n.; Potter v. Brown, 5 East, 130; Ferraris v. Hertford, 3 Curt. Ecc. 468; s. c., 7 Eng. Jur. (Apr. 1, 1843) 262; Somerville v. Somer- ville, 5 Ves. 750; Balfour v. Scott, 6 Bro. P. C. 550; s. c., 2 Add. Ecc. 15, n.; Curling v. Thornton, 2 Add. Ecc. 21; s. c., 8 Sim. 310, 311; Moore v. Darell, 4 Hagg. Ecc. 346, 352; Breemer v. Freeman, 10 Moore, P. C. 358; Pison v. Pison, Amb. 25; Burn v. Cole, Amb. 415; Thorne v. Watkins, 2 Vez. 35; Phillips v. Hunter, 2 H. Black. 402; Drummond v. Drummond, 6 Bro. P. C. 601; Hunter v. Potts, 4 T. R. 182; Bemp-de v. Johnstone, 3 Ves. 198, 200; Brodie v. Barry, 2 Ves. & B. 127, 131; Price v. Dewhurst, 8 Sim. 279, 299, 300; s. c., 4 Myl. & Cr. 76, 80, 82; Moore v. Darell, 4 Hagg. Ecc. 346, 352; Bennett's case, Mon. L. Mag. (Sep. 1840) 264; Sill v. Wors- wick, 1 H. Black. 690; Ommaney v. Bing- ham, 5 Ves. 757; s. c., 3 Hagg. Ecc. 414, n.; Stanley v. Bernes, 3 Hagg. Ecc. 377; Hogg

v. Lashley, 3 Hagg. Ecc. 415, n.; De neval v. De Bonneval, 1 Curt. Ecc. Robins v. Dolphin, 1 Sw. & Tr. 37; C enden v. Fuller, 1 Sw. & Tr. 442; La ville v. Anderson, 2 Sw. & Tr. 24; 4 Com. on Col. & For. L. pt. 2, pp. 588- Robertson, Succ. 99, 191, 214, 215, 285, 297; Ersk. Inst. b. 3, tit. 9, sec. 4; K Princ. Eq. b. 3, ch. 8, § 48. See, Vattel, b. 21, ch. 8, § 110; Denizart, Domicil, §§ 3, 4; Voet, lib. 38, tit. 17. Vinnius, Select Quest. lib. 2, ch. 19; Leevrien, Cusura For. lib. 3, ch. 12; par. 1, lib. 3, tit. 13, § 20; Id., par. 2, § 15; Bynkerhoek, Quest. Priv. Juris 1, ch. 16, 334, 335.

3 Goodwin v. Jones, 3 Mass. 514; l ards v. Dutch, 8 Mass. 506; Dawe v. Boylston, 9 Mass. 337; Guier v. O'Da 1 Binn. (Pa.) 349, n.; Grattan v. Appl 3 Story, C. C. 755; Harvey v. Richa Mason, C. C. 381; Armstrong v. Lea Wheat. (U. S.) 169; Dixon's Exrs. v. sey's Exrs., 3 Cr. (U. S.) 319; Holm Remsen, 4 John. Ch. (N. Y.) 450. Desesbats v. Berquier, 1 Binn. (Pa.) Rue High App. 2 Doug. (Mich.) 522.

4 Lucas v. Tucker, 17 Ind. 41; A gate v. Smith, 31 Mo. 166; Holm Hopkins, 27 Tex. 38; Armstrong v. 12 Wheat. (U. S.) 169; McCormic Sullivant, 10 Wheat. (U. S.) 192; U States v. Crosby, 7 Cr. (U. S.) 115; C v. Copin, 2 P. Will. 291; Curtis v. Hu 14 Ves. 537; Crookenden v. Fuller, 1 & Tr. 442; Laneville v. Anderson, 2 & Tr. 24; Onslow v. Cannon, 2 Sw. & Tr. 24; 436.

5 In re Guttierrez, 38 L. J. Rep. (N. S.) Prob. & M. 48.

cution of his will, he must follow the law of his domicile, — not that of his native land.<sup>1</sup>

In the United States, if a will as to personalty is good by the law of the domicile, it is good everywhere; and if void by the law of the domicile, it is void everywhere.<sup>2</sup>

*a. Change of Domicile.* — Where a testator, after the execution of his will in one domicile, abandons that domicile, and acquires a new residence in the second domicile in which such will is invalid for want of proper execution, the law of the latter domicile will prevail,<sup>3</sup> and the will, in effect, will be revoked.<sup>4</sup>

Where a citizen, domiciled in South Carolina, executed a will according to the law of that State, and subsequently abandoned his domicile there, and acquired a new one in New York, where he died, the New York courts held that the South Carolina will, not being executed according to the forms prescribed in New York, was not valid to pass personalty in New York.<sup>5</sup> The same doctrine has been held in Connecticut<sup>6</sup> and other States.<sup>7</sup>

*b. Subsequent Birth of a Child.* — If the proper tribunal of the domicile adjudge a will to be revoked by the subsequent birth of issue, it cannot be established as a valid will of personalty in another State; but as to the realty the question of testacy is governed by the *lex loci*.<sup>8</sup>

3. CONSTRUCTION OF WILLS. — *a. As to Interpretation of Words.* — It is a general rule, in the construction of wills, that the last

<sup>1</sup> Moore v. Darell, 4 Hagg. Ecc. 346; Stanley v. Bernes, 3 Hagg. Ecc. 373; Ferrars v. Hertford, 3 Curt. Ecc. 468.

<sup>2</sup> Johnson v. Copeland, 35 Ala. 521; Hill v. Townsend, 24 Tex. 575; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460; Moultrie v. Hunt, 23 N. Y. 394; Abston v. Abston, 15 La. An. 137; Perin v. McMicken, 15 La. An. 154; Jones v. Gerock, 6 Jones (N. C.) Eq. 190; Dunlap v. Rogers, 47 N. H. 281; Desesbats v. Berquier, 1 Binn. (Pa.) 336; Dixon v. Ramsay, 3 Cr. (U. S.) 319; Armstrong v. Lear, 12 Wheat. (U. S.) 169; Harrison v. Nixon, 9 Pet. (N. S.) 483; Gilman v. Gilman, 52 Me. 165; Swearingen v. Morris, 14 Ohio St. 424.

<sup>3</sup> Nat. v. Coons, 10 Mo. 543. See Desesbats v. Berquier, 1 Binn. (Pa.) 336; Pottinger v. Wightman, 3 Meriv. 68.

"This doctrine," it is said by Sir R. Phillimore (Priv. Inter. L. IV. 628), "is fraught with obvious and many inconveniences, and with the great evil of rendering difficult and uncertain that which is one great object of civilization, to render easy and certain the validity of the testaments. It is to be lamented, therefore, that the doctrine has been in some degree countenanced, though not judicially adopted, by the judicial committee of the Privy Council." Breemer v. Freeman, 10 Moore, P. C. 359.

<sup>4</sup> But it has been held, that, if a will be executed in conformity to the law of the domicile, its validity is not affected by a subsequent change of domicile. *Ex parte McCormick*, 2 Bradf. (N. Y.) 169.

The principle that a change of domicile after the will is made may revoke a prior will, if the same be invalid, according to the law of the new domicile, was modified in England by Lord Kingsdown's act (23, 24, 25, Vict. ch. 114, § 3), which provides that "no will shall be held to be revoked, or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same." Under this act, where a will was made in one country where a person was domiciled, which was valid in that country, but invalid in England, and the person subsequently removed to England, and acquired a new domicile, and died there, his will was held to be good in England. See *In re Reid*, L. R. 1 P. & D. 74.

<sup>5</sup> Moultrie v. Hunt, 3 Bradf. (N. Y.) 322; s. c., 23 N. Y. 394.

<sup>6</sup> Irwin's App. 33 Conn. 128; but this subject is now regulated by statute in Connecticut. 1 Redf. Wills. (3d ed.) 381.

<sup>7</sup> See Nat. v. Coons, 10 Mo. 543; Manuel v. Manuel, 13 Ohio St. 458.

<sup>8</sup> Bloomer v. Bloomer, 2 Bradf. (N. Y.) 339. *Vide infra*, this series, tit. "WILLS."

domicile of the testator is to be resorted to in all questions of construction or interpretation.<sup>1</sup>

But where a will is made in one country, as to the meaning of the terms used, it is to be constructed according to the law of that country, whether the judicial inquiry as to its meaning and interpretation arise in that country, or in a foreign country.<sup>2</sup>

If a question should arise as to whether the terms of the will include a bequest of real estate, or show an intention on the part of the testator to bequeath real estate as well as personal property, such question is to be determined according to the law of the country of his domicile, where the will was made; and the same interpretation must be put upon those terms in every other country where the will would be put upon them by the law of that domicile.<sup>3</sup>

<sup>1</sup> *Bascom v. Nichols*, 1 Redf. (N. Y.) 340; *Parsons v. Lyman*, 20 N. Y. 103; *Dannelli v. Dannelli*, 4 Bush (Ky.), 61; *Adams v. Norris*, 23 How. (U. S.) 354; *Pierson v. Garnet*, 2 Bro. Ch. 38; *Enohin v. Wylie*, 10 H. L. Cass. 1; *Trotter v. Trotter*, 4 Bligh (N. S.), 502; *Laneville v. Anderson*, 2 Sw. & Tr. 26; s. c., 22 Eng. L. & Eq. 642; *Stewart v. Garnett*, 3 Sim. 398; *Boyes v. Bedale*, 1 Hem. & M. 803; *Yates v. Thompson*, 1 Sh. & McL. 325; s. c., 3 Clark & Finn. 544; 1 Redf. Will. (3d ed.) 388; *Whart., Conf. L.* § 592.

<sup>2</sup> *Trotter v. Trotter*, 4 Bligh (N. S.), 502; *Gordan v. Brown*, 3 Hagg. 455, n.; s. c., 3 Wills. & S. 407; *Price v. Dewhurst*, 8 Sim. 279, 299.

This rule, it has been said, does not require the adoption of foreign rules of evidence or procedure in the tribunal where the will is brought for a construction or interpretation. *Adams v. Norris*, 23 How. (U. S.) 354; *Yates v. Thompson*, 3 Clark & Finn. 548; *Di Sora v. Phillips*, 10 H. L. Cass. 624.

Thus, the words "heir at law" in a bequest of personalty, if the testator were domiciled in England, would pass the estate to his eldest son; if domiciled in Ohio or any of the States of a similar jurisprudence, it would pass the estate to all of his children. *Harrison v. Nixon*, 9 Pet. (U. S.) 483. And this is true although the testator was a native of England (*Harrison v. Nixon*, 9 Pet. (U. S.) 483; *Anstruther v. Chalmers*, 2 Sim. 1), who, after having made his will, moved to such State, where he died. *Nat v. Coons*, 10 Mo. 543.

A Georgia court, in construing a devise of land in Georgia to the testator's "own right heirs," will hear proof that the testator lived in Pennsylvania, and there made the will; and that, under the laws of Pennsylvania, brothers and sisters of the whole blood are preferred to those of the half blood, and will, from such proof, infer that the testator's use of the term was in the

sense there attached to it. *Guerard*, 73 Ga. 506.

<sup>3</sup> *Enohin v. Wylie*, 10 H. L. Cass. 1; s. c., 1 Sw. & Tr. 118; 1 De. G. 410.

What is deemed to be "real estate" in the sense as used in a will devising property, must be decided by the law of the country of the testator. *Stewart v. Garnett*, 3 Sim. 398; 1 Redf. Will. (3d ed.) 383; *Conf. L.* § 593; *Story, Conf. L.* § 410.

It has been held, that where the terms of a will give a legacy, or create a trust, in favor of a particular party, should the language used import a wish or desire, it is to be constructed according to the law of the place where the will is made and where the testator has his domicile. *Pierson v. Garnet*, 2 Bro. Ch. 38. Thus, legacies are payable in the currency of and according to the laws of the country where the will was made and the testator was domiciled. *Saunders v. Drake*, 2 Atk. 465; *Lane v. Lansdowne*, 2 Bligh, 60, 88, 89, 90; *Polm v. Martin*, 3 Bro. Ch. 50; *Pierson v. Garnet*, 2 Bro. Ch. 39, 47; *Wallis v. Wallis*, 2 P. Wms. 88.

The question whether, by the terms of a foreign will, a legatee takes an estate for life or in fee, is to be determined by the law of the place where the will was made and the testator domiciled, and not by the law of the place where the controversy arises. *Brown v. Brown*, 4 Wils. 28, 37. The same is true of the testator's capacity to make a particular bequest of property. *Price v. Dewhurst*, 8 Sim. 299, 300, 301.

Where a person to whom a legacy is given dies during the lifetime of the testator, the question whether it is an estate for life, or whether the legacy descends to the personal representative of the legatee, is to be decided by the law of the country where the will was made and the testator domiciled. *Boyes v. Bedale*, 1 Hem. & M. 805; *Anstruther v. Chalmers*, 2 Sim. 1.

The law of the place of the actual domicile of the testator must govern in its construction and interpretation of a foreign will.<sup>1</sup> And it seems that, where a will is made in one country, and the testator afterwards removes to another country, where he acquires a domicile, and dies there, such will, if not executed in accordance with the law of such new domicile, will be invalid, although executed according to the law of the testator's domicile at the time when it was made.<sup>2</sup>

The law of the domicile of the testator governs in the construction of a will disposing of real property, unless the testator had in view the law of the *situs*, or uses language necessarily referring to the usages and customs, and appropriate only to that *situs*.<sup>3</sup>

It has been held in this country, that, in the construction of a foreign will, the foreign law will be presumed to be the same as the law of the forum, unless the contrary is proved.<sup>4</sup>

) *Designatio Personarum*. — Where the bequest in a will designates a particular class or description of persons entitled to take under the *designatio personarum*, who belong to that class, is to be determined by the law of the place where the will is made and the testator is domiciled.<sup>5</sup>

*As to Effect of Particular Provisions*. — It has been said, that, although the law of the testator's domicile is of general application, when aid is asked from the court to enforce a provision which the law of the forum is forbidden, an exception is to be made.<sup>6</sup>

<sup>1</sup> *Newton v. Curling*, 2 Add. Ecc. 6, 10-25; 3 Sim. 310.

<sup>2</sup> Where a testator domiciled in one country provides for the sale of his land in that country, and the application of the proceeds to charity in another country, the question of the validity of such will is to be determined by the law of the country where he is domiciled and the land situated, not by the law of the country where it is to be applied to charity. *Trustees of Asso. v. Smith*, 3 Pet. (U. S.) appx. 63; s. c., 4 Wheat. (U. S.) 1; *Curtis v. Norton*, 14 Ves. 537, 541.

<sup>3</sup> *Harrison v. Nixon*, 9 Pet. (U. S.) 483, 504, 505; *Anstruther v. Chalmers*, 2 Sim. 1; *Laneville v. Anderson*, 2 Sw. & Tr. 24.

<sup>4</sup> The legal operation and interpretation of a will is to be determined by the law as it existed at the time of its execution; but the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanies it, depend upon the law of the forum at the time of trial. *Adams v. Norris*, 23 How. (U. S.) 354.

<sup>5</sup> *Nat. v. Coons*, 10 Mo. 543; *Desesbats v. Berquier*, 1 Binn. (Pa.) 336; *Pottinger v. Wightman*, 3 Meriv. 68; *Bremer v. Freeman*, 10 Moore, P. C. 359.

<sup>6</sup> This doctrine is severely criticised by Sir R. Phillimore, *Priv. Inter. L.* iv. 628.

<sup>3</sup> *Dannelli v. Dannelli*, 4 Bush (Ky.), 62; *Enoch v. Wylie*, 10 H. L. Cas. 1; *Trotter v. Trotter*, 3 Wils. & Sh. 407; s. c., 4 Bligh (N. S.) 502, 505.

<sup>4</sup> *Sharp v. Sharp*, 35 Ala. 574.

<sup>5</sup> See *Dannelli v. Dannelli*, 4 Bush (Ky.), 61; *Harrison v. Nixon*, 9 Pet. (U. S.) 483.

<sup>6</sup> Whart., *Conf. L.* § 598.

Thus, in constructing wills, provisions of disinheritance will be restricted in those countries where a restricted disinheritance only is permitted, in constructing provisions creating trust entails, endowing ecclesiastical corporations in mortmain, and providing for perpetual accumulations, remainders of personalty, and substitutions, the court will be governed by the law of the forum, although no such law was in force at the place of the testator's domicile. *Harper v. Stanbrough*, 2 La. An. 377; *Harper v. Lee*, 2 La. An. 382; *Mahorner v. Hooe*, 9 Smed. M. (Miss.) 247; *McIntosh v. Townsend*, 16 Ves. 330; *Somerville v. Somerville*, 5 Ves. 749; *Bradalbane v. Shandor*, 2 S. & McL. 377; *Attorney-General v. Mill*, 3 Russ. C. C. 328; s. c., 5 Bligh, 593.

A direction in a will for an accumulation of the income of real estate, until the death of the last of twelve life annuitants, and that then the estate, with the accumulated interest, to be divided, is void as to real estate in New York, although the di-

Where a testator in his will executes a testamentary according to the law of his domicile, it does not relate back to a will of a prior testator domiciled elsewhere, conferring power.<sup>1</sup>

*c. Adjudication by Domiciliary Courts.*—Adjudications by foreign courts, being the domiciliary courts of the deceased testator, in construing a will, or passing upon the question of succession under the laws of such country, will be binding upon courts elsewhere.<sup>2</sup>

4. AUTHENTICATION AND PROOF.—The court of equity has no jurisdiction of testamentary trusts, cannot enforce a foreign will of which there has been no probate obtained from the courts.<sup>3</sup>

*a. Of Personal Property.*—A will of personal property must be proved according to the law of the last domicile of the testator.

Probate may be granted of a foreign will of personal property executed in conformity to the *lex domicilii*, though not valid under the laws of the State where offered for probate.<sup>4</sup> But a will of personal property made in another jurisdiction cannot be admitted to probate unless shown to have been executed in accordance with the law of the domicile.<sup>5</sup>

Probation may be valid in the State where the testator lived and made his will. *Hobson v. Hale*, 95 N. Y. 588.

<sup>1</sup> See *Bingham's Appeal*, 64 Pa. St. 346; *Tatnall v. Hankey*, 2 Moore, P. C. 342. See *supra*, 1, c, "TRUSTS AND EXECUTION OF POWERS."

<sup>2</sup> *Doglioni v. Crispin*, L. R. 1 H. L. 301; *In re Weaver*, 36 L. J. Prob. & Mat. 41; *Crispin v. Doglioni*, 9 Jur. (N. S.) 653; *aff'd*, L. R. 1 H. L. 304; *Partington v. Attorney-General*, L. R. 4 H. L. 104, 107; *Enohin v. Wylie*, 10 H. L. Cas. 1.

It is held that the judgment of the court of the domicile of a testator at the time of his death is binding upon all foreign courts as to questions of succession and title to personal property, where the same questions between the same parties are in issue in the foreign court which have been decided by the court of the domicile. *Gordon v. Brown*, 3 Hagg. 455; *Crispin v. Doglioni*, 8 L. T. (N. S.) 518; s. c., 3 Sw. & Tr. 96; 32 L. J. Prob. 169.

The rule of binding courts of one State by the decision of the courts of another State, in the administration of the laws of the first State, in respect to property subject thereto and within its jurisdiction applied as to interpretation, in 7 Paige Ch. (N. Y.) 182 of N. Y. Rev. Stat. 64, § 45, defining the rights of devisees and an obligee in the testator's bond to convey. See, also, *Haywood v. Daves*, 81 N. C. 8.

<sup>3</sup> See *Campbell v. Wallace*, 10 Gray

(Mass.), 162; *Campbell v. Shelton*, 10 Pick. (Mass.) 8; *Young v. Brush*, 20 N. Y. 667; s. c., 18 Abb. (N. Y.) Pr. 171; s. c., 38 Barb. (N. Y.) 294; *Young v. Price*, 41 N. Y. 620; *Price v. Dewhurst*, 41 N. Y. 620; *McCormick v. Sullivan*, 76 Cr. 76, 80; *Wheat* (U. S.) 192; *Darby v. M. Wheat* (U. S.) 465.

A testamentary paper executed in a foreign country, though a valid will under foreign law, cannot be made the foundation of a suit for a legacy in the courts of this country until admitted to probate. *Armstrong v. Lear*, 12 Wheat. 169.

A will duly probated in Indiana, where there was property of the testatrix, cannot be attacked for incapacity and undue influence in Vermont, where the testatrix had no domicile. *Ives v. Salisbury*, 56 Vt. 169.

*Query.* Whether a will of a non-resident, refused probate in one State on the ground of a local statute which would not give it validity in another, is sufficient to bar title to lands in the latter State. *Lawrence*, 3 Hal. Ch. (N. J.) 215.

<sup>4</sup> *Flannery's Will*, 24 Pa. St. 502; *Appeal*, 75 Pa. St. 201.

<sup>5</sup> *Isham v. Gibbons*, 1 Bradf. (N. Y.) 182; *Pretto's Will*, 4 Phila. (Pa.) 302; *Flannery's Will*, 24 Pa. St. 502.

The will of a *feme covert*, executed in a foreign country, disposing of her personal property, may be admitted to probate in this country, though invalid by the laws of her domicile. *Sullivan v. Wheat*, 11 Paige Ch. (N. Y.) 398.

*b. Of Real Property.* — A will of real estate must be proved in the State where the land is situated, according to the law of that place.<sup>1</sup>

**13. Succession and Distribution.** — 1. **SUCCESSION.**<sup>2</sup> — *a. Movable Property.* — It is now the universal rule, recognized by the common law, that the succession of personal property is governed exclusively by the law of the place where the testator was domiciled<sup>3</sup> at the time of his death.<sup>4</sup>

It seems that a will of personal property executed in a foreign country by an alien there resident, must be proved in accordance with the laws of such country, though the testator be domiciled in New York at the time of his decease. *Robert's Will*, 8 Paige Ch. (N. Y.) 446-519; *Davison's Will*, 1 Tuck. (N. Y.) 479.

1 *Flannery's Will*, 24 Pa. St. 502; *Carey's Appeal*, 75 Pa. St. 201; *Young v. Brush*, 28 N. Y. 667; a. c., 18 Abb. (N. Y.) Pr. 171; *revera*, a. c., 38 Barb. (N. Y.) 294. See *Young v. Brush*, 41 N. Y. 620.

Title of lands by devise can be acquired only under a will proved and recorded according to the laws of the State in which the lands lie; a probate in one State cannot affect the title to lands in another. *McCormick v. Sullivan*, 10 Wheat. (U. S.) 191; *Darby v. Mayer*, 10 Wheat. (U. S.) 405. And under a statute permitting wills, made in another State to be proved and recorded in the county and State where the land is situate, it must appear that the requisitions of the statute have been complied with, to give validity and effect to such will. *Kerr v. Moon*, 9 Wheat. (U. S.) 565.

In Indiana a will made and recorded in another State, according to the laws of such State, will pass lands in Indiana. *O'Brien v. Woody*, 4 McL. C. C. 75. And a person taking title to land in Iowa, by virtue of a foreign will, secures a vested interest at the death of the testator, and may commence his action before probate of the will in Iowa. *Otto v. Doty*, 61 Iowa, 23.

<sup>2</sup> Those interested in the history of the question of succession to property and testamentary disposition thereof, will be instructed by Bentham's chapter on "Succession." See 1 Bentham's Works, 334, and Maine's chapters on "The Early History of Testamentary Succession," and "Ancient and Modern Ideas respecting Wills and Successions." See Maine's Ancient Law, chs. vi., vii., pp. 166-237.

<sup>3</sup> By the law of domicile as applied to succession, is meant, not the general law, but the law which the country of the domicile applies to the particular case. *Dupuy v. Wurtz*, 53 N. Y. 556.

<sup>4</sup> *Richardson v. Lewis* (Mo. App.), 4 West. Rep. 267. See *Lawrence v. Kitteridge*, 21 Conn. 577; *Holcomb v. Phelps*, 16 Conn. 127; *Thomas' Succession*, 35 La. An. 19; *Olivier v. Townes*, 14 Martin (La.), 99; *Suarez v. Mayor*, etc., of New York, 2 Sandf. Ch. (N. Y.) 173; *Holmes v. Remsen*, 4 John. Ch. (N. Y.) 460; a. c., 20 Johns. (N. Y.) 229; *Parsons v. Lyman*, 20 N. Y. 103; a. c., 28 Barb. (N. Y.) 564; *reversing*, 4 Bradf. (N. Y.) 263; *Graham v. Public Adm'r*, 4 Bradf. (N. Y.) 127; a. c., Law. Rep. 386; *Public Adm'r v. Hughes*, 1 Bradf. (N. Y.) 125; *Hurr v. Sherwood*, 3 Bradf. (N. Y.) 85; *Mercury's Estate*, 1 Tuck. (N. Y.) 283; *Guler v. O'Daniel*, 1 Binn. (Pa.) 349, n.; *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 191; *Goodwin v. Jones*, 3 Mass. 514, 517; *Blake v. Williams*, 6 Pick. (Mass.) 286, 314; *French v. Hall*, 9 N. H. 137; *Shultz v. Pulver*, 3 Paige Ch. (N. Y.) 182; *Decouche v. Savatier*, 3 Johns. Ch. (N. Y.) 190; *Harvey v. Richards* cited, 4 Cow. (N. Y.) 517, n.; a. c., 1 Mason, C. C. 418; *Ennis v. Smith*, 14 How. (U. S.) 400; *Pipon v. Pipon*, Amb. 25; *Thorne v. Watkins*, 2 Ves. 35; *Sill v. Worswick*, 1 H. Black. 690, 691; *Bruce v. Bruce*, 2 Hoa. & P. 229, n.; *Hunter v. Potts*, 4 T. R. 182; *Potter v. Brown*, 5 East, 130; *Birt-whistle v. Vardill*, 5 Barn. & Cress. 438, 450-455; a. c., 9 Bligh, 32-33; 2 Clark & Finn. 571; *Enobin v. Wylie*, 10 H. L. Cas. 1; *Crispin v. Doglioni*, 9 Jur. (N. S.) 653; *aff'd* L. R. 1 H. L. 304; *Partington v. Attorney-General*, L. R. 4 H. L. 104; *Vates v. Thomson*, 3 Clark & Finn. 554; *Thornton v. Curling*, 8 Sim. 310, *Price v. Dewhurst*, 8 Sim. 279, 299; *Moore v. Budd*, 4 Hagg. Ecc. 346, 353; *Preston v. Melville*, 8 Clark & Finn. 1, 13; *In re Ewin*, 1 Tyrw. 91; a. c., 1 Rose, Bank. Cas. 478; 5 Barn. & Cress. 451, 452; *Phillips v. Hunter*, 2 H. Black. 403, 405.

The *lex domicilii* fixes the right of descent of personalty. *Grote v. Pace*, 71 Ga. 231. But it is said that the validity of a gift *causa mortis* is to be determined by the law of the place where it is made, without reference to the donor's domicile. *Emery v. Clough*, 61 N. H. 552. And where, while a husband and wife were domiciled in Minnesota, the wife inherited property

The succession to personal property is governed by the law of the actual domicile of the intestate at the time of his death, whether the matter what was the country of his birth or his former domicile, or the actual *situs* of the property at the time of his death.<sup>1</sup>

The courts of one State have no jurisdiction over the assets of a decedent, within the latter's domicile in another State.<sup>2</sup>

In ascertaining who is entitled to take as heirs or distributees, the law of the domicile governs.<sup>3</sup>

*b. Immovable Property.* — The descent and distribution of real estate is governed exclusively by the *lex loci rei sitæ*; <sup>4</sup> but in

from her father in Norway, which, in the form of money, was transmitted to this country, it was held that the rights of the husband and wife in respect to such property were determined by the laws of Minnesota, and not by those of Norway. *Muus v. Muus*, 29 Minn. 115.

1. The right of succession to a descendant's personal property is governed by the law of the domicile; and therefore, where a testator domiciled in Louisiana left two children, a daughter residing in New York, and a son who had been absent and unheard from for twelve years, and the daughter's husband obtained administration in New York, and procured a decree of the probate court of Louisiana declaring his wife sole heir, such decree was held to be a bar to the rights of the son, who subsequently appeared and claimed his share of the estate. *Sherwood v. Wooster*, 11 Paige Ch. (N. Y.) 441.

H., born in Connecticut, went to Europe in 1869 to acquire the German language, and complete his professional studies. In 1872 he went to Paris, where he remained, and in February, 1877, there married a French woman, without any contract as to property. Immediately after, he rented a house at Suresnes, near Paris, for two years, and took up his residence there with his wife. In May, 1878, he was brought to this country, and sent to a hospital for the insane at Philadelphia, where he died in 1881. The court held that his personal property became subject to the community law of France, and that his widow was entitled to one-half thereof, notwithstanding that by his will, made before the marriage, he had bequeathed the whole of it to others. *Harral v. Harral*, 39 N. J. Eq. 279; s. c., 51 Am. Rep. 17.

2. *Russell v. Madden*, 95 Ill. 485.

Accordingly, one dying in the State of Sonora, Mexico, leaving no issue nor father, his mother would succeed to the whole estate, to the exclusion of his brothers and sisters. *Russell v. Madden*, 95 Ill. 485.

3. *Watt's Appeal*, 31 Leg. Int. 182; s. c., 8 Phila. (Pa.) 217; *Van Dyke's Estate*, 32 Leg. Int. 29; s. c., 1 W. N. C. 171.

It has been held in Pennsylvania that the courts of a State have no jurisdiction to grant administration for the purpose of recovering from the resident agent of a foreign executor a fund not collected in the jurisdiction. *Schley's Estate*, Leg. Int. 202; s. c., 2 W. N. C. 684.

It has been said that the qualification "at the time of his death" is imposed because any change made after the death of the testator will not effect the succession. *Lynch v. The Government of Uruguay*, 25 L. T. N. S. 164.

Where a person dies abroad, being domiciled there, and the courts thereof and the local law have adjudicated upon the rights of his heirs, the courts of other countries will be bound thereby in dividing of property within their jurisdiction. *Dogliotti v. Crispin*, L. R. 11 L. 308; *re Weaver*, 36 L. J. Prob. & Mat. 41.

4. Thus, in determining whether primogeniture gives a right to preference as to exclusive succession; whether a person is legitimate or not, and able to take succession, whether heirs are to take *per capita* or *per stirpes*, and the nature and extent of the representation, the law of the testator's domicile governs. *Abston v. Abston*, La. An. 138; *Jennison v. Hapgood*, Pick. (Mass.) 77, 99; *Coster v. Sapp*, Curt. Ecc. 691; *Attorney-General v. De Mees & Welsb.*, 511, *De Bonneval v. Bonneval*, 1 Curt. Ecc. 856.

5. *Cutter v. Davenport*, 1 Pick. (Mass.) 81; *Harper v. Hampton*, 1 Har. & J. (Pa.) 622, 687; *Goodwin v. Jones*, 3 Mass. 518; *Holmes v. Remsen*, 4 Johns. (N. Y.) 460; s. c., 20 Johns. (N. Y.) 1; *Nicholson v. Leavitt*, 4 Sandf. (N. Y.) 1; *Hosford v. Nichols*, 1 Paige Ch. (N. Y.) 220; *Andrews v. Herriot*, 4 Cow. (N. Y.) 510, 527; *Blake v. Williams*, 6 L. (Mass.) 286; *Milne v. Moreton*, 6 L. (Pa.) 353; *Wills v. Cowper*, 3 Ohio, s. c., 2 Ohio, 124; *Augusta Ins. Co. v. Morton*, 3 La. An. 417; *Chapman v. Ertson*, 6 Paige Ch. (N. Y.) 627; *United States v. Crosby*, 7 Cr. (U. S.) 1; *Clark v. Graham*, 6 Wheat. (U. S.) 1; *Kerr v. Moon*, 9 Wheat. (U. S.) 565.



interpretation of wills disposing of movable property, the persons who are to take are described by some general designation, such as "next of kin," "issue," "children," or "heirs," and the like; the rule of common law is, that persons who are to take are to be ascertained by the *lex domicilii*; and this is true whether the will be of movable or immovable property, unless the context clearly shows a different intention on the part of the testator.<sup>1</sup>

Where a man domiciled in one State executes a will there, in which he disposes of personal property in the State of his domicile, and also in another State, which renders it necessary to have administration in both States, after the assets within the latter State have been collected, they should be remitted to the court of the State of the domicile for distribution.<sup>2</sup>

The question whether a person died intestate or not must be determined by the law of the place where he was domiciled at the time of his death.<sup>3</sup>

*Cornick v. Sullivan*, 10 Wheat. (U. S.) 192; *Darby v. Mayer*, 10 Wheat. (U. S.) 465; *Sill v. Worswick*, 1 H. Black. 665; *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Black. 402; *Selkirk v. Davis*, 1 Rose, Bank. Cas. 291; s. c., 2 Dow. 230; *Copin v. Copin*, 2 P. Will. 290, 293; *Brodie v. Barry*, 2 Ves. & B. 130; *Birtwhistle v. Vardill*, 5 Barn. & Cress. 438; *Curtis v. Hutton*, 14 Ves. 537, 541; *Elliott v. Minto*, 6 Madd. 16; *Cockerell v. Dickens*, 3 Moore, P. C. 98, 131, 132; *Tulloch v. Hartley*, 1 Young & C. (N. R.) 114; *Bunbury v. Bunbury*, 3 Jur. (Eng. 1839) 644.

The descent of real estate in Alabama, owned by a person who dies intestate in New York, where he resided, is governed by the laws of Alabama. *Grimball v. Patton*, 70 Ala. 626.

A testator domiciled in California died, possessed of land and personalty there, and also in New Jersey. It was held that the community law prevailing in California would not apply to the lands in New Jersey. *Pratt v. Douglas*, 38 N. J. Eq. 516.

If one dies intestate and childless out of the State of Florida, leaving lands there, his widow is his sole heir to such lands under the Florida statute of 1872, which declares that, where the husband dies intestate without children, the wife shall be sole heir at law. *Crolley v. Clark*, 20 Fla. 840.

The rights of inheritance of a child adopted in Wisconsin, as to real estate in Illinois, the owner whereof was a resident of Illinois, must be determined by the laws of Illinois. *Keegan v. Geraghty*, 101 Ill. 26.

1 *Browne v. Browne*, 3 Hagg. Ecc. 455, n., s. c., 4 Wils. & Sh. 28; *Thorne v. Watkins*, 2 Ves. 35; *Elliot v. Minto*, 6 Madd. 16; *Winchelsea v. Garretty*, 2 Keen, 293, 309, 310.

It has been said "where land and personal property are situated in different countries, and governed by different laws, the question arises upon the combined effect of those laws. It is often very difficult to determine what portion of each law is to enter into the decision of the question. It is not easy to say how much is to be considered as depending on the law of real property, which must be taken from the country where the land lies, and how much on the law of personal property, which must be taken from the law of the domicile, and to blend both together so as to form a rule applicable to the mixed question which any other law separately furnishes sufficient material to decide." *Brodie v. Barry*, 2 Ves. & B. 130, 131. See, also, *Balfour v. Scott*, 6 Browne, P. C. 550; *Drummond v. Drummond*, 6 Browne, P. C. 601; *Robertson on Succ.* 202-207; 4 *Burge, Comm. on Col. & For. L.* pt. 2, ch. 15, § 4, p. 731.

2 *Parsons v. Lyman*, 20 N. Y. 103.

3 *Moultrie v. Hunt*, 23 N. Y. 394; reversing s. c., 26 Barb. (N. Y.) 252; 3 *Bradf. (N. Y.)* 322; *Isham v. Gibbons*, 1 *Brad.* 69.

F. died in Connecticut, leaving a will attested by only two witnesses. The probate court granted administration on her estate, finding in the order that she was there domiciled and died intestate. Afterwards, on citation of all parties interested, the executors named had the will proved in New York (where it was valid): the New York supreme court finding that F. was domiciled in New York at the time of her death, it was held that this was conclusive on all persons who were parties to the proceedings, as to her domicile; and it was the duty of the Connecticut probate court, on application of the executors, to admit the will to the probate for ancillary ad-



*c. Capacity to take.* — The question of the capacity of persons entitled to inherit, either in case of testacy or intestacy, is governed, so far as concerns movables, by the law of the last domicile of the deceased.<sup>1</sup>

(1) *Devises to Corporations.* — A corporation created by the law of one State for educational purposes, with the power to acquire and hold real estate, is capable of taking, by devise, land in another State.<sup>2</sup>

It has been said that the business capacity of a successor in general, to be determined by the law of his domicile at the time of the devolution of the estate.<sup>3</sup>

Successors upon whom rest no incapacity in their domicile may yet be deemed incapable by the *lex fori*, owing to the effect of local laws, based upon public policy.<sup>4</sup>

(2) *Devises for Charitable Purposes.* — It has been said by the Supreme Court of the United States that the law of the testator's domicile is to govern as to the validity or invalidity of devises for charitable purposes,<sup>5</sup> but it is held that the validity of a charitable

administration. *Willet's Appeal*, 50 Conn. 330.

<sup>1</sup> *Dannelli v. Dannelli*, 4 Bush (Ky.), 51.

Thus, where by the law of the parent's last domicile natural children are entitled to succeed, this will be binding in countries where only children born in wedlock have this right. *Enohin v. Wylie*, 10 H. L. Cas. 1; *Doglioni v. Crispin*, L. R. 1 H. L. 301. See, also, *Boyes v. Bedale*, 12 Week. Rep. 232; s. c., 1 Hem. & M. 798; *Goodman v. Goodman*, 3 Giff. 643; *Skottowe v. Young*, L. R. 11 Eq. 474.

The law of the State in which was one's property and domicile at the time of his death governs as to the nature and *quantum* of his heirs' interest. *King v. Martin*, 67 Ala. 177.

The nature and extent of the interest of the legatee is regulated by the domicile of the testator at the time of his death. *Browne v. Browne*, Wils. & Sh. 281; and this law is to determine whether a legacy is adeemed by the death of the legatee during the testator's lifetime. *Thornton v. Curling*, 8 Sim. 310; *Anstruther v. Chalmers*, 2 Sim. 1; and it is also to determine the husband's and wife's distributive interest. *Slaughter v. Garland*, 40 Miss. 172; *Cameron v. Watson*, 40 Miss. 191.

<sup>2</sup> *Saint Clara Female Academy v. Sullivan*, 116 Ill.; s. c., 4 West. Rep. 114.

A bequest by a citizen of Connecticut to an unincorporated association in New York will be declared void by the New York courts, if void under the New York law, although valid under the Connecticut law. *Mapes v. American Home Missionary Society*, 33 Hun (N. Y.), 360.

It has been said that although a New

York corporation might be unable to take a legacy under a will executed within months of the death of the testator, a corporation created under the law of New Jersey, under a law which contains no such provision, may take under such a will executed in New York. *Riley v. Demarest* (N. Y.), 184. And under the statute provision of New York (Stat. p. 57, § 3), that "no corporation shall be valid, unless it be expressly authorized by its charter or by statute to take property," a foreign corporation cannot take assistance from the legislature to overcome whatever the provisions of the will may be. If, however, the will is to be sold, and the proceeds given to a corporation, it seems the gift is valid. *Draper v. President, etc., of Harvard College*, 57 How. (N. Y.) Pr. 269.

Where a bequest is made to a corporation authorized to receive the property, questions relating to the validity of the bequest, and as to investment and accumulation, must be decided by the courts of the foreign State. *Draper v. President, etc., of Harvard College*, 57 How. (N. Y.) Pr. 269.

<sup>3</sup> *Hill v. Townsend*, 24 Tex. 575.

<sup>4</sup> *Harper v. Stanbrough*, 2 La. An. 382. See also *Harper v. Lee*, 2 La. An. 382. See also *Tosh v. Townsend*, 16 Ves. 330; *General v. Mill*, 3 Russ. Ch. 328; *Bligh*, 593.

<sup>5</sup> *Jones v. Habersham*, 107 U. S. 174.

Thus, the validity of a charitable bequest as against the heir-at-law, depends upon the law of the State where the land is situated. *Jones v. Habersham*, 107 U. S. 174.

bequest is to be determined by the laws of the State where the fund is to be administered; <sup>1</sup> and where the law of the testator's domicile prohibits devises for charitable purposes, this law will be held to apply to a devise to a foreign charity, although such devise may be good if made in the country where the charity exists.<sup>2</sup>

(3) *Capacity of Aliens to inherit.*—According to common law, as it prevails in the United States, aliens are competent to take land by deed or devise, and hold the same as against any one except the sovereign, until "office found;" <sup>3</sup> and this is held to be the case, notwithstanding a local statute making such right dependent on a license from the State.<sup>4</sup>

2. DISTRIBUTION.—The distribution of personal property is regulated by the law of the owner's domicile, not by the *lex loci rei sitæ*.<sup>5</sup>

<sup>1</sup> *Manice v. Manice*, 43 N. Y. 303; s. c., 1 Lans. (N. Y.) 348; *Chamberlain v. Chamberlain*, 43 N. Y. 424; s. c., 3 Lans. (N. Y.) 348.

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ith, 3 Pet. (U. S.)  
Appx. 501-503; *Curtis v. Hutton*, 14 Ves.  
507, 541.

*Baptist Ass. v. Smith*, 3  
501-503; *Curtis v. Hut-*

ew York provides that  
a husband, wife, child,  
y his will, bequeath to  
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York. *Crum v. Bliss*,

*v. Mathews*, 26 Cal.  
e, 9 Mass. 363; *Guier*  
39; *Taylor v. Benham*,  
; *Jones v. McMasters*,  
; *Cross v. De Valle*, 1  
*Craig v. Radford*, 3

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—*Yeaker v. Yeaker*, 4  
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cession, provided he makes his residence  
in the State. See *Krogan v. Kinney*, 15

Iowa, 242; *Purcell v. Smidt*, 21 Iowa, 540;  
*Greenhold v. Stanforth*, 21 Iowa, 595;  
*Robin v. Robin*, 3 Iowa, 45.

<sup>4</sup> *Cross v. De Valle*, 1 Wall. (U. S.) 5.

<sup>5</sup> *Hutton's Ex'rs v. Hutton* (N. J.), 2  
Cent. Rep. 216; *Holmes v. Remsen*, 4  
Johns. Ch. (N. Y.) 460; *Vroom v. Van*  
*Horne*, 10 Paige Ch. (N. Y.) 549; *Mills v.*  
*Fogal*, 4 Edw. Ch. (N. Y.) 559; *Suarez v.*  
*New York*, 2 Sand. Ch. (N. Y.) 173; *Par-*  
*sons v. Lyman*, 20 N. Y. 103; s. c., 28 Barb.  
(N. Y.) 564; reversing s. c., 4 Bradf. (N. Y.)  
268; *Graham v. Public Administrator*, 4  
Bradf. (N. Y.) 127; s. c., 19 Law. Rep. 386;  
*Public Administrator v. Hughes*, 1 Bradf.  
(N. Y.) 125; *Burr v. Sherwood*, 3 Bradf.  
(N. Y.) 85; *Mercure's Estate*, 1 Tuck.  
(N. Y.) 288; *Apple's Estate*, 66 Cal. 432;  
*Baubichon's Estate*, *Myrick's Probate* (Cal.),  
55; *Varnum v. Camp*, 1 Gr. (N. J.) 326.

In California, as elsewhere, the rule is  
recognized that the distribution of a deced-  
ent's personalty is governed by the law of  
the domicile. *Apple's Estate*, 66 Cal. 432.  
And the courts will not resort to the laws  
of a foreign country unless those laws are  
expressed in and made a part of a marriage  
contract. *Baubichon's Estate*, *Myrick's*  
*Probate* (Cal.), 55.

But it is held in Pennsylvania that the  
*lex fori* controls the distribution of a de-  
cedent's estate. *Miller's Estate*, 3 Rawle  
(Pa.), 312; *Pleasant's Appeal*, 77 Pa. St.  
356.

Notes taken by an agent, resident of  
Mississippi, for his principal in a foreign  
country, in the business of loaning money  
for the principal, are held to be subject to  
distribution as "personal property" situ-  
ated in that State. *Jahier v. Rascoc*, 62  
Miss. 699.

Money deposited in Mississippi banks,  
or notes secured on land there, have been  
held not within the Mississippi Code of  
1880, § 1270, regulating the descent and  
distribution of personal property situated

The estate of a testator must be applied in satisfaction of his debts, according to the laws of the State of the domicile, and the courts of another State cannot interfere therewith by injunction.<sup>1</sup> But it seems that the right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract or of the domicile of the deceased.<sup>2</sup>

Where there are real assets within the jurisdiction which are vested in a trustee, the grantor having died insolvent, the court of chancery will administer them there, though no administrator has been raised, and the trust deed is the rule of distribution.<sup>3</sup>

Where a lien exists by special mortgage on property in Louisiana, and the mortgagor being deceased, the property being in a course of administration in the probate court, the circuit court of the United States was held to have jurisdiction to decree a sale, under the mortgage, in favor of a citizen of another State.<sup>4</sup>

**14. Persons acting in Autre Droit.** — I. FOREIGN ADMINISTRATORS AND EXECUTORS. — *a. When may act.* — A foreign executor or administrator whose authority springs from the last domicile of his deceased principal, cannot do any act in pursuance of his ministerial office, or take possession of property in any other countries subject to the English common law, until after legal authority or probate to act in the country of the *situs*.<sup>5</sup>

in that State, if the deposits, certificates, and books, and the mortgage notes, are found at the foreign domicile of the intestate, who has no creditors, heirs, or property in Mississippi, and pending a contest between the domiciliary administrator and a stranger as to administering in Mississippi, the court of the domicile orders distribution. *Speed v. Kelly*, 59 Miss. 47. Compare *Weaver v. Norwood*, 59 Miss. 665.

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As to creditors of a deceased debtor, the administration of the assets is governed by the law of the place where the personal representative acts, and was appointed, without regard to the domicile of the creditor, or of the debtor at the time of his death. *Jones v. Drewry*, 72 Ala. 311.

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Debts are to be paid according to their respective dignity, as regulated by the law of the country where the administrator acts, and from which he derives his powers, not by the law of the place where the contract was made. *Union Bank of Georgetown v. Smith*, 1 Cr. C. C. 21.

Yet where A. died intestate and insolvent, domiciled in New Jersey, and administration was taken out in New York, to which

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<sup>5</sup> *Bell v. Nichols*, 38 Ala. 678; *Riley v. Riley*, 3 Day (Conn.), 79; *Rosenthal v. Renick*, 44 Ill. 203; *Rutherford v. Clark*, 4 Bush (Ky.), 27; *Henderson v. Rost*, 15 La. An. 405; *Burbank v. Payne*, 17 La. An. 15; *Borden v. Borden*, 5 Mass. 67; *Langdon v. Potter*, 11 Mass. 313; *Ex parte Picquet*, 5 Pick. (Mass.) 65; *Pond v. Makepeace*, 2 Met. (Mass.) 114; *Vickery v. Beir*, 16 Mich. 50; *Banta v. Moore*, 2 McC. (15 N. J. Ch.) 97; *Vermilya v. Beatty*, 6 Barb. (N. Y.) 431; *Sayre v. Helme*, 61 Pa. St. 299; *Watson v. Pack*, 3 W. Va. 154; *Fenwick v. Sears*, 1 Cr. (U. S.) 259; *Armstrong v. Lear*, 12 Wheat. (U. S.) 169; *Vaughan v. Northup*, 15 Pet. (U. S.) 1; *Trecothick v. Austin*, 4 Mason, C. C. 16; *Pipon v. Pipon*, Amb. 125; *Price v. Dewhurst*, 4 Myl. & Cr. 76; s. c., 8 Sim. 279; *Ferdinand's Executors' Case*, L. R. 5 Ch. App. 315; *Bond v. Graham*, 1 Hare, 482; *Preston v. Melville*, 8 Clark & Finn. 1; 2 Redf. Will, 19.

The grant of administration is governed by the *lex loci rei sitæ*.<sup>1</sup>

Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which granted it, and does not *de jure* extend to other countries.\*

An heir, whether testamentary or by intestacy of immovable property, can take only according to the law *lex loci rei*, and is not admissible as an heir to administer on the estate in any foreign country, until he is duly qualified according to the proofs, rules, and forms of the local law.<sup>2</sup>

Where, by a will, power is given to an executor to sell immovable property, such power cannot be executed until after the will is duly probated in the place where the property is situated, and establishing that such power may be lawfully executed according to the *lex loci rei sitæ*.<sup>4</sup>

And where a party claims the right as a devisee, and not under the power in the will, is intrusted to sell real estate for the payment of debts, he also must have the will duly probated; but it will not be necessary for him to take out letters of administration, although the devisee describes the party as executor, because he takes as devisee under the will, and not as an executor under the letters testamentary.<sup>5</sup>

*b. Title of Administrators and Executors.*—The title of an administrator or executor derived from a grant of letters of administration in the country of the domicile of the deceased, cannot extend as a matter of right beyond the territory of the government granting such letters, and to the movable property therein.<sup>6</sup>

When, by a will executed under the French law, a testatrix constituted her husband her "general and universal legatee," and dispensed with his giving security, and by the law of France all the rights and duties of an executor are devolved on such a legatee, it was held that the husband must be deemed executor of the will, although not specifically named as such, and entitled to letters testamentary. *Re Blancan*, 4 Redf. (N. Y.) 151.

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The register has no jurisdiction to grant administration upon the estate of a citizen and resident of another State, where the only asset within the jurisdiction is a sum of money collected by a resident agent. *Schley's Estate* (Pa.), 33 Leg. Int. 202; s. c., 2 W. N. C. 684.

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A resident of New York there died, and his will was proved there, but was neither proved nor recorded in New Jersey. Where one claiming, as residuary legatee under such will, a fund in the hands of the executors, denied the validity of a bequest thereof, it was held that he could not invoke the aid of the New Jersey courts, although the executors there resided. *Van Gieson v. Banta*, 40 N. J. Eq. 14.

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<sup>6</sup> It has been said that as to movable property situated in foreign countries, the title of the administrator or executor, if acknowledged at all, is acknowledged *ex comitate*; and is subject to be controlled or modified with reference to the institutions and policy of the country of the *situs*, and the rights of its subjects. *Story, Conf. L. sec. 512.*

The estate of a testator must be applied in satisfaction of his debts, according to the laws of the State of the domicile, and the courts of another State cannot interfere therewith by injunction.<sup>1</sup> But it seems that the right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract or of the domicile of the deceased.<sup>2</sup>

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3 *Lewis v. McFarland*, 9 Cr. (U. S.) 151.

4 *Wells v. Cowper*, 2 Ohio, 124.

5 *Lewis v. McFarland*, 9 Cr. (U. S.) 151.

6 It has been said that as to movable property situated in foreign countries, the title of the administrator or executor, if acknowledged at all, is acknowledged *ex comitate*; and is subject to be controlled or modified with reference to the institutions and policy of the country of the *situs*, and the rights of its subjects. Story, Conf. L. sec. 512.

*c. Suits by and against.*—It is the general doctrine of common law, both in England<sup>1</sup> and in America,<sup>2</sup> that no suit be brought and maintained by an administrator or executor against any administrator or executor in his official capacity in the courts of any country, except the courts from which he derived his authority to act, by virtue of probate and letters of administration there granted to him; but the court of a testator's domicile may in particular cases interfere to restrain his successor from proceeding to set up any thing except ancillary administrations in foreign lands.<sup>3</sup> Should an administrator desire to institute and maintain a suit in any foreign country, he must obtain letters of administration, and give new security, according to the rules of the laws prescribed in that country, before he bring suit.<sup>4</sup> The right of a foreign administrator or execu

<sup>1</sup> *Atkins v. Smith*, 2 Atk. 63; *Swift v. Swift*, 1 Ball & B. 326; *Anderson v. Caunter*, 2 Myl. & K. 763; *Bond v. Graham*, 1 Hare, 482; *Silver v. Stein*, 9 Eng. L. & Eq. 216; *Preston v. Melville*, 8 Clark & Finn. 1, 12; *Whyte v. Rose*, 3 Q. B. 498, 507; *Spratt v. Harris*, 4 Hagg. Ecc. 405; *Price v. Dewhurst*, 4 Myl. & Cr. 76; *Lee v. Verdon*, Palm. 163; *Tourton v. Flower*, 3 P. Wil. 369, 370; *Thorne v. Watkins*, 2 Ves. 35; *Attorney-General v. Cockerell*, 1 Price, 179; *Burn v. Cole*, Ambl. 416; *Lowe v. Farlie*, 2 Madd. 101; *Logan v. Fairlie*, 2 Sim. & St. 285; *Attorney-General v. Bouwens*, 4 Mees. & W. 171, 192, 193; *Tyler v. Bell*, 1 Keen, 826, 829; s. c., 2 Myl. & Cr. 89, 100.

<sup>2</sup> *Ball v. Nichols*, 38 Ala. 678; *Vermilya v. Beatty*, 6 Barb. (N. Y.) 431; *Smith v. Webb*, 1 Barb. (N. Y.) 231; *Swearingen v. Morris*, 14 Ohio St. 429; *Gilman v. Gilman*, 54 Me. 453; *Lawrence v. Lawrence*, 3 Barb. Ch. (N. Y.) 71; *Fenwick v. Sears*, 1 Cr. (U. S.) 259; *Dixon's Ex'rs v. Ramsay's Ex'rs*, 3 Cr. (U. S.) 319, 323; *Kerr v. Moon*, 9 Wheat. (U. S.) 565; *Armstrong v. Lear*, 12 Wheat. (U. S.) 169; *Thompson v. Wilson*, 2 N. H. 291; *Dickenson's Adm'r v. McCraw*, 4 Rand. (Va.) 158; *Glenn v. Smith*, 2 Gill & J. (Md.) 493; *Stearns v. Burnham*, 5 Greenl. (Me.) 261; *Goodwin v. Jones*, 3 Mass. 514; *Borden v. Borden*, 5 Mass. 67; *Stevens v. Gaylord*, 11 Mass. 256; *Caldwell v. Harding*, 5 Blatchf. C. C. 501; *Langdon v. Potter*, 11 Mass. 313; *Dangerfield v. Thurston*, 20 Martin (La.), 232; *Riley v. Riley*, 3 Day (Conn.), 74; *Champlin v. Tilley*, 3 Day (Conn.), 303; *Trecothick v. Austin*, 4 Mason, C. C. 16, 32; *Ex parte Paicquet*, 5 Pick. (Mass.) 65; *Holmes v. Remsen*, 20 Johns. (N. Y.) 229, 265; *Smith Adm'r v. Union Bank of Georgetown*, 5 Pet. (U. S.) 518; *Campbell v. Tousey*, 7 Cow. (U. S.) 64; *McNamara v. Dwyer*, 7 Paige Ch. (N. Y.) 239, 241;

*Vaughan v. Northup*, 15 Pet. (U. S.) 5; *Brownlee v. Lockwood*, 5 C. E. N. J. Ch.) 243; *Boston v. Boylston*, 384; *Fay v. Haven*, 3 Met. (Mass.) 384; *Morrill v. Morrill*, 1 Allen (Mass.) 1; *Chase v. Chase*, 2 Allen (N. H.) 1; *Swearingen v. Pendelton*, 4 Serg. (Pa.) 389; *Evans v. Tatem*, 9 Ser. (Pa.) 252; *Bryan v. McGee*, 2 Wash. 337; *McRae v. McRae*, 11 La. 57; *supra*, § 1, h. (1), "SUITS BY ADMINISTRATORS AND THEIR ASSIGNEES."

<sup>3</sup> *Hope v. Carnegie*, L. R. 1 Ch. 320; s. c., L. R. 1 Eq. 126.

<sup>4</sup> A foreign administrator cannot maintain an appeal pending in the courts of the State. *Warren v. Eddy*, 13 Abb. Pr. 28.

Simple contract debts are *bona fide* in the State where the debtor resides, and an administrator appointed in another State cannot release or control them. *Croft v. Fish*, 6 Hill (N. Y.), 554.

The payee and owner of certain notes secured by mortgage, resided in Ohio. The maker of the notes and mortgage resided in Kansas. Upon the death of the payee and owner of the notes in Ohio, the appointment of administrators in Ohio was held that the title to the notes was in such administrator, who was authorized to sue for foreclosure of the mortgage in the Kansas courts. *Cells v. Hays*, 11 McC. C. C. 622.

A corporation authorized by statute of another State to administer on estates of deceased persons in that State, may sue as such administrator in the courts of the State where the debt is due, even if it is aware, for a debt due the decedent, that the decedent was insured by the Fidelity Ins. Trust & Safe Deposit Co. *Niven*, 5 Del. 416. Compare *Deringer*, 5 Del. 528.

A. was appointed in Maine administrator of the estate of B. of Michigan. B. was a resident of Wisconsin. Wisconsin owed the estate upon a

take out new letters of administration in one country is usually admitted as a matter of course, unless some special reason intervenes to vary or control it. Where such new letters of administration are taken out, the new administration will be treated as merely ancillary or auxiliary to the foreign and primary administration, so far as regards collection of effects and the distributions of the assets of the estate.<sup>1</sup>

(1) *When may maintain Action.* — Although a foreign administrator cannot sue as such without local authorization, yet, when by any process he becomes the principal creditor, or reduces the claim to his own possession, he may sue in his own name.<sup>2</sup>

(a) *Suit by Assignee of Administrator.* — Where the local law permits the assignee of a *chase in action* to sue in his own name, the indorsee of an administrator may bring suit in a foreign country upon a negotiable instrument, without the administrator

in contract. A. sued C. for this debt, while C. was temporarily in Maine, personal service being had; and the action was held maintainable; that the duty of the administrator, as defined by the Maine Rev. St. ch. 63, sec. 6, to administer not only upon property within the jurisdiction at the time the administration was granted, but upon such as should afterwards be found therein, clearly authorized such suit, as the debtor must be supposed to represent and carry with him the debt wherever he goes. *Saunders v. Weston*, 74 Maine, 85.

It has been said to be well established that the probate granted to letters testamentary of letters of administration in one country, give authority to maintain suits and collect assets of the testator intestate in that country only, and do not extend to the maintenance of suits and collection of assets in foreign countries, because that would be to assume an extra-territorial jurisdiction for the court granting such letters, and an usurpation of the functions of the foreign local tribunals in those matters. See *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45-47; *Pond's Adm'r v. Makepeace*, 2 Met. (Mass.) 114; *Preston v. Melville*, 8 Clark & Finn. 1, 12, 14; *Attorney-General v. Bouwens*, 4 Mea. & W. 171, 190-192; *Attorney-General v. Dimond*, 1 Crompt. & Jer. 356, 370; *Partington v. Attorney-General*, L. R. 4 II. L. 100.

1 *Stevens v. Gaylord*, 11 Mass. 256; *Miller's estate*, 3 Rawle (Pa.), 312; *Harvey v. Richards*, 1 Mason, C. C. 381.

Yet the auxiliary administration will be subservient to the rights of creditors, legatees, and distributees, who reside within the jurisdiction where it was granted; and the remainder left after a final account has been settled in the proper tribunal where

the new administration is granted, according to the principles adopted by its law of the application and distribution of assets, is to be transmitted to the primary administration for distribution. *Boston v. Boylston*, 2 Mass. 384; *Richards v. Dutch*, 8 Mass. 506; *Dawes v. Head*, 3 Pick. (Mass.) 128; *Hoot v. Olmstead*, 6 Pick. (Mass.) 481; *Davis v. Estey*, 8 Pick. (Mass.) 475; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Stevens v. Gaylord*, 11 Mass. 256; *Gravillon v. Richards, Ex'r*, 13 La. 293; *Miller's Estate*, 3 Rawle (Pa.), 312; *Harvey v. Richards*, 1 Mason, C. C. 381; *Banta v. Moore*, 2 McC. (15 N. J. Ch.) 101; *Preston v. Melville*, 8 Clark & Finn. 12, 14.

2 *Commonwealth v. Griffith*, 2 Pick. (Mass.) 11; *Slack v. Walcott*, 3 Mason, C. C. 508; *Shipman v. Thompson*, Willes 103; *Boitard v. Spencer*, 7 T. R. 358.

Thus, he may sue as the owner of the *chase in suit*. *Smith v. Webb*, 1 Barb. (N. Y.) 230. Hence, an administrator who holds negotiable paper belonging to his decedent payable to bearer, becomes principal on the same, and may sue in a foreign country in which the debtor resides without taking out letters of administration. See *Robinson v. Crandall*, 9 Wend. (N. Y.) 425; *Barrett v. Barrett*, 8 Greenl. (Me.) 353. Compare *Stearns v. Burnham*, 5 Greenl. (Me.) 261; *Thompson v. Wilson*, 2 N. H. 291; *McNeillage v. Holloway*, 1 Barn. & Ald. 218.

And where a domiciliary administrator obtains a judgment against a debtor in the land of his testator's domicile, the debt being merged in the judgment, and the administrator becoming personally liable therefor, he may make such judgment the basis of an action in a foreign State where the debtor resides or has assets. *Talmage v. Chapel*, 16 Mass. 71. Compare *Smith v. Nicolls*, 5 Bing. (N. C.) 308.



taking out ancillary letters of administration;<sup>1</sup> but this principle it seems, does not apply to bonds.\*

(2) *Suit by Administrator on Policy on his Decedent.*—Where a resident of Alabama procured a policy of insurance on his life through an agent residing in that State and acting for a company chartered in New York, and died in Alabama, the administrator at his domicile may maintain an action on it there, although administration had also been granted in New York.\* And an administrator who has duly taken out letters in a State in which he lives and in which a foreign insurance company does business, and an agent on whom process may be served, may there bring an action on a life policy which constitutes the only assets of the intestate of that State, the intestate never having been a resident there.

(3) *Suits by Foreign Administrator for Negligence causing Death of his Intestate.*—As a result of the general principle above given, it has been held that an administrator appointed in one State cannot maintain a suit in another State for an injury sustained there by his intestate, which resulted in death.<sup>5</sup>

<sup>1</sup> *Petersen v. Chemical Bank*, 32 N. Y. 21; s. c., 2 Rob. (N. Y.) 605; 27 How. (N. Y.) Pr. 491; *Middlebrook v. Merchants' Bank*, 3 Keyes (N. Y.), 135; s. c., 3 Abb. App. Dec. (N. Y.) 295; 41 Barb. (N. Y.) 481; 27 How. (N. Y.) Pr. 474; *Campbell v. Brown*, 64 Iowa, 425; s. c., 52 Am. Rep. 446; *Talmage v. Chapel*, 16 Mass. 71; *Harper v. Butler*, 2 Pet. (U. S.) 239. Compare *Dial v. Gary*, 14 S. C. 573; s. c., 37 Am. Rep. 737. *Vide supra*, § 1 h. (1), "SUITS BY ADMINISTRATORS AND THEIR ASSIGNEES."

Thus, the assignee of a foreign executor may maintain a suit in our courts upon a *chose in action* so transferred to him; the disability to sue is a personal one; he has a perfect right to assign the *chose in action* of his testator so as to confer title against every one but creditors and legatees. *Petersen v. Chemical Bank*, 32 N. Y. 21; s. c., 2 Rob. (N. Y.) 605; 27 How. (N. Y.) Pr. 491; *Middlebrook v. Merchants' Bank*, 3 Keyes (N. Y.), 135; s. c., 3 Abb. App. Dec. (N. Y.) 295; 41 Barb. (N. Y.) 481; 27 How. (N. Y.) Pr. 474.

An action will lie, in Iowa, on a claim assigned to the plaintiff by a foreign executor, although there has been no probate or administration in Iowa. *Campbell v. Brown*, 64 Iowa, 425; s. c., 52 Am. Rep. 446.

But where a resident of Massachusetts died there, possessing a bond and mortgage executed by a resident of South Carolina, and his administrator sold and assigned the securities to a resident of South Carolina, who brought suit upon them there, the court held that the suit was not maintainable. *Dial v. Gary*, 14 S. C. 573; s. c., 37 Am. Rep. 737.

<sup>2</sup> It has been held that, in order to maintain a suit on an English bond, the plaintiff must be an English administrator. *Wright v. Rose*, 3 Q. B. 507.

<sup>3</sup> *Equitable Life Assurance Society v. Vogel*, 76 Ala. 441; s. c., 52 Am. Rep. 446.

<sup>4</sup> *New England Mutual Life Insurance Co. v. Woodward*, 111 U. S. 138.

<sup>5</sup> See *Taylor v. Pennsylvania Co.*, 78 Ky. 348; s. c., 39 Am. Rep. 244; *Limekiller v. Hannibal & St. J. R. R. Co.*, 33 Kan. 83; s. c., 52 Am. Rep. 524; *Vawter v. Missouri Pac. Ry. Co.*, 84 Mo. 679; s. c., 54 Am. Rep. 105. Compare *Leonard v. Columbia S. S. Nav. Co.*, 84 N. Y. 48; s. c., 38 Am. Rep. 491; *South Carolina R. R. Co. v. Nix*, 52 Ga. 572; *Central R. R. Co. v. Swin*, 52 Ga. 651. *Vide supra*, § 1, a.—"SUITS FOR NEGLIGENCE CAUSING DEATH."

Thus, an administrator appointed in one State cannot maintain an action in another State for the death of his intestate, caused by negligence in Indiana, such action being maintainable under the Indiana statute but not under that of Kentucky. *Taylor v. Pennsylvania Co.*, 78 Ky. 348; s. c., 39 Am. Rep. 244.

Under the Kansas Code (sec. 422), prohibiting an action by an administrator for injuries resulting in the death of his intestate, it has been held that a foreign administrator cannot maintain such an action where his domiciliary law prohibits him from so doing. *Limekiller v. Hannibal & St. J. R. R. Co.*, 33 Kan. 83; s. c., 52 Am. Rep. 524. And in *Vawter v. Missouri Pac. Ry. Co.*, 84 Mo. 679; s. c., 54 Am. Rep. 105, the court held that an administrator appointed in Missouri cannot maintain an action for the death of his intestate.

(4) *Suit against Administrator.* — It is a general rule that a foreign administrator cannot be sued out of his own forum.<sup>1</sup>

If a creditor of the estate wishes suit to be brought in any foreign country, in order to reach the assets of the deceased testator or intestate situated in such foreign country, it will be necessary to have letters of administration taken out, in due form, according to the local law, before the suit can be maintained, because the executor or administrator appointed in one country is not liable in another, and has no positive right or authority over the debts or assets of his principal in such foreign country, nor is he responsible therefor.<sup>2</sup>

An action of debt will not lie against an administrator in one State, on a judgment recovered against another administrator of the same intestate, appointed under the authority of another State.<sup>3</sup>

in Kansas; such action being allowed by the statute of Kansas, but not by that of Missouri.

But it has been held in New York that an action may be maintained there by the personal representative of one whose death resulted from an injury received in another State, through the negligence of the defendant, where it appears that the laws of the State where the injury was received were similar to those of New York, giving to the personal representative a right of action in such case; it is not essential that the statute should be precisely the same. *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48; s. c., 38 Am. Rep. 491.

Where a South Carolina railroad was allowed to extend its road into Georgia, on condition that all the claims might be brought in the Georgia courts, it was held that a South Carolina administrator might bring suit in a Georgia court to recover the penalty provided by the South Carolina statute, for the killing of his intestate. *South Carolina Railroad Co. v. Nix*, 68 Ga. 572. And where a Georgia railroad company ran its road into Alabama, and there killed a man, it was held that the Alabama administrator might bring suit in Georgia. *Central R. R. Co. v. Swint*, 73 Ga. 651.

<sup>1</sup> *McRea v. McRea*, 11 La. 575; *Fay v. Haven*, 3 Metc. (Mass.) 109; *Boston v. Boylston*, 2 Mass. 384; *Morrill v. Morrill*, 1 Allen (Mass.), 132; *Chase v. Chase*, 2 Allen (Mass.), 101; *Brownlee v. Lockwood*, 5 C. E. Gr. (20 N. J. Ch.) 243; *Vermilya v. Beatty*, 6 Barb. (N. Y.) 432; *Vaughan v. Northup*, 15 Pet. (U. S.) 1; *Caldwell v. Harding*, 5 Blatchf. C. C. 501; *Attorney-General v. Hope*, 2 Clark & Finn. 84; s. c., 1 Crompt. M. & R. 538; *Attorney-General v. Dimond*, 1 Crompt. & Jer. 356. Compare *McNamara v. Dwyer*, 7 Paige Ch. (N. Y.) 239; *Swearingen v. Pendleton*, 4 Serg. &

R. (Pa.) 389; *Evans v. Tatem*, 9 Serg. & R. (Pa.) 252; *Bryon v. McGee*, 2 Wash. C. C. 337.

An administrator is exclusively bound to account for all the assets which he receives, under and by virtue of his administration, to the proper tribunals of the government from which he derives his authority: the tribunals of other States have no right to interfere with him, according to the *lex loci*. *Vaughan v. Northup*, 15 Pet. (U. S.) 1; s. c., 5 Cr. C. C. 496.

An administrator of an intestate who resided out of a State, by letters granted in the place of his domicile, cannot be called to an account out of the State where his letters are granted for assets situated in that jurisdiction. *Brownlee v. Lockwood*, 5 C. E. Gr. (N. J.) 239.

A testator domiciled in New Jersey provided that advances not to exceed \$200,000 should be deducted from the share of a son, and that these charges should not affect the portions of other children. The testator had advanced the son \$120,000. The son and the executor were domiciled in New York, and a large part of the property was there. The son sought in New York court to compel the executors to pay him \$80,000. The other children objected. Pending a decision, the executors asked the New Jersey court for instructions; and the court held that the son should be enjoined from proceeding in the New York court, and that the executors should be enjoined from making further payment, until the condition of the estate should be more fully ascertained. *Hutton v. Hutton*, 40 N. J. Eq. 461.

<sup>2</sup> Story, Conf. L. sec. 513.

<sup>3</sup> *Stacey v. Thrasher*, 6 How. (U. S.) 44; *McLean v. Meek*, 18 How. (U. S.) 16; *Meiklan v. Campbell*, 24 Beav. 100; *Preston v. Melville*, 8 Clark & Finn. 1.

A decree against the primary adminis-

But this rule, as to exemption from liability to suit, does not apply where funds are forwarded by a domiciliary administration to an agent in a foreign land, to pay legatees and distributees. In such case the agent may be compelled to pay over to the *cestuis que trust* without setting up as technical defence an ancillary administration.<sup>1</sup> And where an administrator goes into a foreign country, and there, by collecting debts or seizing assets belonging to the estate, makes himself executor *de son tort*, he will be liable to a suit in that jurisdiction for the same.<sup>2</sup>

And where an administrator has been sued by a creditor of an estate, and has come in and made a defence, he cannot be compelled, after summons and appearances, to take out new letters and enter into new bond.<sup>3</sup>

A court of equity has jurisdiction of an action against a foreign executor for a misapplication of the trust funds which have come into his hands,<sup>4</sup> although the trust funds were received abroad and brought into the jurisdiction of the forum; but the nature and extent of his liability will depend upon the laws of the country where he derived his authority to administer the assets.<sup>5</sup>

trators of an intestate, in a suit relative to the succession of movable property, conducted in due form, and between proper parties, at the place of his domicile in a foreign country, is conclusive upon a subsidiary administrator appointed in another State, in respect to the rights of the parties which were therein adjudicated. *Suarez v. New York*, 2 Sandf. Ch. (N. Y.) 173.

Jurisdiction over the estate of a decedent belongs exclusively to the forum of the domicile where the assets are situate; the executor of a deceased executor of such decedent is not accountable in another jurisdiction; he is only liable to an administrator *de bonis non*. *Van Dyke's Appeal* (Pa.), 31 Leg. Int. 69; s. c., 6 Leg. Gaz. 70.

<sup>1</sup> See *Arthur v. Hughes*, 4 Beav. 506.

<sup>2</sup> See *Campbell v. Tousey*, 7 Cow. (N. Y.) 64; *Taylor v. Benham*, 5 How. (U. S.) 233.

<sup>3</sup> *Moss v. Rowland*, 3 Bush (Ky.), 505.

It has been held that where an administrator or executor goes into a foreign State, and there collects assets which he carries into the State where he was appointed, such effects and assets are to be administered and accounted for as home assets by such administrator or executor. *Evans v. Tatem*, 9 Serg. & R. (Pa.) 252, 259; *Dowdale's Case*, 6 Co. 47, 48; s. c., Cro. Jac. 55.

It has been held by some American courts that where a foreign administrator or executor comes into a State from a foreign State or country, having received assets in the foreign country, he is liable to be sued in such State on account of such assets, although he may not have taken out new letters of administration there, and the estate has not been positively settled

in the foreign State or country. *Swearingen's Ex'rs v. Pendleton's Ex'rs*, 4 Serg. & R. (Pa.) 389, 392; *Evans v. Tatem*, 9 Serg. & R. (Pa.) 252, 259; *Campbell v. Tousey*, 7 Cow. (N. Y.) 64; *Bryon v. McGee*, 2 Wash. C. C. 337. Compare *Fay v. Haven*, 3 Met. (Mass.) 109; *Davis v. Estey*, 8 Pick. (Mass.) 475; *Dawes v. Head*, 3 Pick. (Mass.) 128; *Boston v. Boylston*, 2 Mass. 384; *Goodwin v. Jones*, 3 Mass. 514; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 57; *McRea's Adm'r v. McRea*, 11 La. 571.

<sup>4</sup> *Montalvan v. Clover*, 32 Barb. (N. Y.) 190.

The *ex parte* settlement of an administrator is only *prima facie* correct, and parties interested may file a bill to surcharge and falsify the account so settled; and, fraud being alleged, it is immaterial that the settlement was had in Ohio, and the suit brought in West Virginia, where some of the parties in interest and the administrator live, the Ohio administration being ancillary. *Leach v. Buckner*, 19 W. Va. 36.

<sup>5</sup> *McNamara v. Dwyer*, 7 Paige Ch. (N. Y.) 239. See *Brown v. Brown*, 4 Edw. Ch. (N. Y.) 343; *Gulick v. Gulick*, 33 Barb. (N. Y.) 92.

The nature and extent of a foreign administrator's liability when sued in Georgia, depend upon the laws of the State of his appointment. *Hoskins v. Sheddon*, 70 Ga. 528.

A testator domiciled in Connecticut bequeathed a legacy to his grandson S. one to his daughter, and the residue of his estate to his son W., whom he appointed executor. W. passed his accounts before

And an executor who, pursuant to directions in the will, which the testator had power to give, sells lands in trust and receives the proceeds, is accountable to the *cestuis que trust* in the same State where he resides, though the will has not been proved there.<sup>1</sup>

(a) *Suit by Non-resident Widow for Allowance.*—It has been held that the widow of a non-resident intestate may sue for her year's allowance for support in Georgia, there being property there, and especially if there are no debts in the State of domicile; but the amount to be recovered must be regulated by the law of the State.<sup>2</sup>

d. *Primary and Ancillary Administrations.*—Where there are different administrations granted in different countries, that which is granted in the country where the testator was domiciled at the time of his death, will be regarded as the principal or primary administration, and those granted in other States as auxiliary or ancillary administrations. And the funds collected by the auxiliary or ancillary administrations, after the local administration has been completed, will be transmitted to the primary administration for distribution to the legatees and distributees of the estate. But each administration is said to be especially independent of the others;<sup>3</sup> that property received under one, cannot be sued for

the probate court in Connecticut. At the testator's decease, and at the commencement of an action by S. to enforce payment of interest on his legacy, W. resided in the State of New York; and it was held that the courts of New York had jurisdiction of the action. *Brown v. Knapp*, 17 Hun (N. Y.), 160.

A legatee of a testator who died a resident of England may maintain in South Carolina a suit to impeach an investment by the executrix, who is also a resident of England, and who has had the will proved both in England and in that State, provided assets of the estate be alleged and proved to be remaining there. *Gravely v. Gravely*, 20 S. C. 93.

Where A. of Mississippi by will appointed B. of Virginia trustee of a legacy for a daughter and her children, who became residents of Virginia, it was held that they could maintain a suit in a Virginia court against B.'s executors to hold B.'s estate responsible for a breach of trust committed by B. in reference to the estate in Mississippi, notwithstanding the pendency of a suit in Mississippi, brought by another of A.'s legatees to recover a legacy, plaintiff in Virginia suit and B.'s executors being parties to the Mississippi suit. *Davis v. Morris*, 76 Va. 21.

M.'s intestate died in New York, leaving among his assets notes against a resident of Georgia, which M. settled by taking of the makers a house and lot in Atlanta,

which she afterwards sold to G. In her accounting before the surrogate court of New York, M. was charged with the notes, the record of that court showing that she duly gave bond covering the same. On a bill filed in Georgia by certain distributees to set aside M.'s deed to G., by tracing the funds of the estate into the land, it was held, (1) that that court had jurisdiction to administer the notes according to the New York law; (2) that the record of that court was admissible; (3) that the bill could not be maintained until the complainants had exhausted their remedy in that court; and (4) that G., an innocent purchaser for value, without notice of the complainant's alleged equity, should not be disturbed. *McNamara v. McNamara*, 62 Ga. 200.

<sup>1</sup> *Taylor v. Benham*, 5 How. (U. S.) 233.

<sup>2</sup> *Mitchell v. Word*, 64 Ga. 208.

Yet it has been held that the provision of the North Carolina statute, for making an allowance from a decedent's estate to the widow, upon application by her "to a justice of the peace of the township in which the deceased resided, or some adjoining township," does not apply to the case of a decedent resident, and dying in another State, although having property in North Carolina, and although the widow subsequently moved into that State. *Simpson's Adm'r v. Cureton* (N. C.), 2 S. E. Rep. 668; *Medley v. Dunlap*, 90 N. C. 527.

<sup>3</sup> Thus, it has been held, where administrations are granted to different persons in

under another, although for the time locally situated within the jurisdiction where suit is brought.<sup>1</sup>

different States, that a judgment obtained against one, will not furnish a right of action against the others, so far as to affect assets received by the latter in favor of his own administration. *Merrill v. New Eng. Mut. Life Ins. Co.*, 103 Mass. 245; *Ela v. Edwards*, 13 Allen (Mass.), 48; *Low v. Bartlett*, 8 Allen (Mass.), 259; *Brodie v. Bickley*, 2 Rawle (Pa.), 431; *Stacey v. Thrasher*, 6 How. (U. S.) 44; *Hill v. Tucker*, 13 How. (U. S.) 458; *McLean v. Meek*, 18 How. (U. S.) 16; *Mackey v. Coxe*, 18 How. (U. S.) 100.

And it has been held, that, where letters of administration on the same estate were granted in Wisconsin and Indiana, and in both, the intestate was described as of the place where he died, which was in Indiana, a judgment against the Indiana administrator is not even *prima facie* evidence in an action against the Wisconsin administrator. *Price v. Mace*, 47 Wis. 23. See *Low v. Bartlett*, 8 Allen (Mass.), 259; *Aspden v. Nixon*, 4 How. (U. S.) 467; *Stacey v. Thrasher*, 6 How. (U. S.) 44.

But it has been said, that if a testator, by will, appoints different executors in different States, there will be such a privity between them that a judgment against one administrator in one State, may be evidence against another in a different State. *Hill v. Tucker*, 13 How. (U. S.) 458; distinguishing *Aspden v. Nixon*, 4 How. (U. S.) 467.

And it would seem that where an administrator is appointed in different States, a suit against him in one State will also be binding in the other: *Merrill v. New Eng. Mut. Life Ins. Co.*, 103 Mass. 245; *Ela v. Edwards*, 13 Allen (Mass.), 48; *Low v. Bartlett*, 8 Allen (Mass.), 259; *Brodie v. Bickley*, 2 Rawle (Pa.), 431.

Where a judgment is recovered by a foreign administrator against a debtor of his intestate, it will not form a foundation for an action by an ancillary administrator appointed in another State. *Talmage v. Chapel*, 16 Mass. 71; but such debt being merged by the judgment, and thereby becoming due to the foreign administrator personally, in his own right, and he being responsible therefor to the estate, such administrator can maintain a personal suit against the debtor in any other State. *Talmage v. Chapel*, 16 Mass. 71. Compare *Smith v. Nicolls*, 5 Ping. N. C. 208.

J., domiciled in New Jersey, died intestate, leaving personal property there and in New York; administration was granted in both States. On a bill filed by the administrator in New Jersey, alleging that there were no debts, and praying a discovery and account of the amount in the defendant's hands, and

a decree that he pay over such amount to the complainant, a demurrer being filed to the bill, it was held, that, as the intestate left assets both in New York and New Jersey, administration was rightfully granted in both States, although the right of succession to the personal estate was to be regulated by the law of the domicile. *Banta v. Moore*, 2 McC. (N. J.) 97.

A testator, resident in Wisconsin, died, leaving property in that State, and land in Minnesota. He left an insane widow resident in Wisconsin, for whom, by will, he made provision. Proceedings were instituted in Wisconsin to compel an election in behalf of the widow; and the court elected, in her behalf, to take under the will. After the commencement of the proceedings in Wisconsin, proceedings were instituted in Minnesota; and before the election was made in Wisconsin, the probate court in Minnesota elected, for the widow, to take against the will. An appeal was taken, the effect of which was to transfer the cause to the appellate court for *traverse de novo*. Pending this appeal, and before a new trial, the election aforesaid was made in Wisconsin. It was held that this election was effectual everywhere, and precluded a different election in Minnesota. *Washburn v. Van Steenwyk*, 32 Minn. 33.

Where a testatrix died domiciled in Massachusetts, and named an executor there, and one in New York, on an accounting by the New York executor, it was held that the surplus assets should be transmitted to the Massachusetts executor, but that a question as to whether one claiming a legacy was entitled thereto under the Massachusetts statute should be left to the discretion of the court, be determined in New York, instead of remitting the controversy to Massachusetts. *Clark v. Butler*, 4 Dem. (N. Y.) 378.

The probate court of Connecticut discharged administrators appointed by that court, and who were also appointed by the New York court in ancillary proceedings. It was held that the discharge in Connecticut in no way affected the liability of the administrators to account in New York for property received by them there. *Dulles v. Smith*, 1 Dem. (N. Y.) 202.

1 *Boston v. Boylston*, 2 Mass. 384; *Goodwin v. Jones*, 3 Mass. 514; *Dawes v. Boylston*, 9 Mass. 337; *Dawes v. Head*, Pick. (Mass.) 128-148; *Banta v. Moore*, McC. (N. J.) 101; *Lynes v. Coley*, 1 Rees (N. Y.) 407; *Harvey v. Richards*, 1 Mass. C. C. 381; *Huthwaite v. Phaire*, 1 Man. Gr. 159; *Jauncey v. Sealey*, 1 Vern. 39; *Currie's Adm'r v. Bircham*, 1 Dow. & Ry. 3.

*c. Course of Distribution in Ancillary Administration.* — When the funds in the hands of the ancillary administrator are sufficient to pay all legitimate claims existing in the jurisdiction by which such administration is granted, he is to pay such debts under the direction of such court, settle his accounts under the supervision of said court, and transmit the residuum, if any, to the primary administrator, to be distributed among the heirs and legatees.<sup>1</sup> The ancillary administrator is to make no payments except under the decree of the court by which he was appointed,<sup>2</sup> and to which he is exclusively bound to account.<sup>3</sup>

Where there has been an ancillary administrator appointed, by whom the assets of the decedent have been collected, they should not be transmitted to the primary administrator so long as there remain unsatisfied claimants within the jurisdiction of the ancillary administration;<sup>4</sup> yet the court having jurisdiction over the ancillary administration may order it to pay the residuum directly to the heirs and legatees within its jurisdiction.<sup>5</sup>

Where the estate for which an ancillary administrator has been appointed is insolvent, it seems that the assets coming into the hands of such ancillary administrator are to be administered according to the *lex loci rei sitæ*,<sup>6</sup> and where there is any conflict of law as to priority of payment among contesting claimants, the *lex rei sitæ*, and not the testator's domiciliary law, is to govern;<sup>7</sup>

<sup>1</sup> *Wheelock v. Pierce*, 6 Cush. (Mass.) 288; *Fay v. Haven*, 3 Met. (Mass.) 109; *Meiklan v. Campbell*, 24 Beav. 100; *Preston v. Melville*, 8 Clark & Finn. 1.

The law of the place of ancillary administration governs as to the payment of debts there, but the distribution among the next of kin or legatees is made according to the *lex domicilii*; and a decree against the primary administrator of the domicile is conclusive upon the ancillary administrator. *Churchill v. Prescott*, 3 Bradl. (N. Y.) 233.

In case of an ancillary administration in Pennsylvania of the estate of a decedent whose domicile was in another State or country, the orphans' court, after having paid all lawful claimants on the funds, who are residents of Pennsylvania, must direct the balance to be paid to the administrator of the domicile, and a creditor who has the same domicile as was that of the decedent, cannot make claim to the fund in the ancillary jurisdiction, but must resort to that of his domicile. *Barry's Appeal*, 88 Pa. St. 131.

<sup>2</sup> *Dawes v. Head*, 3 Pick. (Mass.) 128; *Hooker v. Omstead*, 6 Pick. (Mass.) 481; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Richards v. Dutch*, 8 Mass. 506; *Dawes v. Boylston*, 9 Mass. 337; *Miller's Estate*, 3 Rawle (Pa.), 312; *Vaughan v. Northup*, 15 Pet. (U. S.) 1; *Preston v. Melville*, 8 Clark & Finn. 12.

<sup>3</sup> *Lynes v. Coley*, 1 Redf. (N. Y.) 405.

If a person residing in Massachusetts is appointed executor of a will in another State, and ancillary letters are also granted him in Massachusetts, and his final account, showing that the balance in his hands has been paid to him as executor under his appointment in the other State, is allowed by the Massachusetts probate court, the supreme court thereof has no jurisdiction of a bill to construe the will, and marshal and distribute the estate. *Emery v. Batchelder*, 132 Mass. 452.

<sup>4</sup> See *Parker's Appeal*, 61 Pa. St. 478; *Porter v. Heydock*, 6 Vt. 374; *Mackey v. Cox*, 18 How. (U. S.) 100.

An estate will not be remitted to the administrator of the domicile when there are claimants within the jurisdiction of the ancillary administration. *Appeal of Del Valle* (Pa.), 3 Cent. Rep. 163.

<sup>5</sup> *Dawes v. Head*, 3 Pick. (Mass.) 128; *Carmichael v. Ray*, 5 Ired. (N. C.) Ch. 365; *Mackey v. Cox*, 18 How. (U. S.) 100; *Innes v. Mitchell*, 4 Drew. 144; s. c., 1 De G. & J. 423; *Meiklan v. Campbell*, 24 Beav. 100.

<sup>6</sup> See *Dunlap v. Rogers*, 47 N. H. 287; *Carson v. Oates*, 64 N. C. 115; *Dawes v. Head*, 3 Pick. (Mass.) 128; *Union Bank v. Smith*, 4 Cr. C. C. 21.

<sup>7</sup> *Dawes v. Head*, 3 Pick. (Mass.) 128; *Holmes v. Remsen*, 20 Johns. (N. Y.) 265; *Milne v. Moreton*, 6 Binn. (Pa.) 353; *MU-*

but under such ancillary administration the foreign creditors will be entitled to prove their debts.<sup>1</sup>

It has been held, that, in order to enable an ancillary administrator to obtain an order to sell real estate in the ancillary jurisdiction, it is not necessary for him to show that the personal estate in the primary administration has been exhausted; but it will be sufficient if it is made to appear that the personal estate in the domiciliary administration is exhausted.<sup>2</sup>

*f. Property in transitu and Ships at Sea.* — It has been said, that when property at the time of the death of the testator is in a foreign country, and subsequent returns by remittance or otherwise to the country of his domicile, such property will be under the administration of the domiciliary administrator,<sup>3</sup> although some doubt has been expressed as to whether the personal property of the deceased testator or intestate, consisting of goods situated in a foreign country at the time of his death, can be lawfully disposed of, except under the administration granted in the country where they are situated at the time; yet it has been said, that according to the common course of commercial business, ships and cargoes, and the proceeds thereof, locally situated in a foreign country at the time of the death of the owner, always proceed on their voyages, and return to the home port, and are there taken into possession of and administered by the administrator of the *fori domicilii*; and that such administrator is bound to administer upon them as part of the funds appropriately in his hands.<sup>4</sup> But where there is a primary administrator and ancillary administrator, and goods are *in transitu*, such goods are to be charged to the administrator who first reduces them to possession.<sup>5</sup>

*g. Conflict between Primary and Ancillary Administrators.* — The domiciliary administrator and the ancillary administrators are independent of each other; and where there are several local ancillary administrators, the commission of each is to be governed by the law of the place in which his letters are granted;<sup>6</sup> and

ler's estate, 3 Rawle (Pa.), 312; Harrison v. Sterry, 5 Cr. (U. S.) 289; McElnoyle v. Cohen, 13 Pet. (U. S.) 312; Union Bank v. Smith, 4 Cr. C. C. 509; Cook v. Gregson, 3 Drew. 547; Hanson v. Walker, 7 L. J. Ch. 135; Pardo v. Bingham, L. R. 6 Eq. 485.

<sup>1</sup> Cook v. Gregson, 2 Drew. 286.

<sup>2</sup> Rosenthal v. Rennick, 44 Ill. 202.

<sup>3</sup> Story, Conf. L. § 519.

<sup>4</sup> Orcutt v. Orms, 3 Paige Ch. (N. Y.) 459; Wells v. Miller, 45 Ill. 382; Collins v. Bankhead, 1 Strobb. (S. C.) L. 25.

<sup>5</sup> Orcutt v. Orms, 3 Paige Ch. (N. Y.) 459.

Thus, it has been held that where a domiciliary administrator during his administration receives assets belonging to the estate, which at the time of the death of the principal were in a foreign land, he

is accountable for such assets. Randall v. Hubbard, 4 Met. (Mass.) 252; Evans v. Tatem, 9 Serg. & R. (Pa.) 252; Van Hook v. Barret, 5 Vt. 333; Dowdale's Case, Coke, 46b.

<sup>6</sup> Freeman v. Fairlie, 3 Meriv. 24.

It has been held in Massachusetts that where an administrator was appointed by a probate judge, who had no jurisdiction from a want of domicile on the part of the decedent, the whole proceedings will be void, and all titles passed under the same null. Holyoke v. Haskins, 5 Pick. (Mass.) 20; s. c., 9 Pick. (Mass.) 259.

Statutes limiting the time in which an appeal may be taken from such appointments have been passed in Massachusetts, Maine, and other States. Record v. Hubbard, 58 Me. 225.

each ancillary administrator is required to satisfy in full the creditors within his jurisdiction before transmitting any residuum to the primary administrator,<sup>1</sup> even though the principal administration be insolvent.<sup>2</sup>

Where there is a conflict between the law of the domicile and the law of the *situs*, as to priority of payment in cases of insolvency of the estate, the law of the *situs* is to prevail;<sup>3</sup> because in the reciprocal relations of administration, each State is sovereign within its own limits, and each is foreign so far as concerns the issues to the other States of the Union.<sup>4</sup>

It has been held that where assets which have been reduced to possession by a foreign administrator find their way into another land, the administrator of the estate in such land cannot seize such assets either by attachment or by suit against the foreign administrator who has reduced them to possession.<sup>5</sup>

Where a decree has been rendered in favor of an ancillary administrator in his own forum, finding a balance due to him from the estate, such decree is not conclusive as against the primary administration in the forum of the testator;<sup>6</sup> and it has been held that where the same person is both ancillary and primary administrator, that a decree in his favor in the domiciliary forum is no bar to the suit against him in the forum of the ancillary administration.<sup>7</sup>

*h. Payment of Debts to Foreign Administrator.* — Since the administrator has no authority to act outside of the jurisdiction in which the administration is granted, it has been held by the English courts that the payment of a debt to a foreign administrator will be no bar to a suit by an ancillary administration in the *rei situs*,

<sup>1</sup> Appeal of Del Valle (Pa.), 3 Cent. Rep. 163.

<sup>2</sup> Pardo v. Bingham, L. R., 6 Eq. 485; Cook v. Gregson, 2 Drew. 286.

Where administration has been granted in the place of the domicile of the intestate, and ancillary administration elsewhere for the purpose of collecting debts, if the fund in the hands of the foreign administrator is needed for the purpose of due administration in the place of the domicile, the mode of reaching it would be to require its transmission or distribution, after all claims against the foreign administration had been ascertained or settled. Normand v. Grogard, 2 C. E. Gr. (N. J.) 426.

N. C. 115; Union C. 21.

Met. (Mass.) 109; ass. 343; Goodall

88; Brownlee v. 243; Mothland v.

W.) 185; Sayre v. 39; Porter v. Hey-

1 v. Rogers, 16 Vt.

294; Abbott v. Coburn, 28 Vt. 663; Hill v. Tucker, 13 How. (U. S.) 458; McLean v. Meek, 18 How. (U. S.) 16.

A mortgage upon real property in Michigan belonging to a person who dies in another State, and whose estate is in course of regular and valid local administration in Michigan, may not be sold by a foreign administrator to strangers: the title thereto is in the local administrator for purposes of administration, and he alone can sue on it, or assign or discharge it of record. Reynolds v. McMullen, 55 Mich. 568; s. c., 54 Am. Rep. 386.

An administrator appointed at the deceased's domicile in another State cannot sue for a debt due his intestate in Arkansas, after the appointment of an administrator there. Gibson v. Ponder, 40 Ark. 195.

<sup>5</sup> Dawes v. Head, 3 Pick. (Mass.) 128; Harvey v. Richards, 1 Mason, C. C. 381; Currie v. Bircham, 1 Dow. & Ry. 35.

<sup>6</sup> Ela v. Edwards, 13 Allen (Mass.), 48; Brodie v. Bickley, 2 Rawle (Pa.), 431.

<sup>7</sup> See Aspden v. Nixon, 4 How. (U. S.) 467.



should one afterwards be appointed;<sup>1</sup> but it is held in the United States that a voluntary payment of a debt to a foreign administrator, which he may lawfully receive under that administration when there is no domestic administration, is a good discharge of the debt;<sup>2</sup> particularly is this the case where the debt is payable at the domicile of the deceased, which is the forum of the principal administrator;<sup>3</sup> and a payment made to a foreign administrator under decree of a court is a defence to a suit brought on the debt by a domestic administrator afterwards appointed.<sup>4</sup>

Thus, where Q. was a citizen of Tennessee, and died in Alabama in which State G. took out letters of administration, and W. in Tennessee there paid to G. a debt due the estate, there were no other debts due in Tennessee. The payment was included in G.'s account in Alabama. Afterwards, administration was taken out by E. in Tennessee, and it was held that E. could not maintain against W. an action for the debt paid by W. to G.<sup>5</sup>

Where a testator has property in a foreign State, in which State there are no creditors, and no ancillary administration is either set up or called for, the administrator of the decedent's domicile may receive such debts.<sup>6</sup>

2. FOREIGN GUARDIANS. — *a. How constituted.* — It has been said that the State within which a ward is domiciled is that which "in interest and in conscience, is charged with his protection and that, therefore, on general principles, it is the law of that State which should nominate and direct the guardian of such ward and that the guardian thus appointed by such home authorities should have control of his ward's estate abroad as well as at home;<sup>7</sup> but in England and the United States a foreign guardian

<sup>1</sup> Attorney-General v. Dimond, 1 Crompt. & Jer. 356; Preston v. Melville, 8 Clark & Finn. 1, 12, 14.

<sup>2</sup> Hooker v. Olmstead, 6 Pick. (Mass.) 481; Stevens v. Gaylord, 11 Mass. 256; Shultz v. Pulver, 3 Paige Ch. (N. Y.) 182; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 49; Trecothick v. Austin, 4 Mason, C. C. 16; Mackey v. Coxe, 18 How. (U. S.) 104.

Payment of a debt, at the domicile of the debtor, to a foreign administrator, is no defence to a suit by an administrator subsequently appointed under authority of the State in which the debtor is domiciled. Anon., 2 Am. L. Rev. 359.

<sup>3</sup> Huthwaite v. Phaire, 1 Man. & Gr. 159.

<sup>4</sup> Shaw v. Staughton, 3 Keb. 163; Huthwaite v. Phaire, 1 Man. & Gr. 159.

But an administrator should not be permitted to enforce the collection of debts outside of his own forum. McRea v. McRea, 11 La. 571; Fay v. Haven, 3 Met. (Mass.) 109; Boston v. Boylston, 2 Mass. 384; Morrill v. Morrill, 1 Allen (Mass.),

132; Chase v. Chase, 2 Allen (Mass.) 132; Vermilya v. Beatty, 6 Barb. (N. Y.) 509; Brownlee v. Lockwood, 5 Gr. (N. J.) 15; Vaughan v. Northup, 15 Pet. (U. S.) 370; Caldwell v. Harding, 5 Blatchf. C. C. 84; a. c., 1 Crompt. M. & R. 538; Attorney-General v. Hope, 2 Clark & Jer. 370. See Huthwaite v. Phaire, 1 Man. & Gr. 159, 164, 165; Whyte v. Rose, 3 Cr. 159, 164, 165; Currie v. Bircham, 1 Dow. & Ry. 493; Tyler v. Bell, 1 Keen. 826; a. c., 2 M. & Cr. 89, 109, 110. Compare Anderson v. Caunter, 2 Myl. & K. 763; McNamara v. Dwyer, 7 Paige Ch. (N. Y.) 239; Sengen v. Pendleton, 4 Serg. & R. (Pa.) 159; Evans v. Tatem, 9 Serg. & R. (Pa.) 337; Bryan v. McGee, 2 Wash. C. C. 337.

<sup>5</sup> Wilkins v. Ellett, 108 U. S. 256.

<sup>6</sup> Vaughn v. Barret, 5 Vt. 333.

<sup>7</sup> Such is the uniform practice of European and Continental states. See Savigny, § 380; Wächter, § 23; Pütler, § 6; Föelix, ii. p. 198, No. 466; *Id.*, No. 187; *Id.*, No. 89; Argentrén, No. 19; Priv. Intr. L. § 106; Schaeffer, p.

as in the case of foreign administrators and executors, is not usually permitted to act without giving bond in the local court;<sup>1</sup> and it has even been held that a foreign guardian, appointed by the court of the domicile, is not by virtue of his office necessarily entitled to the custody of his ward in Massachusetts, though the court, after appointing a local guardian, may decree the custody of the child to a guardian appointed in a foreign State.<sup>2</sup>

*b. How administered.* — (1) *As to Person of Ward.* — The rights and powers of guardians are considered as strictly local, and they are not entitled to exercise any authority over the person or personal property of their wards in other States;<sup>3</sup> and the same principle has recently been sustained in England.<sup>4</sup>

Under the common-law doctrine, foreign guardians have no rights over immovable property situated in other countries: such rights are "deemed to be strictly territorial, and are not recognized as having any influence upon property in other countries, whose systems of jurisprudence embrace different regulation, and require different duties and arrangements."<sup>5</sup>

A guardian appointed in a foreign State, and giving bond there, is not bound to account in the court of his ward's domicile for funds received in such foreign State.<sup>6</sup>

Hertius, iv. 29; Stockman, Decis. Brabant, 125, No. 6; Boullenois, ii. p. 3; Gand. No. 469; Pottinger, § 61.

It is said by Sir R. Phillimore (iv. 377) that "whatever may be the difference in the positive laws of the different States, with regard to the mode of constituting a guardian, the rule of international comity imperatively demands that a guardian, duly constituted according to the laws of the domicile of the ward, should be recognized as such by all other countries." See Nugent v. Vetzera, L. R. 2 Eq. 704.

<sup>1</sup> Young's Succession, 21 La. An. 394; Stephens' Succession, 19 La. An. 499.

A guardian, who has been appointed in another State, and given bond there, is not bound to account, in the court of the ward's domicile, for funds received in such other jurisdiction. Smoot v. Bell, 3 Cr. C. C. 343.

<sup>2</sup> Woodworth v. Spring, 4 Allen (Mass.), 321.

<sup>3</sup> Kraft v. Wickey, 4 Gill & J. (Md.) 332; Woodworth v. Spring, 4 Allen (Mass.), 324; Morrell v. Dickey, 1 John. Ch. (N. Y.) 153; Morrison's Case, 4 Durn. & East, 185; 2 C. & T. R. 185; Sill v. Worswick, 1 H. Black. 677, 682. Compare Beattie v. Johnstone, 1 Phill. Ch. 17; s. c., 10 Clark & Finn. 42.

<sup>4</sup> Nugent v. Vetzera, L. R. 2 Eq. 704; Beattie v. Johnstone, 10 Clark & Finn. 42, 113, 145; Stuart v. Moore, 4 L. T. N. S. 382; s. c., 9 H. L. Cas. 463; 4 McQ. 1.

<sup>5</sup> Kraft v. Wickey, 4 Gill & J. (Md.)

322, 340, 341; McNamara v. Dwyer, 7 Paige Ch. (N. Y.) 239, 241; Morrill v. Dickey, 1 John. Ch. (N. Y.) 153; Andrews v. Herriot, 4 Cow. (N. Y.) 529.

Story says that "no one has ever supposed that a guardian appointed in one State of this Union, had any right to receive the profits, or to assume the possession, of the real estate of his ward in another State, without having received a due appointment from the principal tribunal of the State where it is situated." Story, Conf. L. § 504.

Lord Kames says, that, according to the Scottish doctrine, it is of no importance in what country curators of minors are chosen; and that accordingly a choice made in England of curators, whether English or Scotch, will be held effectual in Scotland; but that the authority of any guardian or curator, however appointed in a foreign country, is not understood to extend to any real estate in Scotland. 2 Kames, Eq. b. 3, ch. 8, § 1, p. 325; *Id.*, § 4, p. 348.

<sup>6</sup> Riley v. Riley, 3 Day (Conn.), 74; Champlin v. Tilley, 3 Day (Conn.), 303; Dangerfield v. Thurston, 20 Martin (La.), 232; McRae v. McRae, 11 La. 571; Smoot v. Bell, 3 Cr. C. C. 343. See, also, Boston v. Boylston, 2 Mass. 384; Fay v. Haven 3 Met. (Mass.) 109; Morrill v. Morrill, 1, Allen (Mass.), 132; Chase v. Chase, 2 Allen (Mass.), 101; *Ex parte* Picquet, 5 Pick. (Mass.) 65; Goodwin v. Jones, 3 Mass. 514; Borden v. Borden, 5 Mass. 67; Stevens v. Gaylord, 11 Mass. 256;

(a) *Power over Domicile of Ward.* — By the common law a guardian has no right to change the domicile of his ward, except under order of the court.<sup>1</sup>

It is said that the law of succession varies so much in the different States of the Union, that the power to arbitrarily change succession by changing the minor's domicile, is one which no guardian should possess.<sup>2</sup>

(2) *As to Property of Ward.* — (a) *Personal Property.* — Since personal or movable property is deemed to be in the domicile of the owner, the law of such domicile will govern the rights and powers of guardians appointed in foreign countries, and regulate their control or authority over the property of their wards situated in other countries, to the same extent as they are acknowledged by the law of the domicile of the ward.<sup>3</sup>

(b) *Immovable Property.* — As regards real estate, the rule is, that the *lex rei sitæ* must govern, and that the foreign guardian

Langdon v. Potter, 11 Mass. 313; Glenn v. Smith, 2 Gill & J. (Md.) 493; Stearns v. Burnham, 5 Greenl. (Me.) 261; Brownlee v. Lockwood, 5 Gr. (N. J.) 243; Thompson v. Wilson, 2 N. H. 291; Campbell v. Tousey, 7 Cow. (N. Y.) 64; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 265; Vermilya v. Beatty, 6 Barb. (N. Y.) 429; Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71; Fenwick v. Sears, 1 Cr. (U. S.) 259; Dixon's Ex'rs v. Ramsay's Ex'rs, 3 Cr. (U. S.) 319, 323; Smith, Adm'r, v. Union Bank of Georgetown, 5 Pet. (U. S.) 518; Kerr v. Moon, 9 Wheat. (U. S.) 565; Armstrong v. Lear, 12 Wheat. (U. S.) 169; Dickinson, Adm'r, v. McCraw, 4 Rand. (Va.) 158; Caldwell v. Harding, 5 Blatchf. C. C. 501; Trecothick v. Austin, 4 Mason, C. C. 16, 32; Preston v. Melville, 8 Clark & Finn. 1; Whyte v. Rose, 3 Q. B. 498, 507; Spratt v. Harris, 4 Hagg. Ecc. 405; Price v. Dewhurst, 4 Myl. & Cr. 76; Lee v. Verton, Palmer, 163; Tourton v. Flower, 3 P. Wms. 369, 370; Thorne v. Watkins, 2 Ves. 35; Attorney-General v. Cockerell, 1 Price, 179; Burn v. Cole, Amb. 416; Lowe v. Farlie, 2 Madd. 101; Logan v. Farlie, 2 Sim. & S. 285; Attorney-General v. Bouwens, 4 Mees. & W. 171, 192, 193; Tyler v. Bell, 1 Keen, 826, 829; s. c., 2 Myl. & Cr. 89, 109. Compare McNamara v. Dwyer, 7 Paige Ch. (N. Y.) 239; Swearingen v. Pendleton, 4 Serg. & R. (Pa.) 389; Evans v. Tatem, 9 Serg. & R. (Pa.) 252; Bryan v. McGee, 2 Wash. C. C. 337.

<sup>1</sup> School Directors v. James, 2 Watts & S. (Pa.) 568; Whar., Conf. L. §§ 41, 42. Compare Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. (Mass.) 20; Guier v. O'Daniel, 1 Binn. (Pa.) 349, n.; Pottinger v. Wightman, 3 Meriv. 67.

But where a parent domiciled in one State, appoints a testamentary guardian

domiciled in another State, for his child, with other circumstances indicating a desire that the child should reside with the guardian, followed by the actual removal of such child to the domicile of the guardian, this will constitute a change of the child's domicile. See White v. Howard, 52 Barb. (N. Y.) 294.

It seems that a mother cannot change the domicile of the minor children of her first marriage, by taking them into another State subsequent to her second marriage, so as to make property subject to the laws of succession and distribution of such other State. See Johnson v. Copeland, 35 Ala. 521; Freetown v. Taunton, 16 Mass. 52; Mears v. Sinclair, 1 W. Va. 185.

But a change of the domicile of her children by a surviving mother, when it is made reasonably and in good faith, will be sustained by the English and American courts. See Holyoke v. Haskins, 5 Pick. (Mass.) 20; School Directors v. James, 2 Watts & S. (Pa.) 568; Pottinger v. Wightman, 3 Meriv. 67.

Continental jurists hold that the minor's domicile is fixed by the father's death, and cannot be changed during the minority of the infant by the mother or guardian, except by act of law. Bouhier, ch. 21, No. 3; *Id.*, ch. 22, No. 164; Boulenois, ii. p. 69; Bar, Priv., Int. L. § 31; Denisart, Domicile, § 2; Fœlix, i. pp. 54, 55, 94.

<sup>2</sup> Whart., Conf. L. § 42. See also Robertson, Per. Succ. 275, n.

<sup>3</sup> Story, Conf. L. 500; Whart., Conf. L. 268.

As a general rule, the management and investment, by a guardian, of the property of his ward, should be governed by the law of the State of the domicile of the ward, and not by the law of the State wherein the guardian has been appointed. Lamar

can have no authority or control over lands situated in another State without the sanction of the local court.<sup>1</sup>

*c. Lunatics.*—Where a committee has been appointed for a lunatic, in what is conceded to be his place of domicile, it seems such committee is accountable in the place of his appointment for fund received by virtue of an ancillary appointment in another State; but the question cannot be raised in a suit against the surety in his bond.<sup>2</sup>

*v. Micon*, 112 U. S. 452; *s. c.*, 114 U. S. 218.

Wharton says, that as to personalty a foreign guardian may "at least make himself liable on his bond for money received by him in a foreign jurisdiction." Whart., Conf. L. § 268. See also *United States v. Bender*, 5 Cr. C. C. 620; *United States v. Nichols*, 4 Cr. C. C. 291.

1. *Kraft v. Wickey*, 4 Gill & J. (Md.) 332, 340, 341; *Morrell v. Dickey*, 1 John. Ch. (N. Y.) 153; *Andrews v. Herriot*, 4 Cow. (N. Y.) 529, n.; *Brooke v. Potowmack Co.*, 1 Cr. C. C. 526. Compare *McNamara v. Dwyer*, 7 Paige Ch. (N. Y.) 239, 241.

"Administration on the estate of Michael Marck having been granted in Baltimore County, the orphans' court of that county had express power conferred upon it to appoint a guardian to his infant children, and the legality and consequent regularity of this appointment could in no manner be affected by the fact that a guardian for these children had been appointed by the orphans' court of York County, in the State of Pennsylvania. For the appointment of a guardian granted in a foreign State can have no extra-territorial operation, so as to oust our courts of their jurisdiction over the property of infants. . . . But it is supposed that the determination which would give validity to the guardian's appointment, made by our courts, when at the same time there existed a guardian appointed by a foreign power, would produce a conflict of jurisdictions prejudicial to the interests of the minor. But it cannot be perceived in what manner this result is to be produced. The control of the person of the ward being with the foreign jurisdiction, cannot be disturbed by the guardian here; on the other hand, the foreign guardian cannot interfere with the management and control, by the domestic guardian, of the ward's property. *Kraft v. Wickey*, 4 Gill & J. (Md.) 332, 340, 341. But persons coming *en autre droit*, under the appointment of foreign laws, cannot be parties. To entitle them to be received as such, they must have their appoint-

ments repeated under our laws. This has been held of foreign guardians,—*Morrell v. Dickey*, 1 John. Ch. Rep. (N. Y.) 153,—of foreign executors and administrators. 1 John. Ch. Rep. (N. Y.) 156; *Tourton v. Flower*, 3 P. Wms. 369; *Lee v. Bank of England*, 3 Ves. 44; *Goodwin v. Jones*, 3 Mass. 514; *Riley v. Riley*, 3 Day (Conn.), 74; *Fenwick v. Adm'rs of Sears*, 1 Cr. C. C. 259; *Dixon's Ex'rs v. Ramsay's Ex'rs*, 3 Cranch C. C. 319; *Doolittle v. Lewis*, 7 John. Ch. Rep. (N. Y.) 45; *Williams v. Storrs*, 6 Johns. Ch. Rep. (N. Y.) 353; *Lewis v. McFarland*, 9 Cranch C. C. 159; *Langdon v. Potter*, 11 Mass. 313; *Borden v. Borden*, 5 Mass. 67; *Stevens v. Gaylord*, 11 Mass. 256; *Cutler v. Davenport*, 1 Pick. (Mass.) 81; *Kerr v. Devises of Moon*, 9 Wheat. (U. S.) 565; *Darby's Lessee v. Mayer*, 10 Wheat. (U. S.) 465; *Admrs. of Dodge v. Wetmore*, *Brayton's Rep.* 92; *Lee v. Havens*, *Brayton's Rep.* 93.

"It appears to be perfectly well settled that a foreign executor or administrator cannot maintain a suit in this State by virtue of letters testamentary or of administration granted abroad. And the learned and very distinguished American commentator on the conflict of foreign and domestic laws is evidently of the opinion that this principle extends to suits brought against the foreign executor or administrator to recover the property which he has received in that character. *Story's Conf. of Laws*, 422, §§ 513, 514. I have, however, after a careful examination of the several cases referred to by him, not been able to find any one in which it has been directly decided that the remedy against an executor or administrator, either in behalf of the next of kin or of the creditors, is necessarily confined to the courts of the country in which the letters testamentary or of administration were granted. Indeed to suppose such was the law, would lead to the conclusion that cases must frequently exist in which there would be a total failure of justice." *McNamara v. Dwyer*, 7 Paige Ch. (N. Y.) 239, 241.

2. *Commonwealth v. Rhoads*, 37 Pa. St. 60.

## CONFUSION OF DEBTS—CONGREGATION.

**CONFUSION OF DEBTS** is the concurrence of two adverse rights the same thing in one and the same person.<sup>1</sup>

Confusion of goods takes place where there has been such an intermixture of goods owned by different persons, that the property of each can no longer be distinguished.<sup>2</sup>

**CONFUSION OF GOODS.** See ACCESSION, Vol. I. p. 50.

**CONGREGATION.** (See also RELIGIOUS SOCIETY.)—An assemblage or union of persons in society for some religious purpose.<sup>3</sup>

1. *Woods v. Ridley*, 11 Humph. (Tenn.) 198, quoting Story on Prom. N. sec. 439.

2. *Hesseltine v. Stockwell*, 30 Me. 241.

"Confusion, as it is termed, is a mixture of liquids, as wine and wine, or wine and honey, or melted silver and gold. . . . And within the same reason is the intermixture of money or coin or hay, that forms one undistinguishable mass. . . . But the placing of crockery, china, or other articles resembling each other, on the same shelf, is not a confusion of them, within the meaning of the law." *Treat v. Barber*, 7 Conn. 280.

"In the case of confusion of goods . . . the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original domain is invaded, and endeavored to be rendered uncertain without his own consent." 2 Bl. Com. 405.

3. On a motion to show cause why a writ of *mandamus* should not issue, commanding the defendants to restore their pastor into the place and function of minister of the congregation of the German or High Dutch Reformed Christian church in Fredericktown, the court, Chase, J., in granting the *mandamus*, held that the court had jurisdiction therein both because, by the form of government in Maryland, the Christian religion is the established religion, and also because of the temporal rights and emoluments annexed to the position, these emoluments being held by trustees for the use of the congregation, whom he

defines as above. *Runkel v. Winemiller et al.*, 4 Har. & McH. (Md.) 429.

In refusing an application for an injunction, restraining the defendants from occupying the pulpit or impeding the complainants from celebrating divine worship in the church by a Baptist minister in regular standing, and from using or interfering with the temporalities of the church, the Chancellor Walworth said: "The complainants appear to have acted on the supposition that the decision of the ecclesiastical judicatory, that a certain portion of the members of the Baptist church in Hartford were heterodox in doctrine or practice, and were not the true church, must have a legal effect upon the incorporation of the members of this religious society. But I apprehend that in this they have overlooked the distinction between the 'congregation' and the church strictly so-called, which comprises only a part of the 'congregation' or society. The church consists of an indefinite number of persons, of one or both sexes, who have made a public profession of religion, and who are associated together by a covenant of church fellowship, for the purpose of celebrating the Sacrament and watching over the spiritual welfare of each other. But a religious society, or 'congregation,' as recognized by the third section of the statute providing for the incorporation of religious societies is, with us, what is usually denominated a poll parish, in some of the neighboring States. It consists of a voluntary association of individuals or families, united for the purpose of having a common place of worship and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, etc. Although a church, or body of professing Christians, is almost uniformly connected with such a society or 'congregation,' the members of the church have no other or greater rights than any other members of the society who stately attend with them for the purposes of divine worship. Over the church, as such, the legal or

Definition.

**CONSANGUINITY—CONSCIENCE.**

Definition.

**CONNIVANCE.** See **DIVORCE.**

**CONSANGUINITY.**—The having the blood of some common ancestor.<sup>1</sup>

**CONSCIENCE.**—That sense by which men determine whether a thing is right or wrong.<sup>2</sup>

temporal tribunals of this State do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatory to which they have voluntarily subjected themselves. But, as a general principle, those ecclesiastical judicatories cannot interfere with the temporal concerns of the 'congregation' or society, with which the church or the members thereof are connected. It follows, from this view of the subject, that these defendants, although they may have been rightfully excluded from the communion and fellowship of the Baptist Church, on account of anti-Sabbatarianism, or some other heresy, as suggested by the complainants' counsel, yet they may still not only be legal voters as members of the 'congregation' or society, but they may be elected trustees, and have the management of the temporal concerns of the "congregation." Baptist Church in Hartford *v.* Witherell, 3 Paige Ch. (N. Y.) 296.

So in *Roberson v. Bullions*, 9 Barb. (N. Y.) 64. Hand, J., said: "But as used in this statute, a 'congregation' is an assembly met, or a body of persons who usually meet, in some stated place for the worship of God and religious instruction, and may or may not include a church or spiritual body. And the same may be said of the term 'religious society' used in the same connection in the third section. The church, congregation, or society must, to organize, have stated 'divine worship,' for the electors must have attended the same to constitute them such by the third and seventh sections."

**Congregation Met for Religious Worship.**—See **ASSEMBLY; CAMP-MEETING.**

1. *Blodget v. Brinsmaid*, 9 Vt. 30.

In holding that, by the civil law, the rules of which are to be used in determining who are the next of kin, the grandfather of the decedent is in the second degree, and the aunt in the third, the court, Bradford, surrogate, said: "'Consanguinity' is the connection or relation of persons descended from the same stock or common ancestor." *Swezey v. Willes*, 1 Bradford Surr. R. (N. Y.) 495.

So Woodward, C. J., held that in *Pennsylvania*, under the Intestate Act of April 8, 1833, the next of kin are to be ascertained by the rules of the civil law, saying: "Consanguinity is either lineal or collateral. Lineal is that which subsists between persons of whom one is descended in a right line from the other. Every generation in this direct lineal consanguinity constitutes a degree. Collateral consanguinity is that which subsists between persons who lineally descend from the same ancestor who is the *stirps* or root, but who do not descend the one from the other." *McDowell v. Addams*, 45 Pa. St. 430.

**Consanguinity and Affinity Distinguished.**—In dissenting from the general opinion of the court that a father-in-law is a competent witness, under the Civ. Code, 312 Art. 248, which declares "that all persons above 14 years of age, free, of a sound mind, and not rendered infamous, may be witnesses of any fact . . . provided that the husband cannot be a witness for or against the wife, nor the wife for or against the husband. Neither can ascendants with respect to their descendants, nor descendants with respect to their ascendants." Martin, J., said: "Consanguinity is the basis of the laws which regulate the degrees between which marriage is forbidden, the rules of succession and tutorship, the recusation of judges, and the admission or rejection of persons who are offered as witnesses. Affinity is the basis of the same laws, with the exception of those which regulate succession." *Bernard v. Vignaud*, 10 Martin (La.), 478.

In *New York* it has been held that degrees of affinity are computed in the same way as those of consanguinity, and that therefore a judge whose wife is the aunt of the wife of one of the parties to a cause cannot sit at the trial of the cause, under the 16th section of chap. 50 of the Digest, which declares that "No judge of the circuit court, etc., shall sit on the determination of any cause or proceeding in which he is interested or related to either party, within the fourth degree of consanguinity or affinity, or shall have been counsel without consent of parties." *Kelly v. Neely*, Judge, etc., 12 Ark. 667.

2. **Conscience and Principle Distinguished.**—Where a juror in a capital case

**CONSCIOUS.**—Having a knowledge of anything, in a way to enable an opinion to be formed of its character.<sup>1</sup>

**CONSENT, in Criminal Law.** (See the particular criminal titles for the application to special crimes.)—No act shall be deemed a crime if done with the consent of the party injured, unless it be committed in public, and is likely to provoke a breach of the peace, or tends to the injury of a third party; provided no consent can be given which will deprive the consenter of any inalienable right.<sup>2</sup>

was asked if he entertained such conscientious opinions as would preclude him from finding the defendant guilty, when the offence charged was punishable with death, to which he answered that he was opposed to capital punishment on principle; it was held error to sustain the challenge on such answer, the court, Murray, C.J., saying: "There is an important difference between conscience and principle. Conscience is defined by Webster to be 'internal or self-knowledge, or judgment of right and wrong, or the faculty, power, or principle within us, which decides on the lawfulness or unlawfulness of our own actions or affections, and instantly approves or condemns them; conscience is called by some writers the moral sense, and considered as an original faculty of our nature.' Principle he also defines to be, in a general sense, 'the cause, source, or origin of anything; that from which a thing proceeds, as the principle of motion, the principles of action; ground foundation, that which supports an assertion, an action, or a series of actions, or of reasoning; a general truth; a law comprehending many subordinate truths, as the principles of morality, of law, of government, etc.' In the language of the learned counsel for the appellant, 'the one is the result of judgment, is tested by reason, defended by argument, and yields to the decision of an intelligent mind. The other springs from some internal source of self-knowledge, which acknowledges no superior, bows to no authority, yields to no demonstration, and is governed by no law; it ignores reason, defies argument, and is unaccountable and irresponsible to all human tests and standards: it is a law unto itself, and its scruples and its teachings are not amenable to human tribunals, but rests alone with its possessor and his God.' All writers on moral philosophy make this same distinction. In fact, in very many cases conscience and principle have no connection whatever, and a man may be opposed on principle to

what he conscientiously believes to be right." *People v. Stewart*, 7 Cal. 140.

1. **Conscious of what he is Doing.**—A charge of the lower court as follows: "If he (the prisoner) had power of mind enough to be conscious of what he was doing at the time, then he was responsible to the law for that act," was held not to be error, the court, Agnew, C.J., saying: "It is contended this language was incorrect, and was liable to mislead the jury, because the prisoner might be conscious of what act he was doing, and yet, in consequence of mental disability or disease, be incapable of refraining from its commission. But the charge has a plain English meaning, referring to the nature of the act, and when taken in connection with other parts of the charge, this portion is not susceptible of misconstruction. All the judge said referred plainly not to the mere act, but to the prisoner's consciousness of what he did as a crime. The phrase 'conscious of what he was doing' is idiomatic, and is understood to mean the real nature and true character of the act as a crime, and not to the mere act itself. As used by the judge in connection with what else he said, it was not contradictory or misleading. A memorable instance of this idiomatic use of the word 'what' is found in the language of our Saviour on the cross, when He said 'Father, forgive them; for they know not what they do!' Clearly the Jews knew well that they were crucifying Jesus, but their darkened minds were unconscious of the great crime they were committing." *Brown v. Com.*, 78 Pa. St. 122.

2. *Desty's Cr. L.* § 33. See *R. v. Wollaston*, 26 L. T. N. S. 403; *People v. Dohring*, 59 N. Y. 374; *People v. Bransby*, 32 N. Y. 525; *State v. Beck*, 1 Hill (S. Car.), 363; s. c., 26 Am. Dec. 190; *State v. Matthews*, 20 Mo. 55; *Smith v. State*, 12 Ohio St. 466; *Hull v. State*, 22 Wis. 553; *State v. Moon*, 41 Wis. 684; *Dodge v. Brittain*, Meigs (Tenn.), 34; *Wilson v. State*, 45 Tex. 76; *R. v. Dead*, 2 C. & K. 957; *R. v.*

Banks, 8 C. & P. 574; R. v. Meredith, 8 C. & P. 589; R. v. Martin, 2 Moody C. C. 123; R. v. Wollaston, 26 L. T. R. 403.

**Definition.**—To will or to consent is an operation of the mind, and implies positive mental action, and when these words are used as the ground of responsibility for any given act, their meaning is the same. It is the *quo animo* of the act. Consenting is to be willing, as a condition of the mind.

Mr. Pollock, in his recent work on Torts, p. 139 *et seq.*, says:

**Limits of Consent.**—"Wilful hurt is not excused by consent or assent if it has no reasonable object. Thus if a man licenses another to beat him, not only does this not prevent the assault from being a punishable offence, but the better opinion is that it does not deprive the party beaten of his right of action. On this principle prize-fights and the like 'are unlawful even when entered into by agreement and without anger or mutual ill-will.' 'Whenever two persons go out to strike each other, and do so, each is guilty of an assault.' The reason is said to be that such acts are against the peace, or tend to breaches of the peace. But inasmuch as even the slightest direct application of force, if not justified, was in the language of pleading *vi et armis* and *contra pacem*, something more than usual must be meant by this expression. The distinction seems to be that agreement will not justify the wilful causing or endeavoring to cause appreciable bodily harm for the mere pleasure of the parties or others. Boxing with properly padded gloves is lawful, because in the usual course of things harmless. Fighting with the bare fist is not. Football is a lawful pastime, though many kicks are given and taken in it; a kicking match is not. Single stick or playing with blunt sabres in the accustomed manner is lawful, because the players mean no hurt to one another, and take such order by the use of masks and pads that no hurt worth speaking of is likely. A duel with sharp swords after the manner of German students is not lawful, though there be no personal enmity between the men, and though the conditions be such as to exclude danger to life or limb. It seems to be what is called a question of mixed law and fact whether a particular action or contest involves such intention to do real hurt that consent or assent will not justify it. Neglect of usual precautions in any pastime known to involve danger would be evidence of wrongful intention, but not conclusive evidence.

"This question was incidentally considered by several of the judges in the recent case of R. v. Coney, 8 Q. B. D. 534, where the majority of the court held that mere voluntary presence at an unlawful fight is not necessarily punishable as taking part in an assault, but there was no difference of opinion as to a prize-fight being unlawful, or all persons actually aiding and abetting therein being guilty of assault, notwithstanding that the principals fight by mutual consent. The court had not, of course, to decide anything as to civil liability, but some passages in the judgments are material. Cave, J., said: 'The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize fight is clearly an assault; but playing with single-sticks or wrestling do not involve an assault, nor does boxing with gloves in the ordinary way.' Stephen, J., said: 'When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. . . . In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as for instance in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character is a question of degree depending upon circumstances.' These opinions seem equally applicable to the rule of civil responsibility.

**Extended Meaning of "Volenti Non Fit Injuria."**—"Trials of strength and skill in such pastimes as those above mentioned afford, when carried on within lawful bounds, the best illustration of the principle by which the maxim *volenti non fit injuria* is enlarged beyond its literal meaning. A man cannot complain of harm (within the limits we have mentioned) to the chances of which he has exposed himself with knowledge and of his free-will. Thus in the case of



The consentor must be capable of giving consent.<sup>1</sup>

two men fencing or playing at single-stick, *volenti non fit injuria* would be assigned by most lawyers as the governing rule, yet the words must be forced. It is not the will of one player that the other should hit him; his object is to be hit as seldom as possible. But he is content that the other shall hit him as much as by fair-play he can; and in that sense the striking is not against his will. Therefore the 'assault' of the school of arms is no assault in law. Still less is there an actual consent if the fact is an accident, not a necessary incident, of what is being done; as where in the course of a cricket-match a player or spectator is struck by the ball. I suppose it has never occurred to any one that legal wrong is done by such an accident even to a spectator who is taking no part in the game. So if two men are fencing, and one of the foils breaks, and the broken end, being thrown off with some force, hits a bystander, no wrong is done to him. Such, too, is the case put in the Indian Penal Code of a man who stands near another cutting wood with a hatchet, and is struck by the head flying off. It may be said that these examples are trivial. They are so, and for that reason appropriate. They show that the principle is constantly at work, and that we find little about it in our books just because it is unquestioned in common-sense as well as in law.

**Relation of these Cases to Inevitable Accident.**—"Many cases of this kind seem to fall as naturally under the exception of inevitable accident, if that exception is allowed to the extent contended for above. But there is, we conceive, this distinction, that where the plaintiff has voluntarily put himself in the way of risk the defendant is not bound to disprove negligence. If I choose to stand near a man using an axe, he may be a good woodman or not; but I cannot (it is submitted) complain of an accident because a more skilled woodman might have avoided it. A man dealing with explosives is bound, as regards his neighbor's property, to diligence and more than diligence. But if I go and watch a firework-maker for my own amusement, and the shop is blown up, it seems I shall have no cause of action, even if he was handling his materials unskillfully. This, or even more, is implied in the decision in *Hott v. Wilkes*, 3 B. & Ald 304, where it was held that one who trespassed in a wood, having notice that spring guns were set

there, and was shot by a spring-gun, could not recover. The maxim *non fit injuria* was expressly held applicable: 'he voluntarily exposes to the mischief which has happened. The case gave rise to much public excitement, and led to an alteration in the law, but it has not been doubted by subsequent authorities that on the facts as they came before the court, it was well decided. The point of negligence was expressly negatived by the pleadings, the decision is an authority that if a man goes out of his way to a dangerous action or thing, he must take the risk as it is. And this appears to be material in regard to the attempt made by the defendant to bring under this principle the case of *Hott v. Wilkes*, and noticed as an exception and by reason of inevitable accident." *Holmes v. Mather*, L. R. 10 Q. B. 267; *Rylands v. Fletcher*, L. R. 1 Ex. 287.

1. 1 Whar. Cr. L. (9th Ed.) 373; *Hadden v. People*, 25 N. Y. 373; *Insane Persons*.—1 Whar. Cr. L. (9th Ed.) § 146.

On an indictment for rape, the defendant proved that the prosecutrix was a girl of a half years old, and that even when she was six weeks old she was born with a wrong in her mind; that she was incapable of understanding anything that was said to her, but that she could walk and down stairs by herself; that if she was in a chair by any one she would stay there till night, passing her evening and water in the chair; that if told to do so she would do so; that she could not communicate to her friends what she wanted; that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work. It was proved that the father of the prisoner, on returning home one day, saw the prisoner through the window of the sitting-room, and saw the prisoner lying on the floor, and the prosecutrix on a couch in the room, and that she had been placed by her sister. The prisoner then sent on an errand, and who desired the prisoner to lie on the couch till her return. On going into the room he found the prisoner standing up at the head of the bed, buttoning up his trousers, and the prosecutrix was lying quietly on the couch. There were no external signs of violence on the person of the prosecutrix. The learned judge told the jury that if the prisoner had connected

In each of these articles the word "consent" means a consent freely given by a rational and sober person, so situated as to be able to form a rational opinion upon the matter to which he consents.

Consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature.<sup>1</sup>

the prosecutrix by force, and if she was in such an idiotic state that she did not know what the prisoner was doing, and if the prisoner was aware of her being in that state, they might find him guilty of rape. But if from animal instinct she yielded to the prisoner without resistance, or if the prisoner from her state and condition had reason to think she was consenting, they ought to acquit him. The jury found the prisoner guilty of an attempt at rape. *Held*, that the prisoner was rightly convicted. *Reg. v. Fletcher*, Law Rep. 1 C. C. 39, explained and distinguished. *R. v. Barratt*, L. R. 2 C. C. 81.

Upon an indictment for rape there must be some evidence that the act was without the consent of the woman, even where she is an idiot. In such a case, where there were no appearances of force having been used to the woman, and the only evidence of the connection was the prisoner's own admission, coupled with the statement that it was done with her consent, the court held that there was no evidence for the jury. *R. v. Fletcher*, L. R. 1 C. C. 39.

**Intoxicated Persons.**—*Hadden v. People*, 25 N. Y. 373; *Com. v. Burke*, 105 Mass. 376.

**Children.**—At common law a child under ten years cannot give consent to any criminal intercourse so as to deprive that intercourse of criminality, but she can give such consent as to render the attempt no assault. *R. v. Cockburn*, 3 Cox C. C. 543; *R. v. Read*, 2 C. & K. 957; *R. v. Roadley*, 14 Cox C. C. 463; *State v. Pickett*, 11 Nev. 255; s. c., 21 Am. Rep. 754; *Smith v. State*, 12 Ohio St. 466. Compare *Com. v. Roosnell*, 143 Mass. 32; *Hays v. People*, 1 Hill (N. Y.), 352; *People v. McDonald*, 9 Mich. 150; *Givens v. Com.*, 29 Gratt. (Va.) 830.

The presumption of the law is that a female child under ten years is incapable of giving consent to an act of carnal knowledge, or of assault with intent to commit the act; but the presumption may be rebutted by proof that she understood the nature of the act committed or intended. *O'Meara v. State*, 17 Ohio St. 515; *Moore v. State*, 17 Ohio St. 521.

A child of nine years cannot consent to his own abduction. *Com. v. Nicker-*

*son*, 5 Allen (Mass.), 518; *U. S. v. Ancarola*, 1 Fed. Repr. 676. See title ABDUCTION.

**Public Welfare.**—An indictment for inflicting actual bodily harm is sustainable by evidence that a man, knowing that he has an infectious disease, has intimacy with a girl without informing her of the fact, by means of which the disease was communicated to her. *Reg. v. Sinclair*, 13 Cox C. C. 28; s. p., *Reg. v. Bennett*, 4 F. & F. 1105.

**Excuses only the Act Consented to.**—The performance of the sexual act, even with the consent of the woman, may be so brutal on the part of the man as to amount to an assault and battery. *Richie v. State*, 58 Ind. 355. See *Don Moran v. People*, 25 Mich. 356; *Com. v. Stratton*, 114 Mass. 303; *R. v. Sinclair*, 13 Cox C. C. 28; *R. v. Bennett*, 4 F. & F. 1105; *R. v. Flattery*, 2 L. R. Q. B. Div. 410.

**Accessory.**—See Am. & Eng. Encyclo. of L., vol. i. p. 64.

**Deceits.**—See Am. & Eng. Encyclo. of L., vol. i. p. 65, vol. ii. 671.

**1. Fraud.**—See 1 Am. & Eng. Encyclo. of L. 805; 1 Bish. Cr. L. (7th Ed.) § 261a; *State v. Shepard*, 7 Conn. 54; *People v. Crosswill*, 13 Mich. 427; *People v. Metcalf*, 1 Wheel. C. C., note, p. 381; *Huber v. State*, 57 Ind. 341.

A master of a workhouse was indicted for disposing of the dead bodies of paupers for the purpose of dissection and for gain to himself. On the death of the paupers he had caused their bodies to be shown to their relatives in coffins, and every appearance of regular funerals to be gone through; whereas, just before the funeral, other coffins had been substituted, and the bodies were afterwards taken to a hospital for dissection. The relatives had not, in accordance with the proviso in sect. 7 of 2 & 3 Will. 4. c. 75, required that the bodies should be interred without anatomical examination; but the jury found that he had caused the appearance of funerals to be gone through with a view to prevent the relatives making such requirement, and that they would have so required but for the supposed funerals. *Held*, that as, in fact, the relatives had not made the requirement which they had a right to make, the master of

**1. Right to Consent to Bodily Injury for Surgical Purposes.**—Every one has a right to consent to the infliction of any bodily injury, in the nature of a surgical operation, upon himself, or upon any child under his care and too young to exercise a reasonable discretion in such a matter, but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.<sup>1</sup>

**2. Surgical Operation on Person Incapable of Assent.**—If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent, or in spite of his resistance.<sup>2</sup>

**3. Right to Consent to Bodily Injury Short of Maim.**—Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim. A maim is bodily harm whereby a man is deprived of the use of any member of his body, or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened; but a bodily injury is not a maim merely because it is a disfigurement.<sup>3</sup>

**4. No Right to Consent to Infliction of Death.**—No one has a right to consent to the infliction upon himself of death, or of an injury likely to cause death, in any case (other than those mentioned

the workhouse was protected as a person having the lawful custody of the bodies, and was not therefore guilty of the offence charged. *R. v. Feist*, Dears. & B. C. C. 59; 8 Cox C. C. 18.

• Rape can only be committed by force, if the woman consent, in the belief that an illegal marriage is legal, upon the fraudulent assertion of the pretended husband, the latter will not be guilty of rape. *State v. Murphy*, 6 Ala. 765; s. c. 41 Am. Dec. 79. See *People v. Quin*, 50 Barb. (N. Y.) 128; *Lewis v. State*, 30 Ala. 54; *Don Moran v. People*, 25 Mich. 357; *Whittaker v. State*, 50 Wis. 519; *Com. v. Childs*, 2 Pittsb. (Pa.) 391; *Wyatt v. State*, 2 Swan (Tenn.), 364; *R. v. Rosinski*, Moody C. C. 19; *R. v. Nichol*, R. & R. 130; *R. v. Jackson*, 8 C. & P. 265.

1. Steph. Dig. Cr. L. (Am. Ed.) 144; Pollock on Torts, 139; *R. v. Spiller*, 5 C. & P. 333; *R. v. Long*, 4 C. & P. 398; *R. v. Whitehead*, 3 C. & K. 202; *R. v. Williamson*, 3 C. & P. 635; *R. v. Senior*, 1 Moody C. C. 346.

Where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation on her for the cure of the disease, soon after which she died, it was

held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if in his judgment it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant. *McClallen v. Adams*, 19 Pick. (Mass.) 333.

**2. Illustrations.**—(1) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2) If the accident made him mad, the amputation, in spite of his resistance, would be no offence.

(3) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence. Steph. Dig. Cr. L. (Am. Ed.) 145.

3. It is maim to strike out a front tooth. It is not maim to cut off a man's nose. Castration is a maim. Steph. Dig. Cr. L. (Am. Ed.) 145; Co. Litt. 127; *People v. Clough*, 17 Wend. (N. Y.) 351.

*supra*), or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public.<sup>1</sup>

5. **No Right to Consent to Injury Constituting a Breach of the Peace.**—No one has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize-fight or other exhibition calculated to collect together disorderly persons.<sup>2</sup>

6. **Consent to Being Put in Danger.**—It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another.<sup>3</sup>

7. **Evidence.**—The defendant is not obliged to show consent; but the burden of proof is upon the prosecution to establish dissent.<sup>4</sup>

**CONSEQUENTIAL DAMAGES.** See DAMAGES; EMINENT DOMAIN.

**CONSIDERATION.** See CONTRACTS.

**CONSIGNATION.**—"Consignation is a deposit which the debtor makes of the thing that he owes into the hands of a third person, and under the authority of a court of justice."—*French law.*<sup>5</sup>

**CONSIGNED.**—"To consign, in the mercantile law, is ordinarily to send or transmit goods to a merchant or factor for sale, and a

1. **Illustrations.**—(1) A and B agree to fight a duel together with deadly weapons. If either is killed or wounded, his consent is immaterial.

(2) A gets B to cut off A's right hand, in order that A may avoid labor and to be enabled to beg. Both A and B commit an offence. Steph. Dig. Cr. L. (Am. Ed.) 146; 1 Inst. 107, a, b. Mr. Stephens says: "I think the qualification in the article 'for any purpose injurious to the public,' must be supplied. It seems absurd to say that if A gets a dentist to pull out a front tooth of A's because it is unsightly, though not diseased, A and the dentist both commit a misdemeanor. When it was an essential part of a common soldier's drill to bite cartridges, I believe that it was not an uncommon military offence to get the front teeth pulled out, and this would, I presume, be an offence at common law also." See Com. v. Parker, 9 Metc. (Mass.) 263; s. c., 43 Am. Dec. 396; McAfee v. State, 31 Ga. 411.

2. Steph. Dig. Cr. L. (Am. Ed.) 146; Pollock on Torts, 139; Foster, 260; 1 East, 270; R. v. Billingham, 2 C. & P. 234; R. v. Perkins, 4 C. & P. 537; Com. v. Wood, 11 Gray (Mass.), 85. Compare Duncan v. Com., 6 Dana (Ky.), 295; Com. v. Welsh, 7 Gray (Mass.), 324; Com. v. Barrett, 108 Mass. 302, Chamber v. State, 14 Ohio St. 437.

3. **Illustration.**—A, with B's consent,

wheels B in a barrow along a tight rope at a great height from the ground. C hires A and B to do so, D, E, and F pay money to C to see the performance. B is killed. *Quære*, are A, C, D, E, and F, or any and which of them, guilty of manslaughter? Steph. Dig. Cr. L. (Am. Ed.) 146. Mr. Stephens says: "There is, so far as I know, no authority on this point, but the principle on which prize-fights have been held to be illegal might include such a case. Such an exhibition might also, under circumstances, be a public nuisance. To collect a large number of people to see a man put his life in jeopardy is a less coarse and boisterous proceeding than a prize-fight, but is it less immoral?"

4. Pollard v. State, 2 Iowa, 567; Conyers v. State, 50 Ga. 103; s. c., 15 Am. Rep. 686.

5. See 1 Pothier's Obligations, 376. For distinction between the French *consignation* and *tender* in our law, see Weld v. Hadley, 1 N. H. (Adams) 304.

Though not an actual payment, the consignation is equivalent thereto. To be valid, it ought to be preceded by offers of payment, which place the creditor *in demeure*. It discharges the debtor. The augmentation or diminution in value of what is consigned enures to the profit or loss of the creditor, if the consignation is valid. Index to Pothier's Obligations, Lond. Ed. 1806.

consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted." <sup>1</sup>

**CONSIGNOR AND CONSIGNEE.** See CARRIERS.

**CONSOLIDATE.**—To consolidate means something more than rearrange or redivide. In a general sense it means to unite into one mass or body, as to consolidate the forces of an army, or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate benefices is to combine them into one. <sup>2</sup>

**CONSPIRACY.** See CRIMINAL CONSPIRACY.

1. Gillespie v. Winberg, 4 Daly's N. Y. Com. Pl. 321.

The radical meaning of "consign" is to transfer or deliver as a charge or trust. When used in connection with a vessel, it ordinarily refers to the goods shipped by her, for the vessel herself is in charge of the master, who is, by his office, clothed with power to do whatever is essential to his employer's interests. But both vessel and cargo may be consigned to a person at the port of destination; or the vessel alone may be consigned. "And where a person is authorized to take charge of her upon her arrival, to collect the freight, pay all her expenses, obtain a cargo for her, and who, by virtue of this authority, enters and clears the vessel at the customs, he may, I think, be termed the consignee, for she is for that purpose and to that extent consigned to him."

**Ship's Husband.**—Where duties of this description are discharged at the home port or place where the vessel belongs, by a person appointed by the owners, he is known by the maritime term of the "ship's husband." Story's Agency, § 35; Abbott's Shipping, Part 1, c. 3, p. 105, 8th Lond. Ed.; 1 Parsons on Ship. & Ad. 109. From opinion by Daly, C. J., Gillespie v. Winberg, 4 Daly's N. Y. Com. Pl. 321.

**New York Pilot Laws.**—N. Y. Laws of 1857, p. 502, ch. 243, providing that pilotage shall be paid by the master, "owners, or consignees," where the master refuses to take a pilot upon coming into the port of New York by way of Sandy Hook," applies to the ship's husband who has just been described.

N. Y. Laws 1853, p. 925, ch. 567, § 18, (of which said Act of 1857 is amendatory), providing that the pilotage shall be payable by the master, owner, consignee, or agent clearing the vessel, means by "consignee" the consignee of the vessel,

and not of the goods. Gillespie v. Winberg, 4 Daly's N. Y. Com. Pl. 321.

**Insurance.**—Goods were shipped to B, on whom bills were drawn in favor of the general agent of the consignor. These bills, and also the bill of lading, were sent to C (the general agent), with the request that they should be sent on to B if that B might insure. But B declined to receive the cargo or to accept the bills drawn on him, whereupon C drew a policy of insurance in his own name, and informed the consignor of the fact, the consignor approving of his conduct. In an action by C on the policy, it was held that C was a consignee within the meaning of 28 Geo. 3, c. 56, and that the policy was therefore valid.

2. Ind. Dist. of Fairview v. Durland, 45 Iowa, 56.

**Consolidated Company.**—The words "consolidate" and "consolidation," as used in statutes authorizing and ratifying the union or combination of several railroad corporations into one, have acquired a recognized judicial construction, which imports that all the companies are dissolved and merged into one new company. "When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law and according to common understanding a consolidation of such companies; whether such single corporation, called the consolidated company, be a new one then created, or one of the original companies continuing in existence, with only larger rights, capacities, and property." Meyer v. Johnston, 64 Ala. 656.

"Consolidation" and "stay of proceedings" distinguished. Lee v. Tp. of Kearney, 13 Vr. (N. J.) 544.

**CONSTABLES.** See **POLICE.**

**CONSTITUTION.**—A constitution is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established.<sup>1</sup> According to the common acceptation of the word in the United States, it may be said to be an agreement of the people, in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves;<sup>2</sup> the organization of the government, distributing its powers among bodies of magistracy and declaring their rights, and the liberties reserved and retained by the people.<sup>3</sup> The constitution of an American State is the supreme, organized, and written will of the people acting in convention, and assigning to the different departments of the government their respective powers.<sup>4</sup>

1. *Vanhorne's Case v. Dorrance*, 2 Dall. (U. S.) 308; *Cohen v. Hoff*, 3 Brev. (S. C.) 501.

2. *State v. Parkhurst*, 4 Halst. (N. J.) 443.

3. *French v. State*, 52 Miss. 762.

In *State v. McCann*, 4 Lea (Tenn.), 9, the court says, quoting Cooley on Const. Lim.: "In our American constitutional law, the word 'constitution,' is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union or of any one of the States, as the absolute rule of action and decision for all department, and officers of the government, in respect to all points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be altogether void."

The constitution provides a class of officers, generally of the ministerial and executive class, with whose names and general functions the people are familiar, without a specification of their duties; thus: A State treasurer and auditor of accounts shall be elected, who shall hold their office for four years. Manifestly the convention had in view officers whose duties and functions had in general been defined by law, with which the people were familiar, and which were shadowed forth and symbolized by their names. When the people ratified the constitution which declared that they should quadriennially elect an auditor and treasurer of State, and every two years a coroner, sheriff, etc., they distinctly associated the offices with the functions and privileges which before that pertained by law re-

spectively to them. It would be too narrow a view to consider the framers of the constitution as referring alone to those functions incident to the sheriff at common law. For many of the privileges and duties conferred by the common law and ancient statutes never belonged to him in this State, and would be wholly unsuited to our society. . . . We must suppose, when the constitution refers the election of this officer to the people, without a word to indicate the nature of his functions, or descriptive of them, other than the name itself imports, it must be implied that it means the sheriff, with such general attributes and authority as had been theretofore connected with the office, and declared in both the written and unwritten law. *French v. State*, 52 Miss. 762.

4. *Taylor v. Gov'r*, 1 Ark. 27.

"A constitution is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life." *People v. N. Y. Cent. R. Co.*, 24 N. Y. 486.

"A constitution is defined by Judge Story to be 'a fundamental law or basis of government.' It is established by the people in their original sovereign capacity, to promote their own happiness, and permanently to secure their rights, property, independence, and common welfare." *McRoan v. Devries*, 3 Barb. (N. Y.) 198.

"The constitution of the United States is, in its more essential and fundamental character, a tripartite instrument. The parties to it are the States, the people, and the United States." *In re Booth*, 3 Wis. 96.

**CONSTITUTIONAL LAW.** (See also CITIZENSHIP; EMINENT DOMAIN; EXTRADITION; HABEAS CORPUS; INTERSTATE COMMERCE; JEOPARDY; OFFICERS; PARDON; POLICE POWER; STATES; STATUTES; TAXATION.)

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**1. Definitions.**—In its modern sense, a constitution comprises the principles or fundamental laws which govern a state or other organized body of men, and are embodied in written documents or implied in the institutions and usages of the country or society.<sup>1</sup>

1. Webster *sub voce*; 1 Bouv. Inst. 9; Duer's Const. Jur. 26.

**Constitution.**—The fundamental law of a free country which characterizes the organism of the country and secures the rights of the citizen and determines his main duties as a freeman. Bouvier's Law Dict.; 1 Story on the Const. § 339; Cooley's Const. Lim. 2.

A national constitution "prescribes the order of succession to the throne; or, in a republic, the mode of electing a president. It enumerates the prerogatives of the king or other chief magis-

trate. It regulates the composition of the council of state, and of the upper and lower houses of the assembly when the assembly is thus divided; the mode in which a seat is acquired in the upper house, whether by succession, by nomination, or by tenure of office; the mode of electing the members of the house of representatives; the powers and privileges of the assembly as a whole, and of the individuals who compose it; and the machinery of law-making. It deals also with the ministers, their responsibility, and their respective spheres of action;

According to the American usage, the word "constitution" is used to designate the written instrument agreed upon by the people of the Union or of a particular State, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or ordinance of any such department or officer is null and void.<sup>1</sup> The term "constitutional" means that which is consonant to, and agrees with, the constitution.<sup>2</sup> An "unconstitutional law" is therefore one which violates the provisions or principles of the supreme law of the land or of that constitution by which the particular law-making body is more immediately governed.<sup>3</sup> Constitutional jurisprudence is that branch of the science of law which treats of constitutions, their establishment, construction, and interpretation, and of the validity of legal enactments as tested by the criterion of conformity to the fundamental law.

**2. Establishment and Amendment of Constitutions.**—The people of the several Territories may form for themselves State constitutions whenever enabling acts for that purpose are passed by Congress, but only in the manner allowed by such enabling acts, and through the action of such persons as the enabling acts shall clothe with the elective franchise to that end.<sup>4</sup> The people of a State have

the government offices and their organization; the armed forces of the state, their control, and the mode in which they are recruited; the relation, if any, between church and state; the judges and their immunities; local self-government; the relations between the mother country and its colonies and dependencies. It describes the portions of the earth's surface over which the sovereignty of the state extends; and defines the persons who are subject to its authority. It comprises, therefore, rules for the ascertainment of nationality and for regulating the acquisition of a new nationality by naturalization. It declares the rights of the State over its subjects in respect of their liability to military conscription, to service as jurymen, and otherwise. It declares, on the other hand, the rights of the subject to be assisted and protected by the State, and of that narrower class of subjects which enjoys full civic rights to hold public offices and to elect their representatives to the assembly or parliament of the nation." Holland on Jurisprudence, 249. See 1 Austin on Jurisprudence (Campbell's Ed.), § 248 *et seq.*

1. Cooley's Const. Lim. 3; 1 Story on the Const. § 338 *et seq.*

2. Bouvier's Law Dict.

3. Cooley's Const. Lim. 3. See 1 Austin on Jur. (Campbell's Ed.) § 248.

4. Cooley's Const. Lim. 30. When a constitution has been adopted by the people of a Territory preparatory to admission as a State, and Congress prescribes certain changes and additions to be adopted by the legislature as a part of the constitution, and such changes and additions are declared to be fundamental conditions of the admission of the State, and the legislature accepts them, and the State is thus admitted, they thereby become a part of the constitution and binding as such, although not submitted to the people for their approval. *Brittle v. People*, 2 Neb. 198.

But in general a constitution is not operative until its adoption by the people, and does not change any rights or duties dependent upon any territorial act until it has received such sanction. *Parker v. Smith*, 3 Minn. 240. See *Secombe v. Kittleson*, 29 Minn. 555.

**Ordinance of 1787 superseded.**—The ordinance of 1787 for the government of the Northwest Territory was superseded by the adoption of the United States constitution and the admission to the Union of the States formed from that Territory, in so far as any of its provisions conflict with the Federal or State constitutions. *Strader v. Graham*, 10 How. (U. S.) 82; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U. S.) 158.



the right to alter or revise their constitution in a proper and manner to any extent they may choose so long as they deny allegiance to the United States, nor abolish the republican form of government, nor otherwise invade the provisions of the Federal constitution.<sup>1</sup> But a State constitution can only be changed by the people in convention, or in the mode prescribed in the instrument itself; and if the latter mode is adopted, the requisition of the constitution must be observed.<sup>2</sup> A constitutional convention cannot take from the people their sovereign right to ratify or reject the constitution or ordinance framed by it, and cannot infuse life or vigor into its work before ratification by the people.<sup>3</sup> It generally requires a majority of the electors of the State to ratify an amendment to the constitution. A constitutional amendment does not become operative upon its casting in its favor of the necessary majority of votes, but only after the due promulgation of the result.<sup>4</sup>

*Connecticut Ins. Co. v. Cross*, 18 Wis. 109.

So of the acts of Congress organizing the territorial government of Orleans. *Permoli v. Municipality*, 3 How. (U. S.) 589.

1. *Penn v. Tollison*, 26 Ark. 545. See U. S. Const. art. 4, § 4; *Cooley's Const. Lim.* 33; *Federalist*, No. 43.

2. *Collier v. Frierson*, 24 Ala. 100; *Opinion of the Judges*, 6 Cush. (Mass.) 573; *In re Constitutional Convention*, 14 R. I. 649; *State v. Timme*, 54 Wis. 318.

**Bill of Rights.**—A clause in the declaration of rights, in a State constitution, may be amended in the same manner as any other part of the constitution. *State v. Cox*, 3 Eng. (Ark.) 436.

**Convention Called by Congress.**—Provisions of the former State constitution of North Carolina, authorizing a call of a convention for amending the constitution, held not to exclude the power of the United States to call a convention of the people of North Carolina for the purpose of forming a constitution at a time when the State government organized under the former one had been practically superseded by acts of rebellion against the National Government. *Matter of Hughes*, Phill. (N. Car.) 57.

3. *Wood's Appeal*, 75 Pa. St. 59; *State v. New Orleans*, 29 La. Ann. 863; *Gibbes v. Railroad*, 13 S. Car. 228; *Jameson's Constitutional Convention*, §§ 415-418; *Cooley's Const. Lim.* 32.

If the convention is called for the purpose of amending the constitution in a specified part, the delegates have no power to act upon and propose amendments in other parts of the constitution. *Opinion of the Judges*, 6 Cush. (Mass.) 573.

The constitutional convention has the inherent right of all independent governments to control its own incidental proceedings. *Goodrich v. Moore*, 2 Minn. 61.

**Reconstruction.**—The act of Congress, entitled "An act to admit the people of North Carolina, etc., to represent Congress," does not operate as a repeal or enactment of the constitutions of the States, but merely as a recognition of the fact that they had been adopted by the people. *Hatch v. Burroughs*, 10 Woods (U. S. Cir.), 439.

4. The whole number of votes cast at the election at which the amendment submitted may be taken as the number of electors of the State. *State v. Green*, 69 Ind. 505. See *Green v. W. Miss.* 650; *Prohibitory Amendment Cases*, 24 Kans. 700; *Dayton v. Paul*, 22 Minn. 400.

The question whether or not a majority of qualified voters voted to amend the constitution, cannot be determined by action at law. *Luther v. Borden*, 7 (U. S.) 1. See *State v. Starling*, 120 (S. Car.) 120. Compare *State v. Borden*, 4 Mo. 303.

5. *Sewell v. State*, 15 Tex. 400; *State v. Morgan City*, 32 La. 400; *People v. Norton*, 59 Barb. 169.

Where legislation is necessary to give effect to a constitutional provision, laws that were in existence at the time the new constitution was adopted remain in force until legislation is had to amend the provisions of the new constitution. *Provisors v. Stout*, 9 W. Va. 7; *Indiana Co. v. Agricultural Soc.* 357.

An amendment to a constitution is to be considered as if it had been adopted by the original instrument, but rather as

**3. Power of the Judiciary to Determine the Constitutionality of Statutes.**—It is the right, and consequently the duty, of the judicial tribunals to determine whether a legislative enactment drawn in question in a suit pending before them is repugnant to the constitution of the United States or of the State, and if so found, to declare it inoperative and void.<sup>1</sup> But every presumption and in-

gous to a codicil or a second deed, altering or rescinding the first, which is referred to only to see how far the first must yield to give full effect to the last. The legal fiction regarding an amendment to a pleading as if inserted in the first instance does not apply. *University v. McIver*, 72 N. Car. 76.

1. *Caldier v. Bull*, 3 Dall. (U. S.) 386; *Cooper v. Telfair*, 4 Dall. (U. S.) 18; *Bowdoinham v. Richmond*, 6 Me. 112; *Lewis v. Webb*, 3 Me. 326; *Woart v. Winnick*, 3 N. H. 473; *Dow v. Norris*, 4 N. H. 16; *Hill v. Sunderland*, 3 Vt. 507; *Stanford v. Barry*, 1 Aik. (Vt.) 314; *Holden v. James*, 11 Mass. 396; *Norwich v. Commissioners*, 13 Pick. 60; *King v. Bank*, 15 Mass. 447; *Derby Turnpike Co. v. Parks*, 10 Conn. 522; *Gosben v. Stonington*, 4 Conn. 225; *People v. Foot*, 19 Johns. (N. Y.) 58, *Ex parte McCollum*, 1 Cow. (N. Y.) 550; *Stoddart v. Smith*, 5 Binn. (Pa.) 355; *Moore v. Houston*, 3 S. & R. (Pa.) 169; *Eakin v. Raub*, 12 S. & R. (Pa.) 330; *Cronise v. Cronise*, 54 Pa. St. 355; *Vanuxem v. Hazelhurst*, 1 South. (N. J.) 192; *Norris v. Trustees*, 7 Gill & J. (Md.) 7; *Crenshaw v. State River Co.*, 6 Rand. (Va.) 245; *Dyer v. Bridge Co.*, 2 Port. (Ala.) 303; *Bank of St. Mary's v. State*, 12 Ga. 475; *Cotton v. Commissioners*, 6 Fla. 610; *Bliss v. Commonwealth*, 1 Lat. (Ky.) 90; *Tate v. Bell*, 4 Yerg. (Tenn.) 202; *Railroad Co. v. Commissioners*, 1 Ohio St. 77; *Miller v. State*, 3 Ohio St. 475; *Dawson v. Shaver*, 1 Blackf. (Ind.) 206; *Thomas v. Commissioners*, 5 Ind. 4; *Phoebe v. Jay*, 1 Breese (Ill.), 209. See 1 Story on the Const. §§ 373-396.

**Origin of the Power.**—"The administration of public justice is referred to the courts. To perform this duty, the first requisite is to ascertain the facts, and the next to determine the law that is applicable. The constitution is the fundamental law of the State, in opposition to which any other law, or any direction or decree, must be inoperative and void. If therefore such other law, direction, or decree seems to be applicable to the facts, but on comparison with the fundamental law it is found to be in conflict, the court, in declaring what the law of the case is, must necessarily determine its invalidity, and thereby in effect annul it." *Cooley's Const. Lim.*

45. See *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Bates v. Kimball*, 2 Chip. (Vt.) 77; 1 Story on the Const. § 532.

It appears that it is within the province of the courts to declare that a general law governing certain matters *might* be passed by the legislature, although such never has been. *Ex parte Pritz*, 9 Iowa, 30; *Opinion of the Judges*, 49 Mo. 216. But the courts have no means and no power to avoid the effects of non-action by the legislature. *Myers v. English*, 9 Cal. 341.

**Legislature Not to Judge.**—The legislative branch of the government cannot, by a statutory enactment, declare an act of its own to be either constitutional or void, though it may repeal any law, subject to the rights which may have been acquired under it if it was constitutional when enacted. *In re Lafayette Co.*, 2 Chand. (Wis.) 212.

**Inferior Courts.**—A court *ad nisi prius* will not declare an act unconstitutional unless convinced beyond a reasonable doubt of its invalidity. *Sarony v. Lithographic Co.*, 16 Repr. (U. S. Cir.) 8; *White v. Kendrick*, 1 Brevard (S. Car.), 469.

The courts of one State have power to decide on the validity of legislative acts of another State with respect to the Federal Constitution, when the question arises in a case within their jurisdiction. *Stoddart v. Smith*, 5 Binn. (Pa.) 355.

**Presumption from Lapse of Time.**—The fact that statutes of a certain class have long been in existence and considered constitutional does not prevent the court from declaring them invalid. *Baltimore v. State*, 15 Md. 376; *Sadler v. Langham*, 34 Ala. 311. Compare *Chambers v. Fisk*, 22 Tex. 504; *State v. Bosworth*, 13 Vt. 402.

**Preamble.**—The courts have no authority to declare a statute unconstitutional by reason of anything contained in the preamble, where the objection does not appear in the body of the statute. *Sutherland v. De Leon*, 1 Tex. 250; *Lothrop v. Stedman*, 42 Conn. 583.

**State Constitutions**, or any provisions contained in them, or amendments thereto, are inoperative and void in so far as they conflict with the constitution of the United States. *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Gunn v. Barry*, 15 Wall. (U. S.) 610; *New Orleans Gas-Light Co. v. Lon-*

tendment is in favor of the constitutionality of an act of ture, and the courts will not be justified in pronouncing unless satisfied beyond a reasonable doubt of its repu the constitution.<sup>1</sup> And nothing but a clear violation of stitution—a clear usurpation of power prohibited—will w judiciary in declaring an act of the legislative departmen stitutional and void.<sup>2</sup> Still, there is reason and auth holding that if a statute is contrary to the spirit of the co and the implications necessarily drawn from it, or to t mentals of justice and good government, or to those principles of the social compact which underlie all legis enter into the framework of representative government, i power of the courts to pronounce it void.<sup>3</sup> Constitution

isiana Light and Heat Co., 115 U. S. 672; Grigsby v. Peak, 57 Tex. 142; State v. Young, 29 Minn. 474.

**City Ordinances**, conflicting with the constitution of the State or of the United States, are invalid. Mayor v. Hussey, 21 Ga. 80; Hestonville R. Co. v. Philadelphia, 89 Pa. St. 210.

1. Cooper v. Telfair, 4 Dall. (U. S.) 18; Rich v. Flanders, 39 N. H. 304; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; *In re* Wellington, 16 Pick. 95; Foster v. Essex Bank, 16 Mass. 245; Kerrigan v. Force, 68 N. Y. 381; Matter of Clinton St., 2 Brewst. (Pa.) 599; Speer v. School Directors, 50 Pa. St. 150; Baltimore v. State, 15 Md. 376; Gutman v. Virginia Iron Co., 5 W. Va. 22; Cutts v. Hardee, 38 Ga. 350; Franklin Bridge Co. v. Wood, 14 Ga. 80; Macon, etc., R. Co. v. Davis, 13 Ga. 68; Carey v. Giles, 9 Ga. 253; Boston v. Cummins, 16 Ga. 102; Cheney v. Jones, 14 Fla. 587; State v. Robinson, 1 Kans. 17; Smithee v. Garth, 33 Ark. 17; Eason v. State, 6 Engl. (Ark.) 481; Brown v. Buzan, 24 Ind. 194; Allen v. Silvers, 22 Ind. 491; Lafayette v. Jenners, 10 Ind. 70; State v. Cooper, 5 Blackf. (Ind.) 258; Chicago, etc., R. Co. v. Smith, 62 Ill. 268; Morrison v. Springer, 15 Iowa, 304; Blair v. Ridgley, 41 Mo. 63; Scott v. Smart, 1 Mann. (Mich.) 295; People v. San Francisco, etc., R. Co., 35 Cal. 606; Crowley v. State, 11 Oreg. 512; Alexander v. People, 7 Colo. 155; Cooley's Const. Lim. 182 *et seq.* Compare Sadler v. Langham, 34 Ala. 311.

If an act may be valid or not according to the circumstances, the court would be bound to presume that such circumstances existed as would render it valid. Talbot v. Hudson, 16 Gray (Mass.), 417.

**Construction of the Statute.**—Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, this will be done by the courts,

although the construction so may not be the most obvious one, or the literal one. Newla 19 Ill. 376; Iowa Co. v. Web Iowa, 221; Roosevelt v. Gods (N. Y.) 533; Colwell v. Ma Co., 4 Green (N. J.), 245; Railroad, 27 Wis. 478; Dow N. H. 17; People v. Superv Y. 241; Clarke v. Rochester, Y.) 471; Cooley's Const. Lim.

If conflict with the constitution posed to arise from a peculiar tion of a statute, the interpret imperatively required, will b and the law sustained. Inkster 16 Mich. 484.

2. Pennsylvania R. Co. v. Pa. St. 164; People v. Railro (N. Y.) 123; Tyler v. Peop 320; Inkster v. Carver, 16 Flint River Steamboat Co., Ga. 194.

3. Regents v. Johnson, 9 (Md.) 365; Welch v. Wadswor 155; Calder v. Bull, 3 Dall. Wilkinson v. Leland, 2 Pet. Terrett v. Taylor, 9 Cranch Goshen v. Stonington, 4 Conn son v. New York, 10 Barb. ( Bowman v. Middleton, 1 Ba 252; Ham v. McClaws, 1 Ba 98; Black on Constitutional P § 177; Baltimore v. State, 15

*Per contra*, see Cooley's C 164, where it is said: "Nor declare a statute unconstitu void solely on the ground of oppressive provisions, or b supposed to violate the natur political rights of the citize can be shown that such injus hibited or such rights guarant tected by the constitution." People v. Gallagher, 4 Mich. 1 v. Mahaney, 13 Mich. 481; Road Co. v. Woodhull, 25

bare question of legislative power, and no inquiry is permissible as to the motives operating on the minds of the legislators in voting for the law.<sup>1</sup> The courts will take judicial notice of the journals of the legislative houses; and if it should appear from these records that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void.<sup>2</sup>

While the courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics; they will not seek to draw in such weighty

*Jewell v. Weed*, 18 Minn. 272; *People v. Hayden*, 50 N. Y. 525; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 161; *Commonwealth v. McCloskey*, 2 Rawle (Pa.), 374; *Bridgeport v. Railroad*, 15 Conn. 497; *Louisville, etc., R. Co. v. County Court*, 1 Sneed (Tenn.), 687.

The policy of the constitution, an infraction of which will justify the court in declaring a statute unconstitutional, must be manifested by its terms, fixing with precision the particular rule, and not be gathered by general inference or vague and uncertain speculation as to the unexpressed meaning of the framers. *Pattison v. Yuba*, 13 Cal. 175.

When an act of the legislature is plain and unambiguous, and is free from objection on constitutional grounds, the courts of the State are bound to apply and enforce it, notwithstanding objections to its policy. *Leonard v. Wiseman*, 31 Md. 201.

Nor are the courts at liberty to set aside a statute merely because it is absurd or unreasonable. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194. Or because it is an *unwise* enactment. *Merchants' Union Co. v. Brown*, 18 Repr. (Iowa)

**Justification Under Police Power.**—Legislative powers, the exercise of which can be justified on the ground of the police power, and which are otherwise unconstitutional, can be such only as are absolutely requisite for the safety, comfort, or necessities of the public, and which the framers of the constitution, as a matter of ordinary prudence, cannot be supposed to have intended to prohibit, in the language of the prohibition. *People v. Jackson Co.*, 9 Mich. 285. See *New Orleans Gas-Light Co. v. Louisiana Ice and Heat Co.*, 115 U. S. 650; *Black Constitutional Prohibitions*, § 62; *Cooley's Const. Lim.* 577.

*Ex parte Newman*, 9 Cal. 502; *Light v. Derfees*, 8 Ind. 298; *State v.*

*Fagan*, 22 La. Ann. 545; *Sunbury, etc., R. Co. v. Cooper*, 33 Pa. St. 278; *Baltimore v. State*, 15 Md. 376; *Johnson v. Higgins*, 3 Metc. (Ky.) 566; *People v. Draper*, 15 N. Y. 545; *Ex parte McCordle*, 7 Wall. (U. S.) 514.

8. *Prescott v. Illinois, etc., Canal*, 19 Ill. 324; *People v. Commissioners*, 54 N. Y. 276; *People v. Mahaney*, 13 Mich. 481; *Moody v. State*, 48 Ala. 115; *Opinion of the Judges*, 35 N. H. 579; *Pangborn v. Young*, 32 N. J. L. 29; *Spangler v. Jacoby*, 14 Ill. 297; *Miller v. State*, 3 Ohio St. 475; *Southwark Bank v. Commonwealth*, 2 Pa. St. 446; *McCulloch v. State*, 11 Ind. 430; *State v. Moffit*, 5 Ohio, 358; *Turley v. Logan Co.*, 17 Ill. 151; *People v. Supervisors*, 8 N. Y. 317; *Jones v. Hutchinson*, 43 Ill. 721. *Compare* *Sherman v. Story*, 30 Cal. 253; *Kilgore v. Magee*, 85 Pa. St. 401; *Whited v. Lewis*, 25 La. Ann. 568.

But the courts cannot, for the purpose of impeaching a statute, go behind the legislative records to inquire into the regularity of the proceedings in passing it. *People v. Devlin*, 33 N. Y. 269.

And it will not be presumed, from the mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of an act, unless where the constitution requires the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered. *Cooley's Const. Lim.* 135; *Miller v. State*, 3 Ohio St. 475; *McCulloch v. State*, 11 Ind. 424; *Supervisors v. People*, 25 Ill. 181.

As each house of the legislature has the power to judge of the election and qualifications of its members, the court cannot go behind a law to ascertain whether the constitutional vote requisite to give it immediate effect was cast by members legally chosen. *People v. Mahaney*, 13 Mich. 481.

matters collaterally nor on trivial occasions.<sup>1</sup> Many courts adopt the rule that they will not decide a legislative act to be unconstitutional by a majority of the quorum of judges, but will postpone the argument until the bench is full; but this is a rule of propriety only, not of constitutional obligation.<sup>2</sup> A statute will not be declared unconstitutional on the application of a mere volunteer or person whose rights it does not specially affect; this will only be done in a proper case, where some person seeks to resist the operation of the statute and calls in the judicial power to pronounce it void as to him, his property, or his rights.<sup>3</sup> The fact that some provision or part of a statute is unconstitutional does not make the remainder so, if such remainder is independent of and separable from the void part, so that one part may operate without the other.<sup>4</sup> The decision of that court which is the final interpreter

1. *Hoover v. Wood*, 9 Ind. 286; *State v. Rich*, 20 Mo. 393; *Ireland v. Turnpike Co.*, 19 Ohio St. 373.

The court will not decide a question involving the constitutionality of an act of the legislature, although it may be legitimately presented by the record, if the record presents any other clear ground on which its judgment may be based. *Smith v. Speed*, 50 Ala. 276; *Weimer v. Bunbury*, 30 Mich. 201; *Ex parte Randolph*, 2 Brock. (U. S. Cir.) 447; *Frees v. Ford*, 6 N. Y. 177; *White v. Scott*, 4 Barb. (N. Y.) 56; *Mobile & Ohio R. Co. v. State*, 29 Ala. 573.

Nor when it does not appear by the record that the decision of the court below was based upon that question. *Hopson v. Murphy*, 1 Tex. 314.

The courts will not pass upon the constitutionality of a statute upon the decision of preliminary motions or applications for provisional injunctions. *Lothrop v. Stedman*, 42 Conn. 583; *Rensselaer, etc., R. Co. v. Bennington, etc., R. Co.*, 17 Repr. (U. S. Cir.) 168; *Deering v. Railroad*, 31 Me. 172; *Havemeyer v. Ingersoll*, 12 Abb. Pr. N. S. (N. Y.) 301.

The constitutionality of a law upon which an indictment is based cannot be questioned upon an application for a *habeas corpus*. *Parker v. State*, 5 Tex. App. 579; *In re Brosnahan*, 18 Fed. Repr. 62.

The court will not consider the constitutionality of a statute on a summary motion to strike out part of a complaint as irrelevant. *Brien v. Clay*, 1 E. D. Smith (N. Y.), 649.

In *Burbank v. Williams*, Phill. (N. Car.) 37, the court refused to review the constitutionality of a statute which had been repealed, merely for the purpose of determining the right to costs.

2. *Cooley's Const. Lim.* 161. See *Briscoe v. Bank*, 8 Pet. (U. S.) 118.

3. *Jones v. Black*, 48 Ala. 540; *Williamson v. Carlton*, 51 Me. 449; *State v. Snow*, 3 R. I. 64; *Dejarnett v. Haynes*, 23 Miss. 600; *Moore v. New Orleans*, 32 La. Ann. 726; *People v. Brooklyn, etc., R. Co.*, 89 N. Y. 75; *Cooley's Const. Lim.* 163.

A party proceeded against under one branch of a criminal statute cannot object to the unconstitutionality of another and independent part of the statute. *State v. Snow*, 3 R. I. 64.

A law unconstitutional only because impairing the obligation of contracts is not necessarily null as to the rights of persons not concerned in the contracts whose obligations are so impaired. *Moore v. New Orleans*, 32 La. Ann. 726; *New Orleans Nav. Co. v. New Orleans*, 12 La. Ann. 364.

The objection that a legislative act is unconstitutional because divesting the rights of remaindermen against their will cannot be urged by the owner of the particular estate, and can only be made on behalf of the remaindermen themselves. *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543.

Tax-payers, citizens of a State, may maintain a suit *quia timet* to restrain its executive officers from funding the public indebtedness under an act unconstitutional and void. *Lynn v. Polk*, 8 Lea (Tenn.), 121.

**Estoppel to Deny Constitutionality.**—An individual has no right to complain that a law is unconstitutional after he has endeavored to take the benefit of it to the injury of others. *Hansford v. Barbour*, 3 J. J. Marsh. (Ky.) 515; *Barnett v. Barbour*, 1 Litt. (Ky.) 396.

4. *Packet Co. v. Keokuk*, 95 U. S. 80.

Unity *v.* Burrage, 103 U. S. 459; Penniman's Case, 103 U. S. 717; Presser *v.* Illinois, 116 U. S. 252; Duer *v.* Small, 4 Blatch. (U. S. Cir.) 263; Fisher *v.* McGirr, 1 Gray (Mass.), 1; Commonwealth *v.* Clapp, 5 Gray (Mass.), 97; Commonwealth *v.* Hitchings, 5 Gray (Mass.), 482; State *v.* Wheeler, 25 Conn. 290; State *v.* Snow, 3 R. I. 64; People *v.* Kenney, 96 N. Y. 204; Harris *v.* Niagara Co., 33 Hun (N. Y.), 279; Lea *v.* Bumm, 83 Pa. St. 237; Davis *v.* State, 7 Md. 151; State *v.* Commissioners, 29 Md. 521; Gamble *v.* McCrady, 75 N. Car. 509; Robinson *v.* Bank of Darien, 18 Ga. 65; Bucky *v.* Willard, 16 Fla. 330; Mobile & Ohio R. Co. *v.* State, 29 Ala. 573; South & North Ala. R. Co. *v.* Morris, 65 Ala. 193; Campbell *v.* Union Bank, 6 How. (Miss.) 625; Williams *v.* Payson, 14 La. Ann. 7; Franklin Co. *v.* Railroad, 12 Lea (Tenn.), 521; Tillman *v.* Cocke, 9 Baxt. (Tenn.) 429; Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 70; Turner *v.* Woodson Co., 27 Kans. 314; Morrison *v.* State, 40 Ark. 448; Exchange Bank *v.* Hinds, 3 Ohio St. 1; McCulloch *v.* State, 11 Ind. 424; State *v.* Newton, 59 Ind. 173; Nelson *v.* People, 33 Ill. 390; Santo *v.* State, 2 Clarke (Iowa), 165; State *v.* Clark, 54 Mo. 17; Rood *v.* McCargar, 49 Cal. 117; *Ex parte* Frazer, 54 Cal. 94; Mills *v.* Sargent, 36 Cal. 379; Robinson *v.* Bidwell, 22 Cal. 379; Lathrop *v.* Mills, 19 Cal. 513; People *v.* Hill, 7 Cal. 97; Tripp *v.* Overocker, 7 Colo. 72; People *v.* Jobs, 7 Colo. 475; State *v.* Rosenstock, 11 Nev. 128.

The constitutional and the unconstitutional provisions may even be contained in the same section of the law, and yet be perfectly distinct and separable, so that the former may stand though the latter fall: the question is whether the several provisions are essentially and inseparably connected in substance. Hagerstown *v.* Dechert, 32 Md. 369; Commonwealth *v.* Hitchings, 5 Gray (Mass.), 485; Robinson *v.* Bidwell, 22 Cal. 379; Eells *v.* People, 4 Scam. (Ill.) 512; State *v.* Easterbrook, 3 Nev. 173. *Compare* McCready *v.* Sexton, 29 Iowa, 356; Christy *v.* Sacramento Co., 39 Cal. 3.

Where part of an act is declared unconstitutional, but the rest is independent and can stand alone, the portion so declared to be unconstitutional is as if it had never been passed, and the portion declared to be constitutional must remain in full force as if that had been the whole of the act originally. State *v.* Copeland, 3 R. I. 33.

**Provisions Must be Independent.**—If, when the void part is stricken out, there

remains enough to make a statute complete in itself, capable of being executed according to the apparent legislative intent, and independent of that which has been annulled, it will be sustained. State *v.* Tuttle, 53 Wis. 45; State *v.* Exnicios, 33 La. Ann. 253.

The imposition of a tax, and the designation of collectors thereof, are entirely distinct subject-matters, and an illegality in regard to the latter will not necessarily impeach the provisions relating to the tax. People *v.* Lawrence, 36 Barb. (N. Y.) 177. See Kennedy *v.* Railroad, 22 Wis. 581.

A law requiring the secretary of state to furnish copies of the laws to certain newspapers is not rendered void *in toto* by an unconstitutional provision reducing the compensation to be paid to the secretary for furnishing such copies below what it was when he took the office. State *v.* Kelsey, 44 N. J. L. 1.

Where a State, by the terms of a statute, has a lien on the property of a railroad company, as trustee for the holders of bonds issued by the State in aid of such company, it does not follow, because the provisions of the statute in respect to the execution and exchange of the bonds are unconstitutional, that the statutory lien is void also. Florida Cent. R. Co. *v.* Schulte, 103 U. S. 118.

**Statute with Single Object.**—If the purpose of a statute is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion. People *v.* Cooper, 83 Ill. 585; *Ex parte* Towles, 48 Tex. 413; Santo *v.* State, 2 Clarke (Iowa), 165.

But a clause in an act containing an unconstitutional provision will vitiate the whole act, if it enters so entirely into the scope and design of the law that it would be impossible to maintain it without the obnoxious provision. Reed *v.* Railroad, 33 Cal. 212; Campau *v.* Detroit, 14 Mich. 276; State *v.* Commissioners, 5 Ohio St. 497.

A State statute taxed telegraphic messages; the United States supreme court pronounced the statute, so far as interstate and governmental messages were concerned, to be invalid; the cause was remanded to the State courts. Held, that the different parts of the act were so intimately connected that by reason of such invalidity the entire statute was void. Western Union Tel. Co. *v.* State, 62 Tex. 630.

**Legislative Intent.**—When the parts of a statute are so mutually dependent and

of a constitution, passing upon the constitutionality of a particular statute, is binding and conclusive upon all other courts unless reversed.<sup>1</sup>

An unconstitutional act is not a law; it confers no rights, it imposes no duties, it affords no protection, it creates no office in legal contemplation, as inoperative as though it had never passed.<sup>2</sup> When a statute has been held unconstitutional by an appellate court, it is inoperative while such decision is maintained, but a later decision sustaining such statute gives it vitality from the time of its enactment, and it is to be treated as having been constitutional from the beginning.<sup>3</sup>

(a) *Construction and Interpretation of Constitutions.*—The effect of construction applied to the constitution is to give effect

connected, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional and void, all the provisions which are thus dependent conditional, or connected must fall with them. *Sprague v. Thompson*, 118 U. S. 90; *Warren v. Mayor*, 2 Gray (Mass.), 84; *Slauson v. Racine*, 13 Wis. 398; *State v. Dousman*, 28 Wis. 541; *Hinze v. People*, 92 Ill. 406; *Ex parte Frazer*, 54 Cal. 94; *Eckhart v. State*, 5 W. Va. 515; *Cooley's Const. Lim.* 179.

1. *Stare Decisis.*—The decisions of the supreme court of the United States upon the construction of the Federal constitution or the laws of the Union are conclusive and binding upon all State tribunals. *Black v. Lusk*, 69 Ill. 70; *Lebanon Bank v. Mangan*, 28 Pa. St. 452.

And conversely, the judgment of the highest court of a State, that a statute has been enacted in accordance with the requirements of the State constitution, is conclusive upon the United States courts and will not be reviewed therein, when no Federal question is involved. *Atlantic & Gulf R. Co. v. Georgia*, 98 U. S. 359; *Dundee Mortgage Co. v. Parrish*, 24 Fed. Repr. 197; *North Bennington Bank v. Bennington*, 16 Blatch. (U. S. Cir.) 53. See *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175.

Where a statute has been declared unconstitutional, an inferior court is bound by the judgment, notwithstanding new reasons are set up against it. The presumption of law is that all the existing reasons were considered and held insufficient. *Wheeler v. Rice*, 4 Brewst. (Pa.) 129; *Palmer v. Lawrence*, 5 N. Y. 389.

2. *Norton v. Shelby Co.*, 118 U. S.

425; *Poindexter v. Greenhow*, 114 U. S. 270; *Strong v. Daniel*, 5 Ind. 34.

The secession ordinance of Louisiana, being a nullity, had no effect to prevent the judgment of its supreme court a few days after its passage. *Cannon*, 6 Wall. (U. S.) 443.

*Protection to Officers.*—An unconstitutional law can afford no justification for an officer acting under it. *A. Hammond*, 3 McLean (U. S. Cir.); *Poindexter v. Greenhow*, 114 U. S. 289. Compare *Commonwealth v. Combs*, 56 Pa. St. 436.

In *Sessums v. Bolts*, 34 Tex. 289, it was held that an act adjudged unconstitutional by the courts has no force and effect of law prior to such decision, so far as to protect officers who obey its mandates.

Although an act be unconstitutional and void it will yet operate as an act upon the party applying for and receiving it, and as notice to third parties. *Robinson v. Bank*, 18 Ga. 65; *F. v. Landram*, 5 Bush (Ky.) 230.

Although an act be unconstitutional the legislature may, by a subsequent act, direct the expenses incurred by the legislation to be paid. *People v. 64 Barb. (N. Y.) 229.*

*Effect of Repealing Clause.*—When an act is void for unconstitutionality, a clause repealing all acts or parts inconsistent with it repeals nothing. The former law remains unaffected. *State v. Detroit*, 14 Mich. 276; *State v. Crosse*, 11 Wis. 51; *Tims v. State*, 1 Ala. 165; *Shepardson v. Railroad*, 605; *Sullivan v. Adams*, 3 Gray 476; *Devoy v. Mayor*, 35 Barb. 264; *Childs v. Shower*, 18 Iowa 1. Compare *Meshmeier v. State*, 11 Ind. 1; *Ely v. Thompson*, 3 A. K. Mar. 1; *Harvey v. Virginia*, 18 Repr. (U. S.) 1.

3. *Pierce v. Pierce*, 46 Ind. 86.

intent of its framers and the people in adopting it. This intent is to be found in the instrument itself. If the words convey a definite meaning which involves no absurdity or contradiction with other parts of the instrument, then that meaning apparent on its face is to be adopted.<sup>1</sup> When a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new constitution, or into the constitution of another State, it must be presumed to have been adopted with a knowledge of that interpretation, and the courts will feel bound to adhere to it.<sup>2</sup> When the language of a provision in the constitution of a State is of doubtful import, the condition of the people and the history of the instrument itself are to be looked to in determining the meaning of the clause in question.<sup>3</sup> Constitutions are also to

1. *Hawkins v. Carroll Co.*, 50 Miss. 735; *Hills v. Chicago*, 60 Ill. 86; *Commonwealth v. Randall*, 10 Phila. (Pa.) 451; *People v. Potter*, 47 N. Y. 375; *Beardstown v. Virginia*, 76 Ill. 34. See *Cooley Const. Lim.* 55-57; 1 *Story on the Const.* § 400; *Newell v. People*, 7 N. Y. 97; *Den v. Reid*, 10 Pet. (U. S.) 524; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *Leonard v. Wiseman*, 31 Md. 204; *McAdoo v. Benbow*, 63 N. Car. 464.

It has been suggested that in construing a clause of a constitution, if a literal interpretation of the language involves any absurdity, contradiction, injustice, or extreme hardship the courts may deviate a little from the received sense and literal meaning of the words, and interpret the instrument in accordance with what appears to have been the intention of its framers. *Taylor v. Taylor*, 10 Minn. 107.

But in general a liberal construction of statutes, and a strict construction of constitutional provisions, is a safe and reasonable judicial policy. *Wolcott v. Wigton*, 7 Ind. 44.

**Popular Meaning Preferred.**—The words of the constitution are to be taken in their popular, natural, and ordinary meaning rather than in any technical sense, unless the context or the very nature of the subject indicates otherwise. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 188; *Green v. Weller*, 32 Miss. 678; *Settle v. Van Enrea*, 49 N. Y. 281; 1 *Story on the Const.* § 451; *Weill v. Kenfield*, 54 Cal. 111.

But where a word has acquired a fixed technical meaning in legal and constitutional history it is to be understood as used in that sense in a written constitution. *Cooley Const. Lim.* 59; 1 *Story Const.* § 453.

**Whole to be Considered.**—In the interpretation of a constitution the whole instrument must be examined to ascertain the sense in which the words in particular clauses were used. *Manly v. State*, 7

Md. 135; *Wolcott v. Wigton*, 7 Ind. 49; *People v. Purdy*, 2 Hill (N. Y.) 36; *Greencastle Twp. v. Black*, 5 Ind. 570; *Green v. Weller*, 32 Miss. 650; *Cooley Const. Lim.* 57.

**Expediency.**—On constitutional questions presenting grave doubts on account of the uncertainty of the language employed, broad considerations of expediency are not to be overlooked. *Baltimore v. State*, 15 Md. 376. Compare *Greencastle v. Black* 5 Ind. 557.

**Conflict to be Avoided.**—A construction which raises a conflict between parts of the constitution is not permissible when, by any reasonable construction, the parts may be made to harmonize. *People v. Wright*, 6 Colo. 92. But when the constitution speaks in plain language in reference to a particular matter the courts have no right to place a different meaning on the words employed, because the literal interpretation may happen to be inconsistent with other parts of the instrument in relation to other subjects. *Cantwell v. Owens*, 14 Md. 215.

2. *Atty.-Gen. v. Brunst*, 3 Wis. 787; *Ex parte Roundtree*, 51 Ala. 42; *People v. Coleman*, 4 Cal. 46; *Commonwealth v. Hartnett*, 3 Gray (Mass.), 450; *Hess v. Pegg*, 7 Nev. 23; *Leavenworth Co. v. Miller*, 7 Kans. 479; *Walker v. Cincinnati*, 21 Ohio St. 14; *Daily v. Swope*, 47 Miss. 367; *Jenkins v. Ewin*, 8 Heisk. (Tenn.) 456.

3. *Hamilton v. County Court*, 15 Mo. 3; *Kennedy v. Gies*, 35 Mich. 83; *People v. Fanchu*, 50 N. Y. 288; *Cronise v. Cronise*, 54 Pa. St. 255.

But when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument itself. *Chesapeake & Ohio R. Co. v. Miller*, 19 W. Va. 408; *Hamilton v. County Court*, 15 Mo. 3. See *Ex parte Jackson*, 14 Blatch. (U. S. Cir.) 245.



be construed in the light of the common law, and of the fact that its rules are still in force. Thus the familiar rule that a state contravention of the common law ought not to be extended by construction applies with equal force to a constitutional provision of that character.<sup>1</sup> The courts do not feel themselves authorized, unless in very extreme cases, to regard any provision of the constitution as merely directory and not mandatory.<sup>2</sup> Where the bill of rights and the constitution differ, the latter is to be regarded as the established limitation, or limited adoption, of the general principles previously declared.<sup>3</sup> It is also a general rule that where a constitution gives a general power, or enjoins a duty, it also, by implication, every particular power necessary for the execution of the one or the performance of the other.<sup>4</sup> A constitutional enactment should be construed to operate prospectively

**Debates of Convention.**—The debates of the convention that framed a constitution can seldom be referred to by the courts in expounding it. See *Taylor v. Taylor*, 10 Minn. 107; *Springfield v. Edwards*, 84 Ill. 626, 643; *Cooley Const. Lim.* 66.

The constitution is to be interpreted with reference to the previous legislation of the State, and powers always previously exercised by the legislature remain to them unless expressly or impliedly prohibited. *Baltimore v. State*, 15 Md. 375.

As to contemporaneous and practical construction, see *Cooley Const. Lim.* 67; 1 *Story on the Const.* chap. v.

1. *Brown v. Fifield*, 4 Mich. 322.

A constitutional provision declaring in general terms the adoption of the English common law should be deemed to adopt the common law only so far as it was in harmony with the existing institutions, and as its principles are applicable to the state of the country and the conditions of society. Such a provision does not oblige the courts to follow the English doctrine of ancient lights. *Powell v. Sims*, 5 W. Va. 1. See *Day v. State*, 7 Gill (Md.), 321.

Where, in the constitution, technical terms of law or jurisprudence are used, which are common to our law and the law of England, if there is a difference of signification in the two countries the meaning which they have in our country is to be preferred. *The Huntress, Davies*, (U. S. Dist.) 82.

2. *People v. Lawrence*, 36 Barb. (N. Y.) 177; *Cooley Const. Lim.* 74-83.

3. *Baltimore v. State*, 15 Md. 376. Compare *In re Dorsey*, 7 Port. (Ala.) 293.

The bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure

old principles against abrogation; they are conservatory institutions rather than reformatory. *Webster v. Bunbury*, 30 Mich. 201.

While the amendments to the United States constitution were intended primarily to be restrictive upon the powers of the general government and the State legislatures, yet they are declaratory of great principles of civil liberty which can be infringed neither by the federal nor the State governments. *Campanelli v. State*, 11 Ga. 353.

4. *Field v. People*, 2 Scam. 60; *McCulloch v. Maryland*, 4 Wh. (U. S.) 428; *United States v. Field*, 1 Cranch (U. S.), 358; 1 *Story on the Const.* §§ 430-435; *Cooley's Const. Lim.* 63.

But this rule is modified by authority that where the means for the execution of a granted power are also given, or different means or powers can be applied, either on account of convenience or of being more effectual. *People v. People*, 2 Scam. (Ill.) 79.

In a clause of a constitution granting powers the word "necessary" does not always mean "indispensable," but is often construed to signify a power of discretion. *Cotton v. Commissioner*, 11 Fla. 610.

The Federal government being limited to enumerated powers, the constitutionality of an act of Congress is to be tested by the grant of powers contained in the Federal constitution; but the State governments are presumed to be invested with general powers of legislation, and therefore, in determining whether an act of a State legislature is in violation of the constitution, the inquiry is directed to the limitations imposed on the legislature by the terms of the constitution. *In re Bryan*, 5 Tex. App. 93; *Logan v. State*, 10 Tex. 201.

unless the language employed manifests a clear intention to give it a retrospective effect.<sup>1</sup> The principle of *stare decisis* applies with especial force to the interpretation of constitutions.<sup>2</sup>

**4. Separate Provinces of Departments of Government.**—One of the most important features of American constitutional law is the care which has been taken to separate the legislative, judicial, and executive functions. The different classes of power have been apportioned to different departments, and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others.<sup>3</sup> But it is impracticable (and was not intended) that the separation of powers should be absolute and complete in all details.<sup>4</sup>

(a) *Encroachments of Legislative on Judicial.*—The distinction between legislative and judicial action is that the former establishes a rule which regulates matters and transactions occurring after its passage, the latter determines rights and obligations concerning matters and transactions which already exist or which have transpired prior to the exercise of the judicial power.<sup>5</sup> An act of the legislature which undertakes to determine questions of fact and law, affecting the rights of persons or property, is judicial in its

Tex. App. 306. See *infra*, § 6 of this title.

1 See *Allbyer v. State*, 10 Ohio St. 588; *State v. Barbee*, 3 Ind. 258; *State v. Thompson*, 2 Kans. 432; *Slack v. Railroad*, 13 B. Mon. (Ky.) 1; *State v. Macon County Court*, 41 Mo. 453; *Cooley's Const. Lim.* 62; *Black on Const. Prohibitions*, § 181. Compare *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9.

2. When the meaning of the constitution on a doubtful question has been once carefully considered and judiciously decided, every reason is in favor of a steady adherence to the authoritative interpretation; and especially so where the question is not simply as to the constitutionality of the law, but involves the validity of contracts and the rights of innocent parties, and in which the law is only one of the elements. *Maddox v. Graham*, 2 Met. (Ky.) 56. See *Seale v. Mitchell*, 5 Cal. 401; *Grubbs v. State*, 24 Ind. 295.

A construction placed upon a section of the constitution prescribing the mode of amending laws is not a rule of property within the principle that the supreme court ought not to overrule former decisions which constitute a rule of property, but only a rule of legislation. *Greencastle Turnpike Co. v. State*, 28 Ind. 382.

**State and Federal Courts.**—State courts are bound to conform their decisions to those of the supreme court of the United

States on all questions involving the construction of the Federal constitution. *Newmarket Bank v. Butler*, 45 N. H. 236; *Smoot v. Lafferty*, 2 Gilm. (Ill.) 383; *Bank of U. S. v. Norton*, 3 A. K. Marsh. (Ky.) 423; *Black v. Lusk*, 69 Ill. 70, *Lebanon Bank v. Mangan*, 28 Pa. St. 452. Compare *Padleford v. Mayor*, 14 Ga. 438.

The Federal courts follow the decisions of the highest court of a State in construing the constitution and laws of the State, unless they conflict with or impair the efficacy of some principle of the Federal constitution or of a Federal statute, or a rule of commercial or general law. *Norton v. Shelby Co.*, 118 U. S. 425.

3. *Cooley's Const. Lim.* 87; 1 Story on the Const. §§ 518-525; *Federalist*, No. 47; Montesquieu, *Esprit des Loix*, b. 11, c. 6; 1 Bl. Comm. 146. See an article "Are the Departments of Government Independent?" in *Am. Law Review*, March, 1887.

4. Story on the Const. § 525; *Baltimore v. State*, 15 Md. 376.

5. *Smith v. Strother*, 21 Repr. (Cal.) 106; *Merrill v. Sherburne*, 1 N. H. 204; *Bates v. Kimball*, 2 Chip. (Vt.) 77; *Newland v. Marsh*, 19 Ill. 382.

Nothing in the constitution of the United States forbids the legislature of a State to exercise judicial functions. *Satterlee v. Matthewson*, 2 Pet. (U. S.) 413.

Under the colonial charter of Connecticut, the legislature were not restrained from exercising judicial power, and were

character, and is therefore not a rightful subject of legislation.<sup>1</sup> The legislature has no constitutional power to control the action of the courts by revising, annulling, or attempting to regulate their judgments, or interfere with the adjudications they have duly and lawfully reached.<sup>2</sup> Declaratory laws, as such, are unconstitutional.

accustomed to grant appeals and new trials. *Calder v. Bull*, 2 Root (Conn.), 350.

1. *Ponder v. Graham*, 4 Fla. 23.

An act of the legislature directing the levy of a tax and payment out of it of specified demands of public creditors is not in the nature of judicial action, as involving a decision in favor of the validity of the demands, and being therefore beyond the power of the legislature, but is in the nature of an admission of liability and tender of a mode of payment by the executive power representing the party indebted (the public), and is valid. *McLaughlin v. Commissioners*, 7 S. Car. 375; *Greene's Estate*, 4 Md. Ch. 349; *People v. San Francisco*, 11 Cal. 206.

Where the power of the State to alter, amend, or revoke the charter of a private corporation is made to depend on the happening of some event, such as non-user or abuse of its privileges, the determination of the question, whether the circumstances of the particular case are such as to render legitimate the exercise of this power, belongs in the first instance to the legislature, and not to the courts. *Erie & Northeast R. Co. v. Casey*, 26 Pa. St. 302; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; *Lothrop v. Stedman*, 42 Conn. 583; *McLaren v. Pennington*, 1 Paige (N. Y.), 102; *Crease v. Babcock*, 23 Pick. (Mass.) 344; *Black on Const. Prohibitions*, § 38. *Compare* *Flint Plank Road Co. v. Woodhull*, 25 Mich. 99; *State v. Noyes*, 47 Me. 189; *Canal Co. v. Railroad Co.*, 4 Gill & J. (Md.) 122; *Regents v. Williams*, 9 Gill & J. (Md.) 365; *Allen v. Buchanan*, 9 Phila. (Pa.) 283; *Cooley Const. Lim.* 106.

The legislature does not exercise judicial power in declaring what causes "shall" entitle a party to transfer a case from one court to another of co-ordinate jurisdiction, if it leaves the ascertainment of such cause for judicial determination. *Ex parte Hickey*, 52 Ala. 228.

The authority conferred on the Senate to try contested elections is not "judicial power" within the constitutional requirement that the judicial power of the State shall be vested in the courts. *State v. Harmon*, 31 Ohio St. 250.

2. *Northern v. Barnes*, 2 Lea (Tenn.), 603; *Mayor v. Horn*, 26 Md. 194; *Ex parte Low*, 24 W. Va. 620, Opinion of the

Supreme Court, *In re Dorr*, 3 B. 299.

A private act of the legislature providing that a decision of the supreme court quashing an order for the removal of a pauper, shall not be conclusive as to the question of settlement, which act was passed under the erroneous idea that such decision would otherwise be conclusive, is not unconstitutional but merely supererogatory. *West Buffalo v. West*, 8 Pa. St. 177.

An act providing for a graduated reduction from the term of imprisonment for which the prisoner is sentenced to the State penitentiary, as a reward for good conduct, is an interference with the judgment of the court sentencing the criminal, and therefore unconstitutional. *Commonwealth v. Halloway*, 42 Pa. St. 152. See *State v. Fleming*, 7 Humph. (Tenn.) 152.

**Legislature Cannot Grant New Trial.** The legislature does not possess the constitutional power to grant a new trial in an action already determined in a court of law. *Young v. State Bank*, 4 N. H. 301; *Merrill v. Sherburne*, 1 N. H. 301; *Lewis v. Webb*, 3 Me. 326; *Dunham v. Lewiston*, 4 Me. 140; *Bates v. Kimball*, 2 Chip. (Vt.) 77; *Staniford v. Barlow*, 1 Vt. 314; *De Chastellux v. Child*, 15 Pa. St. 18; *Taylor v. Platt*, 1 R. I. 324; *Miller v. State*, 8 Gill (Md.) 145; *Weaver v. Lapsley*, 43 Ala. 145; *Lanier v. Gallatas*, 13 La. Ann. 145; *Beebe v. State*, 6 Ind. 515; *Davis v. Nasha*, 21 Wis. 491; *Cooley Const. Lim.* 95; *Black on Const. Prohibitions*, § 38.

**Writ Appeal.**—The legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error, in cases where no such right existed when judgment was pronounced or when the right has been definitely forfeited. *McCabe v. Emerson*, 18 Pa. St. 147; *Lewis v. Webb*, 3 Me. 326; *Hill v. Derland*, 3 Vt. 506; *Burch v. Newbould*, 10 N. Y. 374; *Prout v. Berry*, 2 Gill (Md.) 147; *Miller v. State*, 8 Gill (Md.) 147. *Compare* *Converse v. Burrows*, 2 B. 229, *Wheeler's Appeal*, 45 Conn. 30.

But a statute which takes away the right to a future appeal in an action pending and undetermined when the statute takes effect, is not unconstitutional. *Gibson v. Coon*, 1 N. Y. 536; *Ex parte McCabe*, 18 Pa. St. 147.

It is well settled that an act of the legislature declaring the interpretation to be placed on a previous statute is not obligatory upon the courts with respect to the application of the first statute to transactions which occurred, or rights of action which accrued prior to the second.<sup>1</sup> It is constitutional for the legislature to authorize a guardian or other trustee to sell the real estate of his ward under the direction of the courts, such not being a judicial act.<sup>2</sup> Unless the State constitution forbids, the granting of di-

<sup>1</sup> 7 Wall. (U. S.) 506; *Baltimore & Potomac R. Co. v. Grant*, 98 U. S. 398.

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(Va.) 105; *Stewart v. Davidson*, 10 Sm. & Mar. (Miss.) 351; *Taylor v. Place*, 4 R. I. 324. Compare *Braddee v. Brownfeld*, 2 W. & S. (Pa.) 271.

**Resolving Injunctions.**—Where a court of competent jurisdiction had enjoined the collection of certain gravel road assessments, *held* that it was not competent for the legislature to authorize the collection of said assessments. *Searcy v. Patriot Turnpike Co.*, 79 Ind. 274.

An act which prescribes that no injunction shall be issued against the commissioners of certain public works is invalid. *Guy v. Hermance*, 5 Cal. 73.

**Rules of Pleading.**—The legislature, in undertaking to regulate the rules of pleading, does not usurp judicial functions. *Whiting v. Townsend*, 57 Cal. 515.

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1 Boom Co. *v.*  
Reiser *v. Saving*  
daley *v. Philadel-*  
equindre *v. Wil-*  
cManning *v. Far-*  
n Building Assn.  
, Gorman *v. Sink-*  
s, 9 Va. L. Journ.  
6 Tex. App. 345;  
Humph. (Tenn.)

165; *Cooley Const. Lim.* 93; *Black Const. Prohibitions*, § 194. Compare *Baker v. Herndon*, 17 Ga. 568.

But a statute construing and expounding a prior act may be valid so far as it relates only to future transactions. *Stebbins v. Pueblo Co.*, 2 McCrary (U. S. Cir.), 196; *Cambridge v. Boston*, 130 Mass. 357. Compare *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 498.

The construction of statutes being exclusively a judicial power, the attempt of a legislature to exercise such a power, by adding as a proviso to a law that "nothing in this act shall be construed contrary to the provisions of the constitution," is an unconstitutional assumption of the functions of the judiciary. *Ex parte Blanchard*, 9 Nev. 101.

It is not within the province of the legislature to prescribe what instructions a court shall give in a murder case, unless the legislature has first embodied such instructions in an act as the law of the land. *State v. Hopper*, 71 Mo. 425.

*Mason v. Wait*, 4 Scam. (Ill.) 127; *Rice v. Parkman*, 16 Mass. 328; *Cochran v. Van Surley*, 20 Wend. 373; *Carroll v. Olmstead*, 16 Ohio, 251; *Wilkinson v. Leland*, 2 Pet. (U. S.) 660; *Watkins v. Holman*, 16 Pet. (U. S.) 25, 60. Compare *Jones v. Perry*, 10 Yerg. (Tenn.) 59.

"If the party standing in the position of trustee applies for permission to make the sale, for a purpose apparently for the interest of the *cestui que trust*, and there are no adverse interests to be considered and adjudicated, the case is not one which requires judicial action, but it is optional with the legislature to grant the relief by statute, or to refer the case to the courts for consideration, according as the one course or the other, on considerations of policy, may seem desirable." *Cooley Const. Lim.* 98.

But the legislature cannot authorize a person who does not occupy a fiduciary relation to the owner to make sale of real estate, to satisfy demands which he asserts, but which are not judicially determined. *Lane v. Dorman*, 3 Scam. (Ill.) 242; *Cash, Appellant*, 6 Mich. 193; *Rozier*

vances by the legislature is not such an exercise of judicial authority as will render them invalid.<sup>1</sup>

(b) *Encroachments of Judicial on Legislative.*—The courts cannot assume the settlement of such questions as belong properly to a political or legislative department.<sup>2</sup> The correctness or incorrectness of a legislative opinion whereon an act is founded is not a question within the province of the court to determine; the court must assume the fact to be as the legislature states or assumes it to be. But if the judiciary cannot assume legislative or political functions, it is equally true that the law-making body cannot impose legislative powers or duties upon them.<sup>3</sup> Courts of justice, which can only operate only upon and under the law, cannot give vitality to laws which have become by paramount authority inoperative and void.<sup>5</sup>

v. Fagan, 46 Ill. 404; Cooley Const. Lim. 104.

1. 1 Bishop on Mar. & Div. §§ 680-686; Cooley Const. Lim. 109 *et seq.*; Starr v. Pease, 8 Conn. 541; Crane v. Meginnis, 1 Gill & J. (Md.) 463; Maguire v. Maguire, 7 Dana (Ky.) 181; Hull v. Hull, 2 Strob. Eq. (S. Car.) 174; West v. West, 2 Mass. 223; Townsend v. Griffin, 4 Harr. (Del.) 440; Holmes v. Holmes, 4 Barb. (N. Y.) 295; Levins v. Sleator, 2 Greene (Iowa), 604; Cabell v. Cabell, 1 Met. (Ky.) 319. Compare Ponder v. Graham, 4 Fla. 23; Wright v. Wright, 2 Md. 429; State v. Fry, 4 Mo. 120.

2. The question, which of two opposing governments, each claiming to be the rightful government of the State, is the legitimate power, is not a question to be decided by the judicial tribunals, but is to be determined by the political department. Luther v. Borden, 7 How. (U. S.) 1.

A bill was filed by the State of Georgia against the secretary of war, the general of the army, and the commander of the third military district to restrain them from executing the "Reconstruction Acts" of March 2 and March 23, 1867, on the ground that such execution would annul and abolish the existing State government of Georgia and establish another and different one in its place. The bill also alleged the ownership by Georgia of certain real and personal property, including the State capitol and executive mansion, and that the execution of the acts would deprive the plaintiff of the possession and enjoyment of its property. *Held*, that the rights thus sought to be protected being rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with its constitutional powers and privileges, the questions presented were political questions merely, belonging to the two great political departments of the government, and not the subject of judicial cogni-

zance. Georgia v. Stanton, 6 (U. S.) 50.

The legislature alone has the power to determine whether an emergency has arisen requiring the creation of a law in case of war, to repel invasion, to suppress insurrection. People v. Scheco, 27 Cal. 175; Franklin v. Board of Examiners, 23 Cal. 173.

The courts have no authority to determine whether peace or war exists. United States v. Packages, 11 Am. L. 419.

Nor whether a foreign country has become an independent state. Kennell v. Chambers, 14 How. (U. S.) 38; G. v. Hoyt, 3 Wall. (U. S.) 246; Ro. Himely, 4 Cranch (U. S.), 241.

Nor can they pass upon the right of Indians to be recognized as a tribe. Texas Indians, 5 Wall. (U. S.) 737; United States v. Holliday, 3 Wall. (U. S.) 37.

When a legislative grant of a bridge or ferry franchise is made on the ground of public convenience, the correctness of the decision concerning the existence of public convenience cannot be reviewed by the courts, this being a matter of political regulation, not of judicial determination. Fall v. Sutter, 21 Cal. 1. See People v. Kelly, 5 Abb. New (N. Y.) 383.

But the eligibility of the person to the office of lieutenant-governor is such a political question that it is not within the jurisdiction of the courts. State v. Gleason, 12 Fla. 190.

3. People v. Lawrence, 36 Bar. (N. Y.) 177. See United States v. Wil. 5 McLean (U. S. Cir.), 133.

4. Hardenburgh v. Kidd, 10 Cal. 1. Tillman v. Cocke, 9 Baxt. (Tenn.) 1. Smith v. Strother, 21 Repr. (Cal.) 1. McLean Co. v. Bank, 81 Ky. 254. Speed v. Crawford, 3 Metc. (Ky.) 2.

5. Austin v. Sandel, 19 La. Ann. 1. See State v. Hardy, 7 Neb. 377.

(c) *Encroachments on Executive Department.*—Such powers as are specially conferred by the constitution upon the executive department, or upon any designated officer, the legislature cannot require or authorize to be performed by any other officer or authority, and from those duties which the constitution requires of him he cannot be excused by law.<sup>1</sup> Where the constitution confers the power of appointing to office upon the executive department, appointments cannot be made by legislative enactment.<sup>2</sup> It is

1. Cooley's Const. Lim. 115; Attorney-General v. Brown, 1 Wis. 522.

The supreme court of a State, without assuming to direct the executive in the discharge of his functions, nor any control in such discharge, has yet such jurisdiction over the inhabitants of the State that it will prevent any one of them from usurping the functions or intruding into the office of the executive, and punish such usurpation. Attorney-General v. Barstow, 4 Wis. 567.

**Ministerial Duties.**—Where a duty is devolved upon the chief executive of the State, rather than upon an inferior officer, it will be presumed to have been done because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were put upon an officer chosen for inferior duties; and such a duty can seldom be considered as purely ministerial. People v. Governor, 29 Mich. 320.

**Mandamus to Governor.**—The chief executive officer of a State, in the exercise of those political or executive powers or functions which are confided to his discretion by the constitution, is entirely independent of the supervision of the judiciary; and the latter cannot use its process either to enjoin or prohibit the performance of such executive acts or to regulate the manner of their exercise. Com. v. Dennison, 24 How. (U. S.) 66; Astrom v. Hammond, 3 McLean (U. S. Cir.) 107; In re Dennett, 32 Me. 508; Mauran v. Smith, 8 R. I. 192; State v. Governor, 1 Dutch. (N. J.) 331; Miles v. Bradford, 22 Md. 170; Magruder v. Swan, 25 Md. 173; Groome v. Gwinn, 43 Md. 572; Catten v. Ellis, 7 Jones (N. Car.) 545; State v. Champlin, 2 Ball. (S. Car.) 220; Low v. Towns, 8 Ga. 360, Tennessee, etc., R. v. Moore, 36 Ala. 371; State v. Warmoth, 22 La. Ann. 1; s. c., 2 Am. Rep. 712; State v. Johnson, 28 La. Ann. 932; Houston, etc., Co. v. Randolph, 24 Tex. 317; Turnpike Co. v. Brown, 8 Baxt. (Tenn.) 490; State v. Moffit, 5 Ohio, 358; State v. Chase, 5 Ohio St. 528, People v. Bissell, 19 Ill. 229; Peo-

ple v. Hatch, 33 Ill. 9; People v. Yates, 40 Ill. 126; Bartley v. Governor, 39 Mo. 388; In re Woodson, 58 Mo. 369; People v. Governor, 29 Mich. 320; s. c., 18 Am. Rep. 89; Chamberlain v. Sibley, 4 Minn. 309; County Treasurer v. Dike, 30 Minn. 363; State v. Whitcomb, 28 Minn. 50; Middleton v. Low, 30 Cal. 596; Harpending v. Haight, 39 Cal. 189; s. c., 2 Am. Rep. 432; Chumaseo v. Potts, 2 Mont. 242; High on Extr. Leg. Rem. § 118; Moses on Mandamus, 80.

In several of the States it is held that *mandamus* will lie against the governor to compel the performance of acts falling within the scope of his duties, which are not political or executive in their nature, but merely ministerial, and which do not rest in his discretion, but in simple obedience to the mandates of positive law. In such case he is regarded as merely the ministerial agent of the law. Marbury v. Madison, 1 Cranch (U. S.), 137; Board of Liquidation v. McComb, 92 U. S. 531; Magruder v. Swan, 25 Md. 212; Groome v. Gwinn, 43 Md. 572; Catten v. Ellis, 7 Jones (N. Car.) 545; Tennessee, etc., R. v. Moore, 36 Ala. 380; State v. Moffit, 5 Ohio 362; State v. Chase, 5 Ohio St. 528; Chamberlain v. Sibley, 4 Minn. 312; Middleton v. Low, 30 Cal. 596, Harpending v. Haight, 39 Cal. 189; Chumaseo v. Potts, 2 Mont. 242.

But in other States the view obtains that *mandamus* will not lie against the governor in any case, even in regard to ministerial duties. Such a practice, it is said, would rob one branch of the government of its essential and entire independence. In re Dennett, 32 Me. 508; Mauran v. Smith, 8 R. I. 192, State v. Governor, 1 Dutch. (N. J.) 331; Low v. Towns, 8 Ga. 372; State v. Warmoth, 22 La. Ann. 1; Turnpike Co. v. Brown, 8 Baxt. (Tenn.) 490; People v. Bissell, 19 Ill. 233; People v. Yates, 40 Ill. 126; State v. Governor, 8 Mo. 39; Sutherland v. Governor, 29 Mich. 320.

8. Wood v. United States, 15 Ct. of Cl. 151; State v. Kennon, 7 Ohio St. 546; Davis v. State, 7 Md. 161; Taylor v. Commonwealth, 3 J. J. Marsh. (Ky.) 404. See Baltimore v. State, 15 Md.

not competent for the legislature to interfere with or control power pertaining to the executive to grant pardons to criminals.

The executive is bound to give effect to the laws which regulate his duties, and in so doing must necessarily give a construction to them.<sup>2</sup> The governor cannot be compelled by attachment to close in aid of an investigation before a grand jury secrets of business of the executive department which he does not think fit to reveal.<sup>3</sup>

**5. Executive Powers.**—The power of appointing and removing subordinate executive officers is generally, by the American constitutions, vested in the chief executive.<sup>4</sup> Where the govern

376; Response to Governor, 58 Mo. 369.

The legislature may change the time of the election of a successor of an officer, so as to prolong the term of the incumbent, who will hold over until his successor is appointed. This does not amount to an "appointment to office." *People v. Batchelor*, 22 N. Y. 128.

For the legislature to name, in an act of incorporation of a city, the persons who shall constitute trustees to organize a city government and conduct the affairs thereof through the first year, is not an assumption of executive power. *State v. Rosenstock*, 11 Nev. 128.

1. *Haley v. Clark*, 26 Ala. 439; *Ogle-tree v. Dozier*, 59 Ga. 800; *Butler v. State*, 97 Ind. 373. See *People v. Bircham*, 12 Cal. 50.

The power given by Congress to the secretary of the treasury to remit penalties incurred by a steamship for carrying too many passengers is no invasion of the pardoning power belonging to the president. *The Laura*, 114 U. S. 417.

A statute authorizing the board of managers of the penitentiary to establish rules and regulations under which certain prisoners then or thereafter under sentence, who had served the minimum term provided by law for the crime for which they were convicted, might be allowed to go upon parole outside the buildings and inclosures, but to remain while on parole in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of the institution, is not an encroachment upon the executive power to grant pardons, reprieves, and commutations. *State v. Peters*, 21 Repr. (Ohio) 591.

2. *United States v. Lytle*, 5 McLean (U. S. Cir.), 9; *State v. Hallock*, 16 Nev. 373.

A ministerial officer cannot be allowed to decide upon the validity of a law, and thus exempt himself from responsibility for disobedience to the command of a

peremptory *mandamus*, his disobedience to the law being the cause of his inability to obey the command of the court. *People v. Solomon*, 54 Ill. 39.

3. *Hartman's Appeal*, 85 Pa. St.

4. **Appointment to Office**—The U. S. Const. art. 2, § 2, allowing the President to fill "vacancies which may happen during the recess of the Senate," applies to those happening during the session continuing after adjournment. *Johnson v. Farrow*, 4 Woods (U. S. Cir.), 491.

A commission issued during the recess of the Senate, to fill a vacancy in an office, continues until the end of the session of Congress, unless sooner determined by the President. *In re Alab. Marshalship*, 20 Fed. Repr. 379.

An appointment by the governor is an "election" within the meaning of art. 6, § 6, of the Kentucky constitution. *Speed v. Crawford*, 3 Met. (Ky.) 207.

Under a statute which empowers the governor, whenever a vacancy shall occur in the office of supreme judge, to call an election after two months' notice, to appoint a person to fill the vacancy until the election of a successor, the governor cannot appoint a person to fill the unexpired term of a resigning judge. *Calloway v. Sturm*, 1 Heisk. (Tenn.) 137.

An appointment to office by the executive is complete upon delivery of the commission. *Weatherbee v. Cazin*, 20 Cal. 503. See *Marbury v. Madison* (U. S.), 137.

**Removal from Office.**—The President has power to supersede or remove an officer of the army or navy by the appointment, by and with the advice and consent of the Senate, of his successor. *Blakely v. United States*, 103 U. S. 227.

Where the tenure of an officer appointed by the governor is not regulated by law, and there is no provision for his removal, he is removable only at the governor's pleasure. *Keenan v. Perry*, 10 Tex. 253.

And in such case the governor



has the constitutional prerogative of approving or objecting to the acts of the legislature, he must exercise his right during the session of that body; his approval of an act after the adjournment of the legislature is a nullity.<sup>1</sup> The power of the executive to pardon from a fine, penalty, or forfeiture, after a judgment by which the right of an informer to share in the amount has become fixed, does not extend to remit the informer's share; he can discharge the share of the government only.<sup>2</sup> A pardon granted to one who is

not specify the causes of removal; his decision is final. *Keenan v. Perry*, 24 Tex. 253.

Under a constitutional provision that the governor "may remove . . . all civil officers who received appointment from the executive for a term of years," an officer nominated by the governor and confirmed by the senate may be so removed. *Harman v. Harwood* 58 Md. 1.

The constitutional right of the appointing power to remove at pleasure is not abridged by an act providing for removal in a certain way, or for a certain cause. *People v. Hill*, 7 Cal. 97.

But the governor has no power to revoke a commission once regularly issued to an officer who is not removable at his pleasure, whether the appointing power be in the governor or elsewhere. *Ewing v. Thompson*, 43 Pa. St. 372. See *People v. Jewett*, 6 Cal. 291.

1. *Hardee v. Gibbs*, 50 Miss. 802; *Fowler v. Peirce*, 2 Cal. 165. Compare *Solomon v. Cartersville*, 41 Ga. 157.

Under the constitution of New York the governor can approve a bill after the adjournment of the legislature, if within ten days from the time it was presented to him. *People v. Bowen*, 21 N. Y. 517.

Where the constitution requires that all bills be sealed with the great seal of the State before being presented to the governor, he may refuse to consider a bill presented without being thus authenticated. *Hamilton v. State*, 61 Md. 14.

A bill is not laid before the governor for his revision, nor presented to the governor, within the meaning of the constitutional provisions, by being sent from the senate or house to the secretary of the commonwealth; it must be laid before the governor personally. Opinion of the Judges, 99 Mass. 636.

In computing the ten days allowed to the governor in which to veto a bill, the first day should be excluded and the last day included. *Beaudeau v. Cape Girardeau*, 71 Mo. 392; *Iron Mountain Co. v. Haight*, 39 Cal. 540.

**Return of Bill.**—The "return" of a bill by the executive to the branch of the legislature in which it originated, in order

to be within the spirit of the usual constitutional provision relating thereto, must be such a return as places the bill beyond the executive control, and in the possession, actual or potential, of the house. If the executive messenger is unable to deliver it to the house while in session, in consequence of an adjournment for the day on the last day allowed for its return by the governor, he should deliver it to some officer or other suitable person connected with the house. If redelivered to the governor and retained by him, no such return has been made as will prevent its becoming a law. *Harpending v. Haight*, 39 Cal. 189, 198.

2. *United States v. Harris*, 1 Abb. (U. S.) 110; *Cook v. Middlesex*, 3 Dutch. (N. J.) 637. Compare *United States v. Thomasson*, 4 Biss. (U. S. Cir.) 336.

Under the clause of the constitution giving the president power to grant reprieves and pardons, he may grant a conditional pardon or commutation of sentence. *Ex parte Wells*, 18 How. (U. S.) 307.

The power to pardon does not carry with it the power of reprieve. *Ex parte Howard*, 17 N. H. 545.

The recital of a specific, distinct offence in a pardon by the President limits its operation to that offence, and such pardon does not embrace any other offence for which separate penalties and punishments are provided. *Ex parte Weimer*, 8 Biss. (U. S. Cir.) 321. Compare *United States v. Cullerton*, 8 Biss. (U. S. Cir.) 166.

**The Effect of a Pardon** granted by the governor is to relieve the accused of the punishment annexed to the offence for which he was convicted, and of all penalties and consequences, except political disabilities, growing out of the conviction and sentence. *Edwards v. Commonwealth*, 17 Repr. (Va.) 286.

The general assembly alone can restore the privilege of voting to one convicted of an infamous crime; the governor's pardon has not that effect. Opinion of Judges, 4 R. I. 583.

**Delivery of Pardon.**—A pardon issued by the President is to be considered as a



*de facto* governor is valid irrespective of his not having a perfect title or evidence of title to the office.<sup>1</sup> The president as commander in chief of the army and navy may establish rules and regulations for their government; and the rules and orders made and issued by the secretary of war and of the navy are to be considered as emanating from him.<sup>2</sup> He is also invested by the constitution with the power to make treaties with foreign nations with the concurrence of the senate.<sup>3</sup> The government has all the rights of individuality in respect to depredations committed on its property, and in the absence of a statute imposing upon any particular officer the enforcement of these rights, such enforcement is *ex necessitate rei* the duty of the executive department.<sup>4</sup> The president speaks

the deed, requiring delivery, either to the prisoner himself or to the prison-keeper having him in custody, in order to its completion. It may be revoked, even after it has been put in the marshal's hands to be delivered, the marshal being in relation thereto merely the President's messenger. *Matter of De Puy*, 3 Ben. (U. S. Dist.) 307.

**Recommendation to Mercy.**—What consideration should be given to a jury's written recommendation to mercy in a capital case, received from the judges by the governor and council, in passing upon an application for a commutation of the sentence, does not depend upon any question of law, nor upon any precedents from which any rule or principle of law can be derived, but upon a question of fact, the determination of which rests exclusively in the discretion of the governor and council. *Opinion of the Justices*, 120 Mass. 600.

1. *Ex parte Norris*, 8 S. Car. 408.

A legislative enactment, signed by the governor, remitting the sentence imposed in a criminal case, is equivalent to a pardon. *People v. Stewart*, 1 Idaho, N. S. 546.

2. *United States v. Eliason*, 16 Pet. (U. S.) 291; *United States v. Freeman*, 3 How. (U. S.) 556.

A declaration of war by Congress does not imply an authority to the president to extend the limits of the United States by conquering the enemy's country. *Fleming v. Page*, 9 How. (U. S.) 603.

The making by the president of rules and regulations for calling forth and drafting the militia is not the exercise of a power strictly and exclusively legislative. *In re Griner*, 16 Wis. 423.

The president's order authorizing the arrest, wherever found within the jurisdiction of the United States, of persons absconding themselves to avoid being drafted, was a legal and valid order. *Al-*

*len v. Colby*, 47 N. H. 544. See *v. Seward*, 40 Barb. (N. Y.) 563.

The president cannot revoke the sentence of a former president confirming the sentence of a court-martial. *Runkle v. United States*, 19 Ct. of Cl. 396.

**Suspension of Habeas Corpus.**—The power of suspending the writ of *habeas corpus*, under the constitution of the United States, is a legislative power, and is vested in Congress, and the president has no power to suspend the privilege of that writ. *In re Kemp*, 16 Wis. 35; *Ex parte Merryman*, Taney's Decision (U. S.); *McCall v. McDowell*, 1 Abb. (U. S.) 212; *Ex parte Field*, 5 Blatch (U. S.) 63. See *Griffin v. Wilcox*, 21 Ind. 2. Story on the Const. § 1342, note.

3. **Treaties**—This power "embraces all sorts of treaties: for peace or war, for commerce or territory, for alliances, succors, for indemnity, for injuries, for payment of debts, for the recognition and enforcement of principles of public law, for any other purposes which the political interests of independent sovereigns may dictate in their intercourse with each other." 2 Story on Const. § 1508.

The construction of a treaty made by the executive department will be followed by the courts when such construction is not repugnant to the language and purpose of the treaty. *Castro Uriarte*, 16 Fed. Repr. 93.

A treaty may be superseded by a subsequent act of Congress. *The Cherokee Tobacco*, 11 Wall. (U. S.) 616; *Clinton Bridge*, 1 Woolw. (U. S.) 150; *United States v. Tobacco Farmers*, 1 Dill. (U. S. Cir.) 264.

4. *Stephenson v. Little*, 10 Mich. 403; *State v. Dubuclet*, 22 La. Ann. 602.

The governor cannot employ counsel to represent the State in a suit, nor give such counsel a lien on the judgment recovered. *Compton v. State*, 30 Ind. 601; *Randall v. State*, 16 Wis. 340.

acts through the heads of departments in reference to the business committed to them.<sup>1</sup>

**6. Nature and Boundaries of Legislative Power.**—The people of a State, in creating by their organic law a legislative department of government, confer upon it the whole of their inherently sovereign and uncontrolled power of legislation, except in so far as they have delegated this power in respect to certain subjects and under certain restrictions to the Congress of the United States, and except also in so far as they contemporaneously impose checks and limits upon the legislative authority. Hence the legislature of a State may enact any law (not infringing upon the other departments) of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, in the constitution of the United States or of that State. In other words, the constitutions are to be considered as limitations upon the legislative power of the State, not as grants of power.<sup>2</sup> The restric-

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Kendall v. United  
) 524. See 2 Story

27 Barb. (N. Y.) 593; *Taylor v. Porter*, 4  
Hill (N. Y.), 144; *Cochran v. Van Surlay*,  
20 Wend. (N. Y.) 365; *Page v. Allen*, 58  
Pa. St. 338; *Philadelphia v. Field*, 58 Pa.  
St. 320; *Commonwealth v. Drewry*, 15  
Gratt. (Va.) 1; *State v. Gutierrez*, 15 La.  
Ann. 190; *Leavenworth Co. v. Miller*, 7  
Kans. 479; *Walker v. Cincinnati*, 21 Ohio  
St. 14; *Lafayette, etc., R. Co. v. Geiger*,  
34 Ind. 185; *Mason v. Wait*, 4 Scam. (Ill.)  
134; *Sears v. Cottrell*, 5 Mich. 251;  
*Bushnell v. Beloit*, 10 Wis. 195; *People*  
*v. Coleman*, 4 Cal. 46; *People v. Rogers*,  
13 Cal. 159; *Pattison v. Yuba*, 13 Cal.  
175; *Smith v. Judge*, 17 Cal. 547; *Cooley*  
*Const. Lim.* 87; *Black on Const. Prohi-*  
*bitions*, § 174.

An act of Congress organizing a Terri-  
torial government is to be regarded as  
the constitution of the Territory. But it  
differs from the constitution of the State  
governments in this, that the former con-  
tains a grant of powers, while the latter  
are restrictions of power primarily pos-  
sessed. *Ponder v. Graham*, 4 Fla. 23.

**Distinguished from Federal Constitution.**  
—The distinction between the United  
States constitution and the State consti-  
tution is, that the former confers upon  
Congress certain specified powers only,  
while the latter confers upon the legis-  
lature all legislative power. In the one  
case the powers specifically granted  
can only be exercised; in the other all  
legislative powers not prohibited. *Peo-*  
*ple v. Flagg*, 46 N. Y. 401; *Page v.*  
*Allen*, 58 Pa. St. 338.

**Continued Exercise of Power** —The con-  
stant exercise of a power by the legisla-  
ture, from the adoption of the constitu-  
tion to the present time, ought to be  
deemed almost conclusive evidence of its

II, in case of an officer acting under  
the president, his authority is simply  
ministerial, he is liable for an excess or  
misuse of authority; but when his au-  
thority is discretionary he is not liable.  
*Droecker v. Solomon*, 21 Wis. 621.

The approval of the secretary of the  
treasury is an indispensable condition to  
the validity of a sale made by the solicitor  
of the treasury of lands acquired by the  
United States in payment of debts; and  
the purchaser thereof is not bound to ac-  
cept a deed without such approval. *Unit-*  
*ed States v. Jonas*, 19 Wall. (U. S.), 598.

A decision by the governor of a State  
that, in accordance with the decision of  
the appellate court on a similar law, a  
certain portion of a tax law was uncon-  
stitutional, and directing the auditor, who  
had oversight of the assessors, to instruct  
them to disregard that portion, is bind-  
ing on auditor and assessors. *State v.*  
*Buchanan*, 24 W. Va. 362.

8. *Concord R. Co. v. Greeley*, 17 N. H.  
47; *Thorpe v. Railroad*, 27 Vt. 142; *People*  
*v. Draper*, 15 N. Y. 532; *Leggett v. Hunt-*  
*er*, 19 N. Y. 445; *People v. Supervisors*,

tions upon legislative power embodied in the State constitution will be found treated under their appropriate heads throughout this title. The constitution of the United States is the supreme law of the land, and State legislation is subject to its prohibitions and limitations.<sup>1</sup> Treaties also are supreme law, and their

rightful possession by that body. *State v. Mayhew*, 2 Gill (Md.), 487.

**Implied Prohibitions.**—It is not true that the inhibitions of the constitution must be always express; they are equally effective when they arise by implication. The remark of Lord Bacon, that "as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated," expresses a principle of the common law applicable to the constitution. *Page v. Allen*, 58 Pa. St. 338.

**Not Lost by Non-User.**—The powers of government are never lost by non-user. Thus the fact that a State legislature does not exercise a reserved power of regulating the tolls charged by a railroad company, for twenty years after granting the charter, does not impair the power. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

All the duties or powers of any of the departments not disposed of or distributed to particular officers of that department are left to the disposal of the legislature. *Ross v. Whitman*, 6 Cal. 361.

**Necessary Powers.**—Where a clause of the State constitution allows the legislature to make "all such laws as may be necessary to carry this constitution into effect," the question of the necessity is within the legislative discretion. *State v. Shields*, 4 Mo. App. 259.

1. The laws of a State may be thus graduated with reference to their authority: (1) The constitution of the United States; (2) treaties; (3) laws of the United States; (4) the constitution of the State; (5) the statutes of the State; (6) provisional acts in force at the adoption of the State constitution, and not repugnant to any of the preceding; (7) the common law of England and such of the statute laws as were usually in force before the Revolution, with the foregoing limitation. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194.

The States are not debarred from the exercise of any power possessed by them prior to the adoption of the Federal constitution, unless the exercise of such power is expressly or by necessary implication prohibited by the constitution, or comes practically in collision with the exercise of some power delegated to the general government. *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507.

**Bills of Credit** may not be emitted by any State. Const. U. S. art. 1, § 10.

To constitute a bill of credit, within the meaning of the constitution, it must be issued by a State, involve the faith of the State, and be designed to circulate money on the credit of the State for the ordinary uses of business. *Bank of Kentucky*, 11 Pet. (U. S.) 518; *Craig v. Missouri*, 4 Pet. (U. S.) 435; 2 Story on the Const. §§ 1358-1363.

Bills issued by a banking corporation which has a capital paid in, and which is sued upon its debts, are not to be considered bills of credit, even though the corporation owns the entire stock, the legislature elects the directors, the faith of the State is pledged for the redemption of the bills, and they are made receivable for the payment of public dues. *Darrington v. State of Kentucky*, 11 Pet. (U. S.) 257; *How. (U. S.) 12*; *Briscoe v. Bank of Kentucky*, 11 Pet. (U. S.) 257; *v. Arkansas*, 15 How. (U. S.) 333; *Woodruff v. Trapnall*, 10 How. (U. S.) 205; *Baily v. Milner*, 35 Ga. 330; *National Bank v. Mahan*, 21 L. 751.

Bills of credit, as contemplated by the constitution, are such as are drawn upon the State upon the general credit thereof, where no specific fund is appropriated for the payment or ultimate redemption of the bills. *Central Bank v. Little*, 11 Ga. 346.

A bill drawn on the State, the redemption of which is to be made out of a specific fund pledged therefor, is not a bill of credit. *Gowen v. Shute*, 4 Baxt. (Tenn.) 397; *State v. Cardozo*, 5 S. Car. 297.

The prohibition against the emission of bills of credit applies with equal force to two or more States which confederate together, and on their faith and credit issue such bills. *Baily v. Milner*, 35 Ga. 330.

**Bills of Attainder.**—Concerning the prohibition against bills of attainder, see *infra*, § 1, and this article.

Concerning legislation impairing the obligation of contracts, see *infra*, § 2, and this article.

**Compacts Between States.**—The constitution requires that no agreement or compact between the States shall be entered into, unless it necessarily be by an express

e disregarded or violated by the State legisla-

tive body, unless restricted by the constitution, abolish the acts of its predecessors; and there is no legislative act can be made irrevocable, except it in and substance of a contract.<sup>2</sup> The power of the disposing of the revenues of the State, and its disposition to such disposition, are complete and unlimited, of constitutional provisions.<sup>3</sup>

of either house of the legislature that a person therein was duly elected is final, and cannot be the executive or judicial department.<sup>4</sup> By com-

of the agreement; it om the legislation of subject. *Virginia v. Vall* (U. S.) 39.

**Federal Constitution.**—ntained in the first ten constitution of the e intended to be re-Federal government, authority of the States. *W. (U. S.)* 410; *Colt v. Kenniston*, 23 N. Y. *Letzger*, 1 Edm. Sel. *Filson v. Wall*, 34 Ala.

A legislative act which yment by contractors upon street improve-orks, but permits all o employed, is in con-y between the United peror of China, which ese resident here the mployed and labor for jects of any other na-fore void. *Baker v. (U. S. Cir.)* 566.

*Stolley*, 5 McLean *Morgan v. Smith*, 4 *atman v. Kirner*, 22 onst. Lim. 125.

*te Water*, 7 Ind. 570.

**Debt**—A provision of miting the State debt e State debt properly i not affect the power to allow the counties tract debts. *Pattison* 5; *Robertson v. Rock-Slack v. Railroad*, 13 *Clapp v. Cedar Co.*, *v. Janesville*, 10 Wis. *unham*, 27 Ill. 474; *Miller*, 7 Kans. 479. *Vapello Co.*, 13 Iowa, *icago*, 51 Ill. 34.

The legislature has no power to appropriate money for debts forbidden to be contracted by the constitution. *Nou-gues v. Douglass*, 7 Cal. 65.

The legislative assembly alone is judge as to whether existing taxation and other income afford sufficient funds, without additional taxes, to pay deficiencies as well as current expenses. *Burch v. Earhart*, 7 Oreg. 58.

The legislature has power to buy a State-house, within the price limited in the constitution, or to rent buildings. *Harris v. Dubuclet*, 30 La. Ann. 662.

In the absence of any constitutional provision, the legislature may control the moneys of the State in the hands of an individual, and may compromise suits instituted for its recovery. *Governor v. McEwen*, 5 Humph. (Tenn.) 241.

4. Opinion of the Justices, 56 N. H. 570; *People v. Mahaney*, 13 Mich. 481; *State v. Jarrett*, 17 Md. 309.

The power of a legislative body to judge of the qualifications of its own members is not exhausted by admitting a member to his seat, but continues during the entire term of office. *State v. Gilmore*, 20 Kans. 551.

The requirement that members of the legislature shall take the oath to support the constitution is merely directory, and the omission to take the oath does not affect the validity of their legislation. *Hill v. Boyland*, 40 Miss. 618. See *Cohen v. Wright*, 22 Cal. 293.

It is competent for the legislature to fix the date from which the terms of office of its members shall begin. *State v. Robinson*, 1 Kans. 17.

The House of Representatives of Massachusetts have the power to expel a member; and the reasons for expulsion and the question whether the member was duly heard before being expelled cannot be inquired into by the courts. *Hiss v. Bartlett*, 3 Gray (Mass.), 468.

In parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body for a reasonable time before and after to enable them to go and return from the same.<sup>1</sup> The legislature has power to correct its journals by amendment at the same or a subsequent session. It also has power to compel witnesses to attend and testify before either house or one of its committees, and to punish them for contempt of its authority.<sup>2</sup>

When the business of the legislature, at a special session convened by the governor, is not restricted by some constitutional provision, it may enact any law at such special session that it might enact at a regular session. The powers of the legislature not derived from the governor's proclamation, it is not confined to the special purposes for which it may have been convened by him.

4) *Legislative Control of Municipal Corporations.*—The legislature has power to compel the municipal bodies to perform the duties and obligations as local governments under their charters, and to regulate, meet, and discharge the duties and obligations properly resting upon them as such, whether legal or merely equitable. It may also require them to exercise the power of taxation whenever or wherever it may be deemed necessary or expedient.<sup>3</sup> Acts of the legislature authorizing counties, cities, and towns to subscribe to the stock of railroads running through, to, or through them, to issue bonds, and to provide for payment by taxation of the individuals or property within their limits, are, in the absence of any constitutional provision to the contrary, undoubtedly constitutional and valid.<sup>4</sup> When the co-

Conley Const. Lim. 134. A senator while in attendance upon the legislature in the discharge of his public duties, at the seat of government of the state, is not privileged against service of process in a civil suit by virtue of a constitutional provision exempting senators and representatives from arrest in going to and returning from a session of the legislature. *Gentry v. Griffith*, 101 Cal. 461.

*Turley v. Logan Co.*, 17 Ill. 151.

*Burnham v. Morrissey*, 14 Gray (Mass.), 226; *Ex parte McCarthy*, 29 Cal. 395.

The supreme court has no authority to review the proceedings of the State Senate in refusing to allow counsel to appear who had been summoned before a committee. *Ex parte McCarthy*, 29 Cal. 395.

Compare *Burnham v. Morrissey*, 14 Gray (Mass.), 226.

*Norford v. Unger*, 8 Clarke (Iowa). See *People v. Blanding*, 63 Cal. 100; *Jones v. Theall*, 3 Nev. 233; *Adams v. Hoyer*, 2 Kans. 17.

Committees have no power to act as courts during the recess of the legislature

unless specially authorized. *Marshall v. Harwood*, 7 Md. 466.

5. *Cooley Const. Lim.* 230; *Kilgob v. Mobile Co.*, 3 Woods (U. S. Cir. Ct. 5th Cir.) 555; *Lycoming v. Union*, 15 Pa. St. 16; *Guilford v. Supervisors*, 13 N. Y. 12; *Sinton v. Ashbury*, 41 Cal. 530; *People v. Flagg*, 46 N. Y. 401; *Mutual Benefit Life Ins. Co. v. Elizabeth*, 42 N. J. 235.

But the legislature cannot impose upon a county a liability which had no previous existence. *Sadbury Supervisors v. Deane*, 96 Pa. St. 400; *Hoagland v. Sacramento*, 52 Cal. 142.

Where a new town or county is formed out of part of an old one, it is proper that a due proportion of the municipal debt should go with the territory taken for the new town or county. How the proportion should be ascertained is left to the legislature to determine. *State v. Elvins*, 3 Vroom (N. J.), 362; *People v. Alameda*, 26 Cal. 641.

6. *Amey v. Allegheny*, 24 How. (U. S.) 364; *Gilman v. Sheboygan*, 2 Bl. (U. S.), 510; *Gelpcke v. Dubuque*, 16 Wall. (U. S.) 175; *Thomason v. Lee Co.*

owers the legislature to establish but one system of county government, to be as nearly uniform as practicable; uniformity is not required.<sup>1</sup> The charter of a corporation is not a contract within the meaning of the clause against impairing contracts.<sup>2</sup>

**Power Regulating Courts, Judges, and Jurisdiction.**—The constitution establishes a particular court and fixes its powers; it is not competent for the legislature to pass any law changing the court, or either enlarging or abridging its powers. The judiciary system created by the constitution

17; Bridgeport v. Railroad, 15; Clarke v. Rochester, 436; Gould v. (N. Y.) 442; Grant v. (N. Y.) 232; Bank of B. N. Y. 38; People v. 551; Commonwealth Pa. St. 61; Moers v. 188; Commonwealth 32 Pa. St. 213; Sharp- a, 21 Pa. St. 147; s. c., ; Goddin v. Crump, 8 Caldwell v. Justices, 4 3q. 323; Hill v. Com- I. Car. 367; State v. (S. Car.) 491; Powers 23 Ga. 65; Cotton v. 6 Fla. 610; Stern v. 591; Gibbons v. Rail- 10; *Ex parte* Selma, Ala. 696; Opelika v. 11; Police Jury v. Mc- v. 341; San Antonio v. 19; San Antonio v. ; Talbot v. Dent, 9 B. Slack v. Railroad, 13 Maddox v. Graham, Allison v. Railroad, 10 Nichol v. Mayor, 9 52; Lauderdale Co. v. (Tenn.), 153; Leaven- ler, 7 Kans. 479; Cin- Commissioners, 1 Ohio Dillon, 2 Ohio St. 607; anati, 21 Ohio St. 14; 9 Ind. 74; Petty v. , Prettyman v. Super- ; Robertson v. Rock- Johnson v. Stark Co., 1 v. Lewis, 24 Ill. 208; 1, 27 Ill. 474; Pattison Cal. 175, 188; Robin- Cal. 379; Napa Valley , 30 Cal. 435; 1 Dillon § 153; 2 Redfield on 1 Rorer on Railr. 128 7. Vernon 27 Iowa, 28; ed, 25 Wis. 167; Peo- tlich, 452. , Comstock, 56 Wis.

590; Milwaukee County Supervisors v. Pabst, 45 Wis. 311.

Fixing the boundaries of counties, and dividing such counties into towns and providing for town organization, are properly within the sphere of the powers of the legislature, though not expressly specified by the constitution. Chicago, etc., R. Co. v. Langdale Co., 56 Wis. 614.

It is competent for a State legislature to transfer the control of the streets of a city or village to park commissioners for boulevard and driveway purposes not inconsistent with the ordinary use of such streets, the city or village assenting. People v. Walsh, 96 Ill. 232.

An act of the legislature fixing a county seat is not unconstitutional because it was passed without any consultation with the people of the county and without giving them an opportunity to petition the legislature; nor because two places were named in the act, and the choice between them left to the popular vote. *Ex parte* Hill, 40 Ala. 121.

One legislature cannot impose restrictions on the powers of a municipal corporation which a future legislature cannot modify or abrogate, except where a vested right or the obligation of a contract might be thereby divested or impaired. State v. Pittsburg, 31 La. Ann. 1.

2. Rader v. Road District, 36 N. J. L. 273; Berlin v. Gorham, 34 N. H. 266; Marietta v. Fearing, 4 Ohio, 427; Trustees v. Taitman, 13 Ill. 27; Louisville v. University, 13 B. Mon. (Ky.) 642; People v. Morris, 13 Wend. (N. Y.) 331; St. Louis v. Russell, 9 Mo. 507; Montpelier v. East Montpelier, 29 Vt. 12; Brighton v. Wilkinson, 2 Allen (Mass.), 27; Reynolds v. Baldwin, 1 La. Ann. 162; Cooley's Const. Lim. 193; Black on Const. Prohibitions, § 44; 3 Parsons on Contracts, \*529-531; 1 Dillon on Munic. Corp. §§ 24, 30, 37; 2 Story on the Const. § 1393.

3. Commonwealth v. Commissioners, 37 Pa. St. 237; Gibson v. Templeton, 62 Tex. 555; State v. Bank of East Ten-

of the United States is entirely disconnected from, and independent of, the judiciary of the several States; and Congress cannot confer jurisdiction upon the State courts, nor can the State legislatures confer jurisdiction upon the federal courts.<sup>1</sup> Where the constitution provides that the judicial power of the State shall be vested in specified courts "and in such other courts as the legislature may from time to time establish," the legislature may vest part of the jurisdiction of the constitutional courts, or a concurrent jurisdiction, in those tribunals which it creates by statute

or by a general law. *Smith v. Judge*, Cal. 547.  
An act allowing judges of the superior courts to hold special terms at discretion is constitutional. *Grinad v. State*, 34 Cal. 270.  
Or to review their decrees in equity after the expiration of the term. *Longworth v. Sturges*, 4 Ohio St. 690. *Goodman v. Morris*, 59 Ga. 60.  
There is no provision in the constitution of Maine which forbids the legislature to confer on courts-martial the power to punish by fine. *Alden v. Fitts*, 25 Me. 488.  
A statute providing that in the case of a tie in the election of clerks of court the court shall decide, is constitutional. *Lewis v. State*, 12 Mo. 128.  
1. *United States v. Peters*, 5 Cranch (U. S.), 115; *Ex parte Knowles*, 5 Cal. 300; *Ferris v. Coover*, 11 Cal. 1; *Greely v. Townsend*, 25 Cal. 604.  
Whether this State can grant jurisdiction to the courts of another State, can grant to another State the right to authorize her courts to act on certain matters in this State, or to constitute a court in this State to act upon the rights and property of citizens of such other State in this State, *quære*. *Eaton, et al. v. R. Co. v. Hunt*, 20 Ind. 457.  
2. *Commonwealth v. Green*, 58 Pa. 226; *Sharpe v. Robertson*, 5 Grant (Vt.) 518; *State v. Washington Co.*, 101 Ind. 69; *Rabe v. Fyler*, 10 Sm. & Mar. (Miss.) 440. See *State v. La Crosse*, 11 Wis.  
Where the legislature, by permission of the constitution, empowers the supreme court to appoint commissioners to estimate when requested by county boards, the jurisdiction of the court is not created by the county boards, but by the fundamental law. *In re Church*, N. Y. 1.  
In *Indiana*, a statute giving the mass commissioners authority to grant writs of *habeas corpus* is unconstitutional, conferring on them judicial power. *Shoultz v. McPheeters*, 79 Ind. 373. *Gregory v. State*, 94 Ind. 384; s. c.,

*Tennessee*, 5 Sneed (Tenn.), 573; *Ward v. Thomas*, 2 Cold. (Tenn.) 565; *Gibson v. Emerson*, 2 Engl. (Ark.) 172; *State v. Jones*, 22 Ark. 331; *Haight v. Gay*, 8 Cal. 297; *Deck v. Gherke*, 6 Cal. 666; *Zander v. Coe*, 5 Cal. 230. See 2 Story on the Const. §§ 1773, 1774; *Durousseau v. United States*, 6 Cranch (U. S.), 307; *United States v. Moore*, 3 Cranch (U. S.), 159, 170; *Ex parte McCardle*, 7 Wall. (U. S.) 506.

Thus, where the constitutional jurisdiction of the supreme court is appellate only, the legislature cannot confer upon it original jurisdiction in any case. *Ward v. Thomas*, 2 Cold. (Tenn.) 565; *State v. Bank of East Tennessee*, 5 Sneed (Tenn.), 573.

But the legislature may point out the mode in which the appellate jurisdiction shall be exercised, as when by appeal and when by writ of error. *Haight v. Gay*, 8 Cal. 297.

The legislature cannot confer upon courts created by statute jurisdiction exclusive of that which the constitution gives to courts established by the constitution itself. *Montross v. State*, 61 Miss. 429.

It is not necessary for the legislature to act to enable the court to exercise its constitutional duties and powers. *State v. Gleason*, 12 Fla. 190.  
A law allowing intermediate appeals to inferior courts is not an infringement of the constitutional jurisdiction of the supreme court, if an ultimate appeal to that tribunal is not denied. *Yalabusha v. Carbry*, 3 Sm. & Mar. (Miss.) 259. See *Anderson v. Berry*, 2 McCarter (N. J.), 232; *Page v. Matthews*, 40 Ala. 547; *Ex parte Anthony*, 5 Pike (Ark.), 358.

The constitutional ordinance that "divorces shall not be granted but in cases provided for by law, by suit in chancery," necessarily implies authority to provide by law in what cases they may be obtained. *Carson v. Carson*, 40 Miss. 349.

A discretionary power bestowed by statute on the court may be taken away in any particular case by a special act

or by a general law. *Smith v. Judge*, Cal. 547.

An act allowing judges of the superior courts to hold special terms at discretion is constitutional. *Grinad v. State*, 34 Cal. 270.

Or to review their decrees in equity after the expiration of the term. *Longworth v. Sturges*, 4 Ohio St. 690. *Goodman v. Morris*, 59 Ga. 60.

There is no provision in the constitution of Maine which forbids the legislature to confer on courts-martial the power to punish by fine. *Alden v. Fitts*, 25 Me. 488.

A statute providing that in the case of a tie in the election of clerks of court the court shall decide, is constitutional. *Lewis v. State*, 12 Mo. 128.

1. *United States v. Peters*, 5 Cranch (U. S.), 115; *Ex parte Knowles*, 5 Cal. 300; *Ferris v. Coover*, 11 Cal. 1; *Greely v. Townsend*, 25 Cal. 604.

Whether this State can grant jurisdiction to the courts of another State, can grant to another State the right to authorize her courts to act on certain matters in this State, or to constitute a court in this State to act upon the rights and property of citizens of such other State in this State, *quære*. *Eaton, et al. v. R. Co. v. Hunt*, 20 Ind. 457.

2. *Commonwealth v. Green*, 58 Pa. 226; *Sharpe v. Robertson*, 5 Grant (Vt.) 518; *State v. Washington Co.*, 101 Ind. 69; *Rabe v. Fyler*, 10 Sm. & Mar. (Miss.) 440. See *State v. La Crosse*, 11 Wis.

Where the legislature, by permission of the constitution, empowers the supreme court to appoint commissioners to estimate when requested by county boards, the jurisdiction of the court is not created by the county boards, but by the fundamental law. *In re Church*, N. Y. 1.

In *Indiana*, a statute giving the mass commissioners authority to grant writs of *habeas corpus* is unconstitutional, conferring on them judicial power. *Shoultz v. McPheeters*, 79 Ind. 373. *Gregory v. State*, 94 Ind. 384; s. c.,



The legislature has no power to legalize any judicial proceedings that were void for want of jurisdiction.<sup>1</sup> Nor to prescribe a form of process at variance with that designated by the State constitution.<sup>2</sup> Where a judge has been elected by the legislature, that body may curtail the territory of his jurisdiction down to the constitutional minimum, although it diminishes his compensation.<sup>3</sup> The legislative department has no constitutional power to impose on judicial officers any duties that are not strictly judicial in their character.<sup>4</sup> Courts are not bound to give written opinions in the cases they decide, and the legislature has no power to compel them to do so.<sup>5</sup>

(c) *Local, Special, and Class Legislation.*—Where there is no express constitutional restriction against the passage of local or special laws, the courts cannot hold such laws void for want of constitutional power to enact them; and the authority to enact laws strictly local implies the same authority to make local exceptions to a general law.<sup>6</sup> The term "local," as applied to a bill or act,

Am. Rep. 162. Compare *Bell v. Payne*, 2 Stew. (Ala.) 414.

A statute providing for the appointment of a special chancellor by the parties in a cause, or by lot if they cannot agree, to sit in the trial of the cause when the chancellor is interested or otherwise disqualified, does not violate the constitutional provision establishing a superior court of chancery, and providing that the chancellor shall be elected by the electors of the State. *Montgomery v. Commercial Bank*, 1 Sm. & Mar. Ch. (Miss.) 632.

A statute providing for the appointment of referees is not unconstitutional on the ground of creating a diversion of judicial power from the legitimate channels as pointed out in the constitution; the referees are subordinate officers of the court. *Carson v. Smith*, 5 Minn. 78.

A trial of a right of property before a sheriff is not a judicial proceeding, and therefore is not affected by that part of the constitution which limits the courts of the State. *Rowe v. Bowen*, 28 Ill. 116.

1. *Maxwell v. Goetschius*, 40 N. J. L. 383; *McDaniel v. Carrell*, 19 Ill. 226; *Denny v. Mattoon*, 2 Allen (Mass.) 361; *Lane v. Nelson*, 79 Pa. St. 407; *Richards v. Rote*, 68 Pa. St. 248; *Pryor v. Downey*, 50 Cal. 388; *Israel v. Arthur*, 7 Colo. 5; *Black on Const. Prohibitions*, § 208; *Cooley Const. Lim.* 107. See *infra*, § 13, (b), of this article.

But where the jurisdiction has attached and there has been a formal defect in the proceedings, not affecting the substantial equities of the parties, it may be cured by a retroactive statute. *Lane v. Nelson*, 79 Pa. St. 407; *State v. Union*, 33 N. J. L. 350.

2. *Manville v. Battle Mountain Co.*, 17 Fed. Repr. 126.

The legislature may constitutionally authorize an execution issued by a city or county court to run all over the State. *Hickman v. O'Neal*, 10 Cal. 292.

The legislature has the power to reasonably regulate, but not to abolish, either directly or indirectly, the use of the writ of *certiorari*. *State v. Jersey City*, 42 N. J. L. 118.

3. *Foster v. Jones*, 79 Va. 642; s. c., 52 Am. Rep. 637.

But when the constitution has created an office, and fixed its term, and has also declared the grounds and mode of removal of an incumbent before the expiration of his term, the legislature has no power to remove or suspend the officer for any other reason or in any other mode. *Lowe v. Commonwealth*, 3 Metc. (Ky.) 237. See *State v. Emerson*, 39 Mo. 80.

4. *Hayburn's Case*, 2 Dall. (U. S.) 409; *In re Cincinnati Citizens*, 2 Flip. (U. S. Cir.) 228.

5. *Houston v. Williams*, 13 Cal. 24.

A case which has been submitted for decision to the supreme court is not subject to any control by the legislature. *Lanier v. Gallatas*, 13 La. Ann. 175.

6. *Beyman v. Black*, 47 Tex. 558; *Orr v. Rhine*, 45 Tex. 345.

A provision of a State constitution that "all laws of a general nature shall have a uniform operation throughout the State," does not inhibit the passage of appropriate local acts. *Ohio v. Covington*, 29 Ohio St. 102.

A prohibition in a State constitution against the passage of special laws does



means one which touches only a portion of the territory of a State or of its citizens; an act may be public and yet local.<sup>1</sup> A statute in relation to the counties or cities of a State, which affects only a portion of them, or which expressly or impliedly excludes a portion from its operation, is local and special within the meaning of the constitutional inhibitions.<sup>2</sup> The prohibition cannot be evaded

not affect special laws passed prior to the adoption of the constitution. *Ex parte Burke*, 59 Cal. 6; *Brown v. Denver*, 7 Colo. 305; *People v. Jobs*, 7 Colo. 475.

The fact that the representatives of a county sanction a local act applicable to it does not affect its constitutionality. *Hamilton v. County Court*, 15 Mo. 3.

1. *Kerrigan v. Force*, 68 N. Y. 381.

The meaning of the word "local," as applied to legislative bills, may be reached in two ways: (1) by ascertaining what the framers of the constitution desired to guard against by placing such a provision in it, and thus finding the meaning with which they charged the word; (2) by ascertaining what meaning has been given to the word by writers and courts when applied to a statute. *People v. Chautauqua Co.*, 43 N. Y. 10.

**Local and Temporary Distinguished.**—The fact that a statute is limited as to the time of its duration does not make it a local or a special law; such an act is termed a temporary one. A local or special statute is one limited in the objects to which it applies; a temporary statute is limited merely in its duration. Necessarily a local or special law may be perpetual, or a general law may be temporary. *People v. Wright*, 70 Ill. 388.

**Local and Special Distinguished.**—The Indiana curative statute of March 21, 1879, "legalizing the practice of circuit courts in calling causes for issues, and in entering judgments on the first day of the term," is unconstitutional for the reason that it is both local and special in its provisions. It is special because it does not apply to all "judgments, orders, or decrees" which may have been or may be taken on the first day of the term; and it is local, also, because it does not in terms legalize and validate all the judgments, orders, or decrees of all the circuit courts of the State which had been so taken, but only of such of said courts as had "adopted rules of practice making the summons in civil causes returnable to the first day of the term." *Mitchell v. McCorkle*, 69 Ind. 184.

**2. Regulating Fees of Officers.**—An act regulating the salaries or fees of municipal or county officers which is applicable to but a single city or county, or to only a portion of the State, is unconstitutional as

being special and local. *Contieri v. New Brunswick*, 44 N. J. L. 1, 58; *People v. Hoffman*, 24 Hun (N. Y.), 142; *Gaskin v. Anderson*, 55 Barb. (N. Y.) 259; *Gaskin v. Meek*, 42 N. Y. 186. Compare *Conner v. New York*, 5 N. Y. 285.

**Classification of Cities.**—The only proper classification of cities and towns is by population. Geographical distinctions cannot be resorted to without entering the domain of special legislation. *Commonwealth v. Patton*, 88 Pa. St. 258; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Kilgore v. Magee*, 85 Pa. St. 401; *People v. Cooper*, 83 Ill. 585.

But an act excluding perpetually from its operation counties containing more than 150,000 or less than 10,000 inhabitants is a local law. The perpetual exclusion of certain counties from the operation of a law is not a classification of counties. *Morrison v. Bachert*, 112 Pa. St. 322.

**Local Laws Regulating Internal Affairs of Towns.**—The constitutional provision against enacting any "private, local, or special laws regulating the internal affairs of towns and counties" applies also to cities. *State v. Parsons*, 40 N. J. L. 1.

A statute conferring upon all cities having a population of not less than 25,000 inhabitants the power of issuing bonds to fund their floating debt is in violation of that provision. *State v. Trenton*, 42 N. J. L. 486.

**Statutes Held Not Local.**—The Kansas statute as to registration, while applying only to cities of the first and second classes, is not within the constitutional inhibition against the enactment of general laws not having a uniform operation. *State v. Butts*, 31 Kans. 537. Compare *State v. Jersey City*, 45 N. J. L. 297.

An act empowering justices of the peace and others to commit to the county jail in lieu of the workhouse, in certain cases, held not to be special legislation, though applicable only to counties having no workhouses. *State v. Gibbs*, 46 N. J. L. 513.

The statute of Illinois providing for summary convictions for refusing to work on public roads, the same being applicable to all counties in the State acting under township organization, is not a local or special law. *Reynolds v. Foster*, 89 Ill.

by declaring the act to be a general law. Any statute which can apply to but a portion of the State, though purporting to be a general statute, is special legislation.<sup>1</sup> In several of the States the legislature is forbidden to pass any special act conferring corporate powers. This provision applies only to private and not to municipal corporations.<sup>2</sup> The constitutions of several States provide that "all laws of a general nature shall be uniform in their operation." A statute is general and uniform in its operation when it operates equally upon all persons who are brought within the relations and circumstances provided for, though it may not affect every citizen or every portion of the State.<sup>3</sup> Where the

257. See *Potwin v. Johnson*, 108 Ill. 70.

An act which applies to fifty-eight of the sixty counties of the State cannot be deemed a local act. *People v. Newburgh Plank Road Co.*, 86 N. Y. 1.

**Police Power.**—Statutes of a certain character, though local or special in their operation, may still be sustained on the ground of the police power. *State v. Aubuchon*, 8 Mo. App. 325; *People v. Harper*, 91 Ill. 357.

1. *Belleville R. v. Gregory*, 15 Ill. 20; *Devine v. Commissioners*, 84 Ill. 590; *Gibbs v. Morgan*, 39 N. J. Eq. 126; *Woodard v. Brien*, 14 Lea (Tenn.), 520; *Topeka v. Gillett*, 32 Kans. 431.

An act which assumes to give a lien for certain kinds of work, and which, although it has an enacting clause applicable to the entire State, yet contains a section excluding from its operation one or more counties either specifically by name or by excluding from its operation counties having a population greater than a certain number, is in violation of the constitutional provision against local and special legislation. *Davis v. Clark*, 18 Repr. (Pa.) 667.

The Missouri statute of 1881 (p. 172) was an act to regulate the appointment of notaries public in all cities having a population of 100,000 or more, and it provided that the office of any notary public in such city, holding a commission bearing date prior to the passage of the act, and whose term of office had not expired at the time the act became a law, should be abolished; the act could only apply to St. Louis. *Held*, that the court would take judicial notice of that fact ascertained from the census reports, and that the act was special legislation and unconstitutional. *State v. Herrmann*, 75 Mo. 340.

2. *State v. Newark*, 40 N. J. L. 71; *Read v. Plattsmouth*, 107 U. S. 568.

Such a provision does not prohibit the legislature from passing a special act changing the name of an existing corpora-

tion and giving it power to purchase the franchises of another existing corporation. *Wallace v. Loomis*, 97 U. S. 146. *Compare In re Union Ferry Co.*, 32 Hun (N. Y.), 82.

An act enabling a particular foreign corporation to sue and be sued within the State is not a private or local bill. *Fall Brook Coal Co. v. Lynch*, 47 How. Pr. (N. Y.) 520.

An act purporting to authorize a single ferry at a designated point on a particular river is void under a constitution which prohibits the legislature from chartering or licensing ferries by local or special laws. *Frye v. Partridge*, 82 Ill. 267.

**Private Highway Bills.**—A constitutional provision against the passage of a private or local bill "laying out, opening, etc., roads, highways, or alleys" does not include city streets or avenues. *In re Woolsey*, 95 N. Y. 135; *In re Lexington Avenue*, 92 N. Y. 629.

A special act authorizing a plank-road company to mortgage its road does not conflict with the constitutional provision against authorizing "by private or special law the sale or conveyance of any real estate belonging to any person," but must be treated as an amendment of the charter. *Joy v. Jackson, etc., Co.*, 11 Mich. 155.

3. *McAunich v. Railroad*, 20 Iowa, 338; *Cordova v. State*, 6 Tex. App. 207; *State v. Mining Co.*, 16 Nev. 432; *Lake v. State*, 18 Fla. 501. See *Kelley v. State*, 6 Ohio St. 269.

The word "operation," as used in the constitutional provision that all laws of a general nature shall have a uniform operation, refers to the practical working and effect of a law. *Geebrick v. State*, 5 Iowa, 491.

A statute authorizing five per cent damages to be taxed as costs against the losing party in litigated cases in San Francisco acts equally and uniformly upon all parties upon whom it acts at all, and is constitutional. *Corwin v. Ward*, 35 Cal. 198.

An act fixing the rate of interest which

constitution empowers the legislature to pass special acts "in cases where a general law cannot be made applicable," the legislature is the exclusive judge of the necessity of special legislation in a given case.<sup>1</sup>

(d) *Delegation of Powers*.—It is an established principle of constitutional law that the power conferred upon the legislature to enact laws cannot be delegated by that department to any other body or authority.<sup>2</sup> But this principle does not restrict the authority

may be charged by pawnbrokers is no violation of a constitutional provision for "uniform laws." *Jackson v. Shawl*, 29 Cal. 267.

**Revenue Laws**.—By the requirement of a "uniform operation," as applied to revenue laws and tax statutes, it was intended that laws of this character should, as near as possible, affect persons and property alike. But approximation is all that can be expected. A revenue law which should be absolutely equal in its operation is impossible. *People v. Coleman*, 4 Cal. 46; *People v. Whyler*, 41 Cal. 351; *Kirby v. Shaw*, 19 Pa. St. 258; *Commonwealth v. Savings Bank*, 5 Allen (Mass.), 428; *Allen v. Drew*, 44 Vt. 174, 186; *Cooley on Taxation*, 164 *et seq.*

**Soldiers**.—A law which extends to a particular class, as soldiers, the privilege of voting, when out of the State, for State and county officers, is not unconstitutional by reason of not extending the same privilege to all the electors of the State when absent from the State. *Chandler v. Main*, 16 Wis. 398.

**Railroads**.—Where a statute imposes on railroad companies the duty of fencing their track, and provides that they shall be liable not only for damages resulting from neglect of such duty, but also for a reasonable attorney fee in any case brought to recover such damages, the provision regarding the attorney fee is not unconstitutional; it is not a case of singling out a certain class of corporations and imposing upon them a peculiar liability, but it is in the nature of a penalty imposed for the neglect of a statutory duty. *Peoria, etc., R. v. Duggan*, 18 Repr. (Ill.) 357. See *Thorpe v. Railroad*, 27 Vt. 156; *Cooley's Const. Lim.* 579. See also **POLICE POWER**.

**Exclusive Privileges**.—A clause in the constitution which declares that "no man or set of men are entitled to separate public emoluments or privileges from the community but in consideration of public services," has no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people or any portion of them. *Williams v. Cammack*, 27 Miss.

209; *Martin v. O'Brien*, 34 Miss. 21. Compare *Smith v. Smith*, 1 How. (Miss.) 102. See *Bank of Newbern v. Taylor*, 1 Car. Law Repos. 246; *Gordon v. Winchester*, 12 Bush (Ky.), 114; *Louisville, Gas Co. v. Citizens' Gas-light Co.*, 115 U. S. 683; *Black on Const. Prohibitions*, § 54; *Cooley Const. Lim.* 393-396. See, *infra*, §§ 9 (g), and 12 (a).

1. *St. Louis v. Shields*, 62 Mo. 247; *Mosier v. Hilton*, 15 Barb. (N. Y.) 657; *Johnson v. Railroad*, 23 Ill. 202; *Hess v. Pegg*, 7 Nev. 23; *In re Sticknoth*, 7 Nev. 223. Compare *State v. Newark*, 40 N. J. L. 71.

The courts have authority to decide whether an act is for a local or private purpose, and therefore within a constitutional provision which requires a two-thirds vote of the legislature for a bill appropriating money for local or private purposes. The legislature must indeed decide in the first instance, but their decision is not final or conclusive. *People v. Allen*, 42 N. Y. 378.

2. *State v. Parker*, 26 Vt. 362; *State v. Copeland*, 3 R. I. 33; *Thorne v. Cramer*, 15 Barb. (N. Y.) 112; *Bradley v. Baxter*, 15 Barb. (N. Y.) 122; *Barto v. Himrod*, 8 N. Y. 483; *People v. Stout*, 23 Barb. (N. Y.) 349; *Parker v. Commonwealth*, 6 Pa. St. 507; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Rice v. Foster*, 4 Harr. (Del.) 479; *State v. Swisher*, 17 Tex. 441; *State v. Armstrong*, 3 Sneed (Tenn.), 634; *Railroad Co. v. Commissioners*, 1 Ohio St. 77; *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 Ind. 482; *Santo v. State*, 2 Iowa. 165; *Geebrick v. State*, 5 Iowa. 491; *State v. Beneke*, 9 Iowa. 203; *State v. Weir*, 33 Iowa. 134; *State v. Wilcox*, 45 Mo. 458; *People v. Collins*, 3 Mich. 343; *Ex parte Cox*, 65 Cal. 21; *Brown v. Fleischner*, 4 Oreg. 132; *Cooley's Const. Lim.* 117; *Cooley on Taxation* (2d Ed.), 61-63; *Dillon on Munic. Corp.* §§ 60, 567, 618.

A statute of Minnesota provided for the taking up of certain State bonds and issuing new ones in lieu of them; but it was doubtful whether this could be done legally without submitting the question to a vote of the people. The act there-

of the legislature, in creating municipal corporations, to confer upon them the right of local government and the power to make by-laws and ordinances not inconsistent with the laws of the State. This is not regarded as a delegation of power.<sup>1</sup> So the legislature may, in its discretion, recall to itself and exercise so much of the powers it has conferred on municipal corporations as are not secured to such corporations by the constitution.<sup>2</sup> Statutes creating municipal corporations, or imposing liabilities upon them, or authorizing them to incur obligations or make improvements, may be referred to the people of the districts immediately affected, to decide by their votes whether they will accept the incorporation or assume the burdens; but the legislature must enact a complete and valid law according to the prescribed usages, and it must derive its whole vigor and vitality from the legislature, and no additional efficacy from the popular vote.<sup>3</sup> A private act of incorporation

fore provided that the decision of this question should be left to the judges of the supreme court, or, in case they should decline to act, to an equal number of judges of the district courts, and that the matter should be submitted to the people or not according as the judges decided. *Held*, that the act delegated legislative power to the judges mentioned, and was therefore unconstitutional. *State v. Young*, 29 Minn. 474.

An act of the legislature conferring on the district court the power to incorporate towns is unconstitutional, because the constitution confers that power on the legislature, and delegated power cannot be delegated. *People v. Nevada*, 6 Cal. 143; *State v. Simons*, 32 Minn. 540. See *Blake v. People*, 109 Ill. 302.

The creation of a railroad commission to fix reasonable tolls for freight and passenger transportation is not an unconstitutional delegation of legislative powers. *Georgia R. v. Smith*, 70 Ga. 694.

Neither is the giving of power to the governor to make pilotage regulations. *Martin v. Witherspoon*, 135 Mass. 175.

An act of Congress authorizing the erection of a bridge over navigable waters may lawfully devolve upon the secretary of war the duty of determining, from a plan of the proposed bridge, to be submitted by the bridge company, whether or not it conforms to a condition in the act that the navigation of the river shall not be injured, there being an express reservation to Congress of power to amend or repeal the act. *People v. Kelly*, 5 Abb. (N. Y.) New Cas. 383.

1. *State v. Noyes*, 30 N. H. 279; *People v. Draper*, 15 N. Y. 532; *Durach's Appeal*, 63 Pa. St. 491; *Burgess v. Pue*, 2 Gill (Md.), 11; *Jones v. Richmond*, 18 Gratt. (Va.) 517; *New Orleans v. Turpin*,

13 La. Ann. 56; *Perry v. Rockdale*, 62 Tex. 451; *Bradley v. McAtee*, 7 Bush (Ky.), 667; *Triggally v. Memphis*, 6 Cold. (Tenn.) 382; *Bliss v. Kraus*, 16 Ohio St. 55; *Dalby v. Wolf*, 14 Iowa. 228; *State v. Wilcox*, 45 Mo. 458; *People v. Hurlbut*, 24 Mich. 108; *Mills v. Charleton*, 29 Wis. 415; *State v. Neill*, 24 Wis. 149; *Cooley's Const. Lim.* 191.

A legislature which itself has power to impose a poll tax may authorize a municipality to impose one. *Perry v. Rockdale*, 62 Tex. 451.

2. *People v. Pinckney*, 32 N. Y. 377.

3. *Lammert v. Lidwell*, 62 Mo. 188.

**Vote on Acceptance of Charter.**—It is not an unlawful delegation of power for the legislature to provide that a proposed city charter shall be submitted for adoption or rejection to the popular vote. *Gorham v. Springfield*, 21 Me. 58; *Call v. Charlbourn*, 46 Me. 206; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Commonwealth v. Painter*, 10 Pa. St. 214; *Commonwealth v. Judges*, 8 Pa. St. 391; *Patterson v. Society*, 4 Zab. (N. J.) 385; *Burgess v. Pue*, 2 Gill (Md.), 11; *Bull v. Read*, 13 Gratt. (Va.) 78; *Clarke v. Rogers*, 81 Ky. 43; *Lafayette, etc., R. v. Geiger*, 34 Ind. 185; *Guild v. Chicago*, 82 Ill. 472; *Morford v. Unger*, 9 Iowa. 82; *State v. Scott*, 17 Mo. 521; *State v. Wilcox*, 45 Mo. 458; *Hobart v. Supervisors*, 17 Cal. 23; *Cooley's Const. Lim.* 118.

**Division of Counties.**—The question whether a county or township shall be divided and a new one erected, or whether two shall be consolidated, or new territory be added to an existing division, may properly be referred to the popular vote. *State v. Elwood*, 11 Wis. 17; *Smith v. McCarthy*, 56 Pa. St. 359; *State v. Reynolds*, 5 Gilm. (Ill.) 1; *State*

may be made to depend upon its acceptance by the corp  
But the legislature has no constitutional power, in enacti  
eral law applicable to all the people of the State, to con  
taking effect upon the casting of a popular vote in its favor

*v. McNeill*, 24 Wis. 149; *Commonwealth v. Judges*, 8 Pa. St. 391; *Call v. Chadbourne*, 46 Me. 206.

**Location of County Seat.**—Whether the county seat shall be located at a particular place, or after its location be removed elsewhere, may be left by the legislature to the decision of the voters immediately concerned. *Commonwealth v. Painter*, 10 Pa. St. 214; *People v. Salomon*, 51 Ill. 37.

A statute changing from one town to another the holding of terms of the supreme court in and for the county is not unconstitutional in making the change depend on the performance of certain acts by the citizens of the latter town, as to providing accommodations, etc. *Walton v. Greenwood*, 60 Me. 356.

**Local Option.**—A statute providing that the citizens of the several counties shall decide by their votes whether or not the retailing of intoxicating liquors shall be permitted in said counties, is unconstitutional, as being an unlawful delegation of legislative power. *Rice v. Foster*, 4 Harr. (Del.) 479; *Parker v. Commonwealth*, 6 Pa. St. 507; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *State v. Copeland*, 3 R. I. 33; *Geebrick v. State*, 5 Iowa. 405; *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 Ind. 484; *State v. Field*, 17 Mo. 529.

**Municipal Aid to Railroads.**—A statute allowing towns through which a certain railroad is to pass to subscribe to its stock, provided a certain proportion of the resident tax-payers vote to do so, is not a delegation of legislative power; it is a grant of a privilege to the towns, taking effect immediately, but providing that their election to use the privilege shall be signified in a certain manner. *Starin v. Genoa*, 23 N. Y. 439; *San Antonio v. Jones*, 28 Tex. 19.

1 Angell & Ames on Corp. § 81.

The principle that a State legislature cannot delegate its legislative power does not forbid it to grant a franchise dependent on a condition of obtaining consent from another body. For the legislature to create a corporation with power to lay a street railroad, subject to the condition of obtaining the assent of the city to the use of the street, does not involve delegating legislative power to the city. *Philadelphia v. Passenger R. Co.*, 4 Brewst. (Pa.) 14.

The repeal of a charter may depend upon a contingency. *Stedman*, 42 Conn. 583.

8 *Barto v. Himrod*, 8 I. Thorne *v. Cramer*, 15 Barb. Santo *v. State*, 2 Iowa, 165 Wall. 48 Cal. 279, 313; *State v. Swish*, 9 Iowa, 203; *State v. Field*, 17 Mo. 441; *State v. Brown*, 26 of Chenango *v. Brown*, 26 People *v. Stout*, 23 Barb. (I. State *v. Wilcox*, 45 Mo. 458 State *v. Parker*, 26 Vt. 357 Noyes, 30 N. H. 292; Bull Gratt. (Va.) 78; *Johnson v. R. (N. Y.)* 680; *State v. Reynolds (Ill.)* 1; *Robinson v. Bidwe* 349; *Smith v. Janesville*, 26 See Cooley's Const. Lim. §§

**Test of Conditional Legislation.** true that a statute may be pas effect upon the happening o event, but this does not mea every event that may be na event should be one which sh such a change of circumstance law-makers, in the exercise of judgment, can declare it to b expedient that the law shall when the event shall occur. is legislature cannot transfer to responsibility of deciding what is expedient and proper, with either to present conditions contingencies. For the legisla that they deem a law to be provided the people shall deen ent, amounts to an abandon legislative functions. A statu to take effect upon a subsequ must be, when it comes from of the legislature, a law in take effect *in futuro*. On th of the expediency of the law laure must exercise its own definitely and finally. If the made to take effect on the oc an event, the legislature m it expedient if the event shall b inexpedient if it shall not happ can appeal to no other man judge for them in relation to or future propriety, or neces must exercise that power them thus perform the duty impo them by the constitution. F of a law drawn to take effect approved by a popular vote.

a legislative act is, by its terms, to take effect in any contingency, it is not unconstitutional to make the *time* when it shall take effect depend upon the event of a popular vote.<sup>1</sup>

**7. Powers of Congress.**—The government of the United States is one of enumerated powers, the national constitution being the instrument which specifies them, and the power of Congress to pass any law must be sought alone in some express grant in the constitution, or be found necessary to carry into effect such powers as are there conferred.<sup>2</sup> Where, by the constitution, power is given to Congress over a subject, not exclusive in its terms nor inconsistent with State action, the States have power to legislate upon that subject until Congress exercises the power conferred

respecting the expediency of the law is expected to happen. The expediency or wisdom of the law, abstractly considered, does not depend on a vote of the people, it is unwise before the vote is taken, it is equally unwise afterward. The legislature has no more right to refer such a question to the whole people than to a single individual. *Ex parte Wall*, 48 Cal. 9, 313. See *Barto v. Himrod*, 8 N. Y. 10. Compare *State v. Parker*, 26 Vt.

's Const. Lim. 123; *State v. Wall*, 48 Cal. 9, 313.

*Thompson*, 103 U. S. 47; *Hunter's Lessee*, 1 Wheat. 130; *Gibbons v. Ogden*, 9 Wheat. 1; *Calder v. Bull*, 3 Dall. (U. S.) 306; *Bank of Kentucky*, 11 U. S. 157; *Gilman v. Philadelphia*, 3 U. S. 713; *People v. Flagg*, 46 Pa. St. 338; *Allen*, 58 Pa. St. 477; *Cooley's* 9; 2 Story on the Const. §

in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." 2 Story on the Const. § 1243.

Thus the act of Congress of Aug. 15, 1876, c. 287, § 6, prohibiting certain officers of the United States from "requesting, giving to or receiving from any other officer . . . money or property or other thing of value for political purposes," was held constitutional, as being within the power of Congress to pass laws to carry into effect its delegated powers. *Ex parte Curtis*, 106 U. S. 371. And see *Reynolds v. United States*, 98 U. S. 145.

On the other hand, U. S. Rev. Stats. § 5519, providing that "if two or more persons in any State or Territory conspire . . . to deprive . . . any person or class of persons of the equal protection of the laws," they shall be punished by fine or imprisonment, was held unconstitutional, as not being within any of the powers delegated to Congress. *United States v. Harris*, 106 U. S. 629.

**Right to Decide upon Extent of Powers Delegated.**—It has been claimed that as the government of the United States is one of delegated powers, the right to decide ultimately upon the extent of powers granted has not been delegated to the Federal government, nor prohibited to the States, and is preserved to the States by the provisions of the Tenth Amendment. See *Ferris v. Coover*, 11 Cal. 175.

But this is, perhaps, to be regarded as one of the political questions that were definitely settled by the recent events in our national history. The government of the Union is to judge of the extent and the proper exercise of its powers. 1 Story on the Const. § 432. See *Crane*

**Implied Powers.**—Power is given to Congress to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution to the government of the United States in any department or officer thereof." Const. U. S. art. 1, § 8. Concerning this Story says: "The plain import of the clause is, that Congress shall have all incidental and instrumental powers necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted, nor is it a grant of any new power to Congress; but it is merely a declaration of the removal of all uncertainty, that the means of carrying into execution the otherwise granted are included in the grant. Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed

upon it.<sup>1</sup> But in cases of concurrent authority, when Congress exercises its power, it thereby prohibits and supersedes all State legislation on the same subject.<sup>2</sup>

The power conferred upon Congress by the constitution "to regulate commerce with foreign nations" includes the power to regulate navigation, and embraces all commercial intercourse with foreign powers, the transportation and entry both of freight and passengers, the nationalization of American ships, and the recording of the muniments of title to the same, and the laws of quarantine, pilotage, wrecks, and embargoes.<sup>3</sup> (For a detailed consid-

and Moses' "Comparative Politics," p. 236 *et seq.*

In the exercise of its admitted powers Congress may undoubtedly deprive an individual of the opportunity to enjoy a right that belongs to him as a citizen of a State, even of the right of suffrage. *Huber v. Reily*, 53 Pa. St. 112.

Congress cannot, by legislative act, coerce any State officer as such to perform any duty. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it; but if he refuses, no law of Congress can compel him. *Kentucky v. Dennison*, 24 How. (U. S.) 66.

1. *Weaver v. Fegley*, 29 Pa. St. 27; *People v. Sheriff*, 1 Parker (N. Y.), 659; *Houston v. Moore*, 5 Wheat. (U. S.) 1; *Sturgis v. Crowninshield*, 4 Wheat. (U. S.) 122; *Ogden v. Saunders*, 12 Wheat. 1. On the subject of concurrent and exclusive powers, consult 1 Story on the Const. §§ 455-447; The Federalist. No. 32.

2. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Houston v. Moore*, 5 Wheat. (U. S.) 1; *Sturgis v. Crowninshield*, 2 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Golden v. Prince*, 3 Wash. (U. S. Cir.) 313; *In re Kirk*, 1 Parker (N. Y.), 67; *Freeman v. Robinson*, 7 Ind. 321; 1 Story on the Const. § 439.

Where the legislature of a State has acted upon a subject which, by the constitution of the United States, is within the jurisdiction of Congress, but as to which Congress has not exercised its power, a subsequent act of Congress on that subject does not operate as a repeal of the State statute. Such action of Congress indicates an intention to assume the exercise of the power conferred by the constitution, and the State law becomes from that time inoperative; but no change of policy on the part of the State is indicated, such as would render it inconsistent to enforce the provisions of a statute which had been repealed. Hence a penalty incurred for a violation

of the State law before the passage of the act of Congress may be recovered after its passage. *Sturgis v. Spofford*, 45 N. Y. 446.

When any right or privilege is subject to the regulation of Congress, it is not competent for State laws to impose conditions which shall interfere with the rights or diminish their value. *Cranston v. Smith*, 37 Mich. 309.

3. *United States v. Craig*, 22 Repr. (U. S. Cir.) 707; 2 Story on the Constitution, §§ 1056-1102; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

**Navigation.**—The power of controlling navigation is incidental to the power to regulate commerce; hence the power of Congress over the vessel is coextensive with that over the cargo. *Brig Wilson v. United States*, 1 Brock. (U. S. Cir.) 423; *The Bark Chusan*, 2 Story (U. S. Cir.) 455; *Moor v. Veazie*, 32 Me. 343; *Veazie v. Moor*, 14 How. (U. S.) 568.

**On What Waters.**—The power is restricted to such waters as can be employed in commerce between a State and foreign nations or some other State; it does not extend to those waters within a State from which a vessel cannot be navigated to a foreign port or to another State. *Moor v. Veazie*, 32 Me. 343; *King v. American Transportation Co.*, 1 Flip. (U. S. Cir.) 1.

But while navigating the high seas between ports of the same State, a vessel of the United States is, together with the business in which she is engaged, subject to the regulating power of Congress. *Lord v. Goodall S. S. Co.*, 102 U. S. 541; *Pacific Coast S. S. Co. v. California R. Comm'rs*, 18 Fed Repr. 10.

So far as it may be necessary to protect the products of other countries and States from discrimination by reason of their foreign origin, the power of the national government over commerce with foreign nations, etc., reaches the interior of every State in the Union. *Guy v. Baltimore*, 100 U. S. 434.

**Registration of Vessels.**—The act of

Congress of July 29, 1850, requiring the transfer of a vessel to be recorded in the office of the collector of customs where the vessel is registered or enrolled, is constitutional. *White's Bank v. Smith*, 7 Wall. (U. S.) 646; *Blanchard v. The Martha Washington*, 1 Cliff. (U. S. Cir.) 463; *Foster v. Chamberlain*, 41 Ala. 158; *Shaw v. McCandless*, 36 Miss. 296.

To determine what shall be evidence of title to vessels is within the power of Congress to regulate commerce; hence the act of 1850, as to recording mortgages, controls the State Statute of Frauds. *Mitchell v. Steelman*, 8 Cal. 363.

**Pilotage.**—Congress has authority to pass laws regulating pilotage under its constitutional control over commerce. *Cisco v. Roberts*, 6 Bosw. (N. Y.) 494; 2 Story on the Const. § 1070.

But the grant to Congress of this control did not of itself deprive the States of the power to regulate pilots. *Cooley v. Philadelphia*, 12 How. (U. S.) 299.

**Embargoes.**—An act of Congress laying an embargo, whether for a limited or an indefinite time, and whether upon foreign or domestic voyages, is valid and constitutional. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 191; *United States v. The William*, 2 Hall's Law Journal, 255; 2 Story on the Const. §§ 1075, 1289-1292.

**Passenger Traffic.**—The term "commerce," as used in the Federal constitution, is not limited to an exchange of commodities only, but includes as well "intercourse" with foreign nations; and the term "intercourse" includes the transportation of passengers. *People v. Raymond*, 34 Cal. 492.

**Immigration.**—A State statute imposing a tax on every alien passenger who shall come by vessel from a foreign country to a port of the State, and holding a vessel liable therefor, is void as a regulation of foreign commerce. *People v. Compagnie Generale Transatlantique*, 107 U. S. 59; *Passenger Cases*, 7 How. (U. S.) 283; *People v. Pacific Mail S. S. Co.*, 8 Sawy. (U. S. Cir.) 630.

But a law of *New York* which required a report to be made of the passengers brought from abroad into the port of New York, and prescribed a fine for neglecting compliance, was held constitutional. *New York v. Miln*, 11 Pet. (U. S.) 102; *Mayor v. Staples*, 6 Cow. (N. Y.) 169.

A statute which imposes a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers, with an alternative of paying a small sum of money for each

one of them, is a tax on the shipowner for the right to land such passengers. Such a statute of a State is a regulation of commerce, and, when applied to passengers from foreign countries, is a regulation of commerce with foreign nations. Legislation on the subject which it covers is confided exclusively to Congress by that clause of the constitution which gives to that body the "right to regulate commerce with foreign nations." It cannot be defended as falling within the police power of the State, for legislation is prohibited to the State over all matters on which it is granted exclusively to Congress. *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275.

But Congress itself has power, under the commerce clause, to inhibit any class or degree of immigrants from coming into the United States. *United States v. Craig*, 22 Repr. (U. S. Cir.) 707. Or to tax them. *Edye v. Robertson*, 112 U. S. 580.

**Tonnage Duties.**—Any duty, tax, or burden imposed under the authority of the States which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity, is void unless the consent of Congress be obtained. *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Hackley v. Geraghty*, 34 N. J. L. 332.

A State statute entitling port-wardens to receive a certain sum or fee for every vessel coming into port, whether called on to perform any service or not, is a regulation of commerce and unconstitutional. *Steamship Co. v. Port Wardens*, 6 Wall. (U. S.) 31.

A State law which authorizes a State officer at a port to make a survey of sea-going vessels there arriving and of damaged goods found on board,—not for the purpose of certifying the quantity and value of the things inspected for the protection of consumers, but to furnish official evidence for the parties immediately concerned, and where goods are found damaged to provide for their sale,—is not an inspection law such as a State may pass, but a regulation of commerce, and unconstitutional. *Foster v. New Orleans*, 94 U. S. 246.

**The Power Exclusive.**—The power of Congress to regulate foreign and interstate commerce is exclusive, and the States are entirely prohibited from legislating on the subject. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *People v. Downer*, 7 Cal. 169; *Mitchell v. Steel-*



eration of the power of Congress to regulate commerce among the several States, the reader is referred to the title INTERSTATE COMMERCE.) Such of the other powers of Congress as have been made the subject of judicial discussion are mentioned in the note.<sup>1</sup>

man, 8 Cal. 363; Railroad Commissioners v. Railroad Company, 19 Repr. (S. Car.) 795; 2 Story on the Const. § 1072. Compare Henderson v. Spofford, 59 N. Y. 131; People v. Coleman, 4 Cal. 46.

Until action has been taken by Congress, the legislation of a State, not directed against commerce or any of its regulations, but relating generally to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, notwithstanding it may remotely and indirectly affect the operations of foreign or interstate commerce, or persons engaged in such commerce. *Sherlock v. Alling*, 93 U. S. 99.

**State Taxation of Imports.**—The constitutional prohibition against the levying by States of duties on imports or exports relates to foreign not to interstate commerce. *Brown v. Houston*, 114 U. S. 622. See *infra*, § 11 of this title. See also *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Smith v. People*, 1 Park. (N. Y.) 583; *Wynhamer v. People*, 20 Barb. (N. Y.) 567.

A State law imposing a tax upon premiums received for insuring imports is not a regulation of commerce. *People v. National Ins. Co.*, 27 Hun (N. Y.), 188.

A State tax on the gross receipts of a State corporation engaged in transporting freight and passengers between this and foreign countries is not a regulation of foreign commerce. *Philadelphia & Southern Mail S. S. Co. v. Commonwealth*, 104 Pa. St. 109.

**1. Regulation of Commerce.**—The power to regulate commerce among the States is vested exclusively in Congress, and a State cannot legislate upon a matter of interstate commerce even where Congress has not acted upon the subject. *Railroad Commissioners v. Railroad Company*, 19 Repr. (S. Car.) 795; 2 Story on the Const. § 1072, and notes. Compare License Cases, 5 How. (U. S.) 504. See *Crandall v. Nevada*, 6 Wall. (U. S.) 42; *Steamship Co. v. Portwardens*, 6 Wall. (U. S.) 31; *Ex parte McNeil*, 13 Wall. 236.

**Bankruptcy.**—The several States have power to legislate on the subject of bankrupt and insolvent laws, subject, however, to the authority conferred upon Congress by the constitution to adopt a uniform system of bankruptcy, which authority when exercised is paramount, and State enactments in conflict with

those of Congress upon the subject are superseded and become inoperative. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Farmers & Mechanics' Bank v. Smith*, 6 Wheat. (U. S.) 131; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Baldwin v. Hale*, 1 Wall. (U. S.) 229; *Meekins v. Creditors*, 19 La. Ann. 497; 2 Story on Const. § 1114.

Since there is nothing in the Federal constitution to prohibit Congress from passing laws impairing the obligation of contracts, it is universally conceded that a national bankrupt law, when there is one in existence, with provisions compulsory upon creditors, is valid and constitutional. *In re Beckerford*, 1 Dill. (U. S. Cir.) 45; *In re Owens*, 12 Nat. Bankr. Reg. 518; *Keene v. Mould*, 16 Ohio, 12; *Morse v. Hovey*, 1 Barb. Ch. (N. Y.) 404; *In re Reiman*, 7 Ben. (U. S. Dist.) 455; *Darling v. Berry*, 4 McCrary (U. S. Cir.), 470.

**Federal Judicial Power.**—Where a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738; *Mayor v. Cooper*, 6 Wall. (U. S.) 252; *Connor v. Scott*, 4 Dill. (U. S. Cir.) 242; *Dillon on Removal of Causes*, § 30.

Congress may vest exclusively in the courts of the United States all the judicial power of the Union; and it seems that no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the State tribunals. *Stearns v. U. S.*, 2 Paine (U. S. Cir.), 300.

**Removal of Causes.**—The power of Congress to authorize the removal of cases, to which the Federal judicial power conferred by the constitution extends, from the State courts to the Federal courts, has been frequently declared by the supreme court, and the constitutionality of the Removal Acts of 1789, 1833, 1863, 1866, 1867, and 1875 is established beyond question. *Gaines v. Fuentes*, 92 U. S. 10; *Tennessee v. Davis*, 100 U. S. 257; *Strauder v. West Virginia*, 100 U. S. 303; *State v. Hoskins*, 77 N. Car. 530; *Hodgson v. Millward*, 3 Grant (Pa.), 412; *State v. Common Pleas*, 15 Ohio St. 377;

Dillon on Removal of Causes, §§ 9, 32, 36.

**Punishment of Counterfeiting.**—Congress has the constitutional power to enact laws for the punishment of passing, or of bringing into the United States with intent to pass, counterfeit coin. *United States v. Marigold*, 9 How. (U. S.) 560.

The power of Congress to "provide for the punishment of counterfeiting" does not preclude a State from passing a law to punish the offence of circulating counterfeit coin of the United States. The two offences—of counterfeiting the coin, and of passing counterfeit money—are essentially different in their character. The former is an offence directly against the government by which individuals may be affected; the latter is a private wrong by which the government may be remotely, if in any degree, reached. *Fox v. Ohio*, 5 How. (U. S.) 410. See *Moore v. People*, 14 How. (U. S.) 13.

It has been held that the State as well as the National courts have jurisdiction to try persons charged with making counterfeit money. *Sizemore v. State*, 3 Head (Tenn.) 26; *People v. White*, 34 Cal. 183. But compare 2 Story on the Const. § 1123; *State v. Brown*, 2 Oreg. 221; *Mattison v. State*, 3 Mo. 421.

**Legal Tender.**—It is within the constitutional power of Congress to make treasury notes of the United States a legal tender in payment of debts. *Legal Tender Cases*, 12 Wall. (U. S.) 457 [overruling *Hepburn v. Griswold*, 8 Wall. (U. S.) 604]; *Dooley v. Smith*, 13 Wall. (U. S.) 605; *Bigler v. Waller*, 14 Wall. (U. S.) 298; *Railroad Co. v. Johnson*, 15 Wall. (U. S.) 195; *Juilliard v. Greenman*, 110 U. S. 421; *George v. Concord*, 45 N. H. 434; *Carpenter v. Bank*, 39 Vt. 46; *Hague v. Powers*, 39 Barb. (N. Y.) 427; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Shollenberger v. Brinton*, 52 Pa. St. 9; *Thayer v. Hedges*, 23 Ind. 141; *Brown v. Welch*, 26 Ind. 116; *Hintragen v. Bates*, 18 Iowa, 174; *Verges v. Giboney*, 38 Mo. 458; *Van Huse v. Kanouse*, 13 Mich. 303; *Breitenbach v. Turner*, 18 Wis. 140; *Lick v. Faulkner*, 25 Cal. 404; *Maynard v. Newman*, 1 Nev. 271.

**Weights and Measures.**—A State has the right to regulate weights and measures until Congress exercises its power over that subject. *Weaver v. Fegely*, 29 Pa. St. 27; 2 Story on the Const. § 1122.

**Federal Taxation.**—"Congress is authorized to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United

States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States." *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 199. See 1 Story on the Const. § 926. And see, *infra*, § 11 of this article.

**Power to Borrow Money.**—The power of the United States to borrow money cannot in any way be controlled or interfered with by the States. The granting of the power is incompatible with any restraining or controlling power, and the declaration of supremacy in the constitution is a declaration that no such restraining or controlling power shall be exercised. 2 Story on the Const. § 1055; *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Bank Tax Case*, 2 Wall. (U. S.) 200; *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; *People v. Commissioners*, 4 Wall. (U. S.) 244; *Bank v. Supervisors*, 7 Wall. (U. S.) 26.

**Naturalization Laws.**—It is well settled that the power of Congress to establish a uniform rule of naturalization is exclusive, and the States cannot legislate on that subject. *Chirac v. Chirac*, 2 Wheat. (U. S.) 259; *Houston v. Moore*, 5 Wheat. (U. S.) 48; *Golden v. Prince*, 3 Wash. (U. S. Cir.) 313; *Thurlow v. Massachusetts*, 5 How. (U. S.) 585; *Smith v. Turner*, 7 How. (U. S.) 283; 2 Story on the Const. § 1104. As to the jurisdiction of State courts, see *Weaver v. Fegely*, 29 Pa. St. 27; *Ex parte Knowles*, 5 Cal. 300; *Beavins' Petition*, 33 N. H. 89.

**Patents and Copyrights.**—It has been suggested that the power of Congress to grant patents and copyrights is not exclusive, but concurrent with that of the States, so, always, that the acts of the latter do not contravene the acts of Congress. *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507; 2 Story on the Const. § 1154.

A State enactment that all "judicial decisions shall be free for publication by any person" is not repugnant to the copyright laws. *Little v. Gould*, 2 Blatchf. (U. S. Cir.) 165.

The power of Congress to legislate on the subject of patents is plenary. *McClurg v. Kingland*, 1 How. (U. S.) 202. It may make special grants. *Bloomer v. Stolley*, 5 McLean (U. S. Cir.), 158. And special extensions. *Blanchard v. Warner*, 1 Blatchf. (U. S. Cir.) 258;

Although a treaty is the law of the land, under the Federal Constitution, yet Congress may abrogate it, so far as it is municipal law, provided its subject-matter is within the legislative power of Congress.<sup>1</sup>

*Evans v. Eaton*, Pet. C. C. 322. It may give its grants a retrospective effect. *Blanchard v. Sprague*, 2 Story (U. S. Cir.), 164; *McClurg v. Kingsland*, 1 How. (U. S.) 202.

**Power to Raise and Support Armies.**—The action of Congress in empowering the President to call forth the militia of the several States under circumstances justifying such a call, is in pursuance of its constitutional powers. *Houston v. Moore*, 5 Wheat. (U. S.) 1, 60; *Martin v. Mott*, 12 Wheat. (U. S.) 19; *Duffield v. Smith*, 3 S. & R. (Pa.) 590; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150; *Luther v. Borden*, 7 How. (U. S.) 1; 2 Story on Const. § 1209. See *Kneedler v. Lane*, 45 Pa. St. 238.

**Power to Declare War.**—The power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of the enemy, and to dispose of it at the will of the captor. *Miller v. United States*, 11 Wall. (U. S.) 268; *Tyler v. Defrees*, 11 Wall. (U. S.) 331; *The Ned, Blatchf. Prize Case* 119; *Wilson's Case*, 4 Ct. of Cl. 559; *Willman v. Wickerman*, 44 Mo. 484; *Knoefel v. Williams*, 30 Ind. 1.

The proclamation by President Lincoln of the emancipation of slaves within all the territory held by the insurgents, was sustained by the courts as a war measure. See *Slabach v. Cushman*, 12 Fla. 472; *Dorris v. Grace*, 24 Ark. 326; *Weaver v. Lapsley*, 42 Ala. 601; *Morgan v. Nelson*, 43 Ala. 586; *Hall v. Keese*, 31 Tex. 504; *Texas v. White*, 7 Wall. (U. S.) 200.

**Pensions.**—The act of Congress providing for the punishment of every guardian having the charge and custody of the pension-money of his ward, who embezzles the same or fraudulently converts it to his own use, is constitutional, and Congress has power to invest the proper circuit court with jurisdiction to try and punish him therefor. *United States v. Hall*, 98 U. S. 343.

**Exclusive Legislation over Purchased Territory.**—The power of Congress to exercise exclusive legislation over places ceded or purchased from the States is conferred on that body as the legislature of the Union, and cannot be exercised in any other character. A law passed in

pursuance of it is the supreme law of the land and binding on all the States, and cannot be defeated by them. *Cohens v. Virginia*, 6 Wheat. (U. S.) 424; 2 Story on the Const. § 1226.

The States cannot take cognizance of any acts done in the ceded places after the cession; and the inhabitants of such places cease to be citizens of the States, and can no longer exercise any of the political rights under the laws of the States. *Commonwealth v. Clary*, 8 Pa. 72; *Sinks v. Reese*, 19 Ohio St. 175; 2 Story on the Const. § 1227.

But the provision that Congress may exercise exclusive legislation over places purchased, etc., does not apply to places ceded by a State but not purchased by the State, in such case, while granting exclusive jurisdiction, may reserve the right to tax the franchises and property of corporations situated within the territory. *Fort Leavenworth R. v. Lowe*, 114 U. S. 525.

And if there has been no cession of the State of the place, although it has been constantly occupied and used under purchase or otherwise, by the United States for a fort, arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect. 2 Story on Const. § 1227; *People v. Godfray*, 11 Johns. (N. Y.) 225; *Commonwealth v. Young*, 1 Hall's Journal, 47.

Congress is without power to delegate general legislative authority to the government of the District of Columbia, hence an act of a general nature passed by the legislative assembly of the District, such, for instance, as the act making judgments liens on real estate, is unconstitutional. *Roach v. Van Renswick*, 4 Mac. Dist. Col.), 171.

**National Corporations.**—Congress has power to create a corporation which to do so is an appropriate measure to carry into execution the enumerated powers of that body. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 416; *Bank of U. S.*, 9 Wheat. (U. S.) 518; *Farmers' Bank v. Dearing*, 91 U. S. 2; 2 Story on the Const. §§ 1259, 1260. See *Daly v. National Ins. Co.*, 64

1. *Cherokee Tobacco*, 11 Wall. 616; *Edye v. Robertson*, 112 U. S. 566; *Webster v. Reid*, 1 Morris 467.

The privilege of members of Congress of exemption from arrest is not violated by the service of citations or declarations in civil cases.<sup>1</sup> The State courts have no jurisdiction to decide whether the election of a United States senator by the legislature conforms to the regulations of Congress or is void; such questions belong exclusively to the United States senate.<sup>2</sup> No express power is conferred upon either house of Congress to punish for contempt, but such a power may probably be sustained by legitimate implications from the constitution.<sup>3</sup>

**8. Constitutional Rules of State Comity.**—In all relations not regulated by the Federal constitution, the States occupy the position of independent powers in close alliance and friendship, hence the principles of international law apply with greater force between the people of the several States than as between the subjects of foreign nations.<sup>4</sup> Yet comity between the States, so far as it concerns rights, privileges, and immunities not guaranteed by the constitution of the United States, must yield to the laws and policy of the State in which it is sought to be invoked.<sup>5</sup> That clause of the constitution of the United States which directs the surrender of a fugitive from justice on the demand of the executive authority of the State from which he fled contains no grant of power, but is the mere regulation of an existing right on the part of the State making the surrender.<sup>6</sup>

1. *Gentry v. Griffith*, 27 Tex. 461; *Case v. Rorabacker*, 15 Mich. 537; *Merritt v. Giddings*, 4 MacArthur (Dist. Colum.), 55.

The privilege from arrest privileges members against all process, the disobedience to which is punishable by attachment of the person, such as a *subpoena ad respondendum* or *ad testificandum*, or a summons to serve on a jury, because the member has superior duties to perform in another place. 1 Story on the Const. § 860.

An indictment of a member of Congress for bribery is not arrested by the privileges secured by the constitution. *State v. Smalls*, 11 S. Car. 262.

2. *In re Executive Communication*, 12 Fla. 686.

3. 1 Story on the Const. § 845 *et seq.* See *Kilbourn v. Thompson*, 103 U. S. 168; *Wilckens v. Willett*, 4 Abb. App. Dec. (N. Y.) 596; *Dunn v. Anderson*, 6 Wheat (U. S.) 204.

4. *Shaw v. Brown*, 35 Miss. 246.

5. *Donovan v. Pucher*, 53 Ala. 411.

A State may pass laws in regard to its own citizens which will be binding and obligatory on them when they are without its territorial limits, and for the violation of which they may be punished in its courts whenever the State can find them within its jurisdiction. *Chandler v. Main*, 16 Wis. 398.

A State cannot, by taking assignments of, or by assuming the prosecution of, debts due its citizens from another State, acquire the right to sue such other State. *New Hampshire v. Louisiana*, 108 U. S. 76.

6. *In re Fetter*, 3 Zab. (N. J.) 311.

**Requisition Imperative.**—When the governor of a State makes a requisition under the Federal constitution on the governor of another State for the return of a fugitive from justice who had escaped from the former to the latter State, if the requisition is made with all the necessary formalities, it is his imperative duty to comply without inquiring whether the fugitive has committed a crime according to the laws of the State to which he fled. *Johnston v. Riley*, 13 Ga. 97; *Ex parte Swearingen*, 13 S. Car. 74; *In re Voorhees*, 3 Vroom (N. J.), 141.

But an inquiry by the State courts whether or not a person charged is really a fugitive from justice is not prohibited. *Hartman v. Aveline*, 63 Ind. 344.

**Who is a Fugitive.**—When a person infringes the criminal laws of a State, and departs therefrom without waiting to abide the consequences of his act, he is a fugitive from justice. *In re Voorhees*, 3 Vroom (N. J.), 141.

A citizen and resident of Iowa, who is charged with having been constructively guilty of an offence in another State,

(a) *Rights of Citizens of Other States.*—Under the Federal constitution, the citizens of one of the United States have, in another of the United States, the same rights and privileges which the citizens of the latter possess.<sup>1</sup> The supreme court will not desc

upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the constitution. *Jones v. Leonard*, 50 Iowa, 106.

**What Crimes.**—The alleged offence need not be an offence at common law; it is sufficient that it is a crime against the State from which the accused has fled. *Matter of Clark*, 9 Wend. (N. Y.) 221; *Johnson v. Riley*, 13 Ga. 97; *Matter of Fetter*, 3 Zab. (N. J.) 311.

But it must have been actually committed within the State reclaiming the alleged offender. *Ex parte Smith*, 3 McLean (U. S. Cir.), 133.

**State or Territory.**—The Cherokee Nation is neither a "State" nor a "Territory" as these words are used in the constitution. Hence the constitution does not authorize the governor of Arkansas to honor the demand of the chief of the Cherokee Nation for the extradition of a fugitive. *Ex parte Morgan*, 20 Fed. Repr. 298.

For a criminal offence committed within the District of Columbia, the offender, if found beyond the District, may be removed there for trial. *In re Buell*, 3 Dill. (U. S. Cir.) 116.

**Habeas Corpus from Federal Court.**—A person arrested under a warrant of extradition from one State of the Union to another is "in custody under or by color of the authority of the United States," and the Federal courts have jurisdiction to inquire by *habeas corpus* into the legality of the custody. *In re Doo Woon*, 18 Fed. Repr. 898.

1. Const. U. S. art. 4, § 2; 2 Story on the Const. §§ 1804-1807; *Lemmon v. People*, 20 N. Y. 562.

In the leading case it is said: "What are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following gen-

eral heads: protection by the government the enjoyment of life and liberty, with right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; an exemption from higher taxes or impositions than are paid by the citizens of the State,—may be mentioned as some of the particular privileges and immunities of citizens, which are comprehended by the general description of privileges deemed to be fundamental, which may be added the elective franchise as regulated or established by the laws or constitution of the State in which it is to be exercised." *Corfield v. Corliss*, 4 Wash. (U. S. Cir.) 371, 380. *McCready v. Commonwealth*, 27 Gratt. (Va.) 985; *Conner v. Elliott*, 18 How. (S.) 591.

A limited and not a full operation must be given to these words in the constitution. They do not mean the right of election, of being elected, or of holding offices. They mean that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected. They mean that such property shall not be liable to any taxes or burdens to which the property of the citizens of the State is not subject. *Campbell v. Morris*, 3 G. & M.H. (Md.) 354.

The history, objects, and construction of this clause explained in *Douglas v. Douglass*, 1 Del. Ch. 465.

**Citizenship, Federal and State.**—There is, in our political system, a government of each of the several States and a government of the United States. The former is distinct from the other, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction,

and define those rights and privileges in a general classification, preferring to decide each case as it may come up.<sup>1</sup> A State cannot impose, for the privilege of doing business within its limits, a heavier license tax upon non-residents than is required of its own citizens.<sup>2</sup> And a State tax which necessarily discriminates in favor of the products and manufactures of the taxing State and against the introduction and sale of goods produced or manufactured in other States, is within the constitutional inhibition and void.<sup>3</sup> Cor-

must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other. The government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States. *United States v. Cruikshank*, 92 U. S. 542.

1. *Conner v. Elliott*, 18 How. (U. S.) 591; *Ward v. Maryland*, 12 Wall. (U. S.) 418.

**Right of Interstate Travel.**—Every citizen of the United States, and every citizen of each State in the Union, has the constitutional right as an attribute of personal liberty, to pass freely from or through the State, without imprisonment or restraint except by due process of law, and this right is subject only to such legislative regulations as may be imposed in the exercise of the police power, or remotely affected by the legitimate exercise of the power of taxation by the State. This right may be referred to several constitutional provisions, and among them to the clause securing interstate citizenship. *Joseph v. Randolph*, 16 Repr. (Ala.) 227. See *Ward v. Maryland*, 12 Wall. (U. S.) 418, 430; *Crandall v. Nevada*, 6 Wall. (U. S.) 35.

**Right of Suffrage.**—The right of a citizen to vote depends on the laws of the State in which he resides, and is not granted to him nor guaranteed by the constitution of the United States. All that is guaranteed is that he shall not be deprived of suffrage by reason of his race, etc. *United States v. Crosby*, 1 Hughes (U. S. Cir.), 448.

**Access to the Courts.**—The Tennessee statute which restricts the right of commencing the process of foreign attachment to citizens of the State is not repugnant to the Federal constitution. *Kincaid v. Frances*, *Cooke* (Tenn.), 49.

**Assessment of Lands.**—The provision of a statute, that "all lands belonging to non-residents shall be valued by three householders of the election township within which the lands are situated, to be appointed by the sheriff, and such valuation, provided it is not less than three dollars per acre, shall govern the sheriff in assessing the same," is not in conflict with the constitutional provision under consideration. *Redd v. St. Francis Co.*, 17 Ark. 416.

**Common Property of the State.**—The constitutional provision that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States does not entitle the citizens of the various States to share in the common property of citizens of a particular State. Thus it is competent for a State to confine the right of fishing in the navigable waters of the State to its own citizens. *McCready v. Virginia*, 94 U. S. 391; *State v. Medbury*, 3 R. I. 138.

2. *Ward v. Maryland*, 12 Wall. (U. S.) 418; *State v. North*, 27 Mo. 464; *McGuire v. Parker*, 32 La. Ann. 832; *Daniel v. Richmond*, 78 Ky. 542; *State v. Lancaster*, 20 Repr. (N. H.) 316; *Crow v. State*, 14 Mo. 237; *Gould v. Atlanta*, 55 Ga. 678; *Marshalltown v. Blum*, 58 Iowa, 184.

An act pronounced void all contracts made by pedlars without a license. Subsequently an amendatory act was passed relieving from its operation citizens of the State. *Held*, that the amendment was void, as discriminating against citizens of other States. *Rash v. Holway*, 20 Repr. (Ky.) 9.

3. *Walling v. Michigan*, 116 U. S. 446; *Webber v. Virginia*, 103 U. S. 344; *Wellton v. Missouri*, 91 U. S. 275; *In re Watson*, 15 Fed. Repr. 511; *State v. McGinnis*, 37 Ark. 362; *Ex parte Rollins*, 20 Repr. (Va.) 765; *Vines v. State*, 67 Ala. 73; *Cooley on Taxation* (2d Ed.), 95.

A statute of a State which imposes a license tax upon all travelling merchants, agents, etc., who travel therein and sell or offer to sell goods by sample or otherwise, to be delivered at a future time, without any discrimination against the

porations are not "citizens" within the meaning of the constitution and a State may grant or refuse to corporations of another State the privilege of engaging in any business within its limits, and grants the right, may grant it on terms.<sup>1</sup> Comity does not require a State to extend any greater privileges to the citizens of another State than it grants to its own.<sup>2</sup>

(b) *Sister State Judgments.*—The constitution of the United States (art. 4, § 1) prescribes that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." The act of Congress of May 1790, declared that "the said records and judicial proceedings . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." Without this act of Congress, the judgments of each State would be regarded as foreign judgments in the courts of every other State.<sup>3</sup> But it is now held by all the State courts, following the Federal decisions, that a judgment rendered by a court of competent jurisdiction in one State is conclusive on the merits in every other State, when made the basis of an action, and in such an action the merits cannot be inquired into.<sup>4</sup> In suing on a judgment

for goods or products of other States, is not unconstitutional with respect to goods sold by such travelling agents for their employers doing business in another State, to be shipped at a future day to the purchaser. *In re Rudolph*, 6 Sawy. (U. S. Cir.) 295; *Ex parte Thornton*, 4 Hughes (U. S. Cir.), 220. See *Machine Co. v. Gage*, 100 U. S. 676; *Webber v. Virginia*, 103 U. S. 344.

1. *Paul v. Virginia* 8 Wall. (U. S.) 168; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Warren Mfg. Co. v. Aetna Ins. Co.*, 2 Paine (U. S. Cir.) 501; *Commonwealth v. Milton*, 12 B. Mon. (Ky.) 212; *People v. Imlay*, 20 Barb. (N. Y.) 68; *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Fire Department v. Helfenstein*, 16 Wis. 136.

2. *Lemmon v. People*, 26 Barb. (N. Y.) 270.

3. *Buckner v. Finley*, 2 Pet. (U. S.) 586; *Smith v. Lathrop*, 44 Pa. St. 326; *Taylor v. Barron*, 30 N. H. 78; *Thurber v. Blackbourne*, 1 N. H. 242; *Seever v. Clement*, 28 Md. 426.

4. *Mills v. Duryee*, 7 Cranch (U. S.) 481; *Hampton v. McConnel*, 3 Wheat. (U. S.) 234; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Sweet v. Brackley*, 53 Me. 346; *Cleaves v. Lord*, 43 Me. 290; *Taylor v. Barron*, 30 N. H. 78; *Blodgett v. Jordan*, 6 Vt. 580; *Hoxie v. Wright*, 2

Vt. 269; *Bissell v. Briggs*, 9 Mass. 433; *Commonwealth v. Green*, 17 Mass. 265; *Brainard v. Fowler*, 119 Mass. 265; *People of North America v. Wheeler*, 28 C. 433; *Rathbone v. Terry*, 1 R. I. 433; *Brinkley v. Brinkley*, 50 N. Y. 156; *Dobson v. Pearce*, 12 N. Y. 156; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162; *Baxter v. Linah*, 16 Pa. St. 162; *Evans v. Tatem*, 9 S. & R. (Pa.) 525; *Rogers v. Burns*, 27 Pa. St. 525; *Wells v. Stillman*, 65 Pa. St. 105; *Chesapeake & Potomac v. Brumagim*, 21 N. J. Eq. 520; *Pritchard v. Clark*, 5 Harr. (Del.) 63; *Wernwaag v. Pawling*, 5 Gill & J. (Md.) 500; *Zimmerman v. Helser*, 32 Md. 274; *De Endre v. Wilkinson*, 2 Pat. & H. (Va.) 663; *Wells v. Sugg*, Phill. (N. Car.) 98; *McLure v. Benceni*, 2 Ired. (N. Car.) Eq. 215; *Brasswell v. Downs*, 11 Fla. 215; *West Feliciana R. Co. v. Thornton*, La. Ann. 736; *Cook v. Thornhill*, Tex. 293; *Rogers v. Coleman*, Har. (Ky.) 418; *Williams v. Preston*, 3 Mar. (Ky.) 600; *Fletcher v. Ferrell*, Dana (Ky.), 372; *Rankin v. Barnes*, Bush (Ky.), 20; *Topp v. Bank*, 2 S. (Tenn.), 184; *Butcher v. Bank*, 2 K. 70; *Nunn v. Sturges*, 22 Ark. 209; *Spencer v. Brockway*, 1 Ohio, 209; *Pelton v. Platner*, 13 Ohio, 209; *Bowling v. Stevenson*, 24 Ohio St. 474; *Anderson v. Fry*, 6 Ind. 76; *Welch v. Sykes*, Gilm. (Ill.) 197; *Bimeler v. Dawson*, cam. (Ill.) 536; *Zep p v. Hager*, 70

ment of a court of record in another State, it is not necessary for the plaintiff to aver that the court had jurisdiction of the person or subject-matter; for jurisdiction is presumed to have existed until the contrary is clearly shown by way of defence to the action.<sup>1</sup> But in an action on a judgment of a court of a sister State, it is always open to the defendant to deny the jurisdiction of the court rendering the judgment.<sup>2</sup> A judgment rendered in one State

223; *Indiana v. He'mer*, 21 Iowa, 370; *Barney v. White*, 46 Mo. 137; *Cone v. Hooper*, 18 Minn. 533.

**Is Pendency.**—The pendency of a suit in one State cannot be pleaded in bar or abatement of a second action in another State, between the same parties and for the same cause of action. *McJilton v. Love*, 13 Ill. 486; *Brown v. Joy*, 9 Johns. (N. Y.) 221; *Walsh v. Durkin*, 12 Johns. (N. Y.) 99; *Smith v. Lathrop*, 44 Pa. St. 326; *Goodall v. Marshall*, 11 N. H. 99; *Hatch v. Spofford*, 22 Conn. 485. *Compare* *Earl v. Raymond*, 4 McLean (U. S. Cir.), 231.

**Justice of the Peace**—A judgment of a justice of the peace of another State, although the court be not one of record, is a judicial proceeding within the constitution, and full faith and credit is to be given to it. *Stockwell v. Coleman*, 10 Ohio St. 33; *Clark v. Parsons*, 1 Rice (S. Car.), 16. *Compare* *Robinson v. Prescott*, 4 N. H. 450. See Bigelow on Esoppel (3d Ed.), 257 *et seq.*

**Federal Courts.**—The Federal tribunals are not regarded as foreign to each other or to the State courts. Hence the judgment of a United States court, when sued on in a State court or in another Federal court, is entitled to full faith and credit, and conversely. *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486; *Thompson v. Lee Co.*, 22 Iowa, 206; *St. Albans v. Bush*, 4 Vt. 58; *Amory v. Amory*, 3 Biss. (U. S. Cir.) 266; *United States v. Dewey*, 6 Biss. (U. S. Cir.) 501; *Owens v. Gotzian*, 4 Dill. (U. S. Cir.) 436.

**Plea to the Record.**—In an action on a judgment recovered in a sister State, *nil debet* is not a good plea, because it would throw open the merits of the controversy; the only proper form of the general issue is *nil tibi record.* *Mills v. Duryee*, 7 Cranch (U. S.) 381; *Hampson v. McConnell*, 3 Wheat (U. S.) 234; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Maxwell v. Stewart*, 22 Wall. (U. S.) 77; *Davis v. Lane*, 2 Ind. 548; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Brainard v. Fowler*, 119 Mass. 265; *Benton v. Burgot*, 10 S. & R. (Pa.) 240; *Bank of North America v. Wheeler*, 28 Conn. 433; *Shumway v. Stillman*, 4 Cow. (N. Y.) 292; *Newcomb*

*v. Peck*, 17 Vt. 302; *Zepp v. Hager*, 70 Ill. 223; *Evans v. Tatem*, 9 S. & R. (Pa.) 252; *Kemp v. Mundell*, 9 Leigh (Va.), 12; *Buchanan v. Port*, 5 Ind. 264.

1. *Williams v. Preston*, 3 J. J. Mar. (Ky.) 600; *Reid v. Boyd*, 13 Tex. 241; *Sumway v. Stillman*, 4 Cow. (N. Y.) 292; *Butcher v. Bank*, 2 Kans. 70; *Gunn v. Howell*, 27 Ala. 663; *Scott v. Coleman*, 5 Litt. (Ky.) 356; *Phelps v. Duffy*, 11 Nev. 80; *Horton v. Critchfield*, 18 Ill. 133.

But if the court (in a sister State) rendering the judgment was one of limited, inferior, or statutory jurisdiction, or if the proceedings were in derogation of the common law, jurisdiction will not be presumed, but must be affirmatively shown. *Commonwealth v. Blood*, 97 Mass. 538; *Pelton v. Platner*, 13 Ohio, 209; *Gunn v. Howell*, 27 Ala. 663; *Gay v. Lloyd*, 1 Greene (Iowa) 78.

2. *D'Arcy v. Ketchum*, 11 How. (U. S.) 165; *Board of Public Works v. Columbia College*, 17 Wall. (U. S.) 521; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Galpin v. Page*, 18 Wall. (U. S.) 350; *Knowles v. Gaslight Co.*, 19 Wall. (U. S.) 58; *Hill v. Mendenhall*, 21 Wall. (U. S.) 453; *Bischoff v. Wethered*, 9 Wall. (U. S.) 812; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Folger v. Ins. Co.*, 99 Mass. 267; *Mowry v. Chase*, 100 Mass. 79; *Carleton v. Bickford*, 13 Grav. (Mass.) 591; *Wright v. Andrews*, 130 Mass. 149; *Bissell v. Wheelock*, 11 Cush. (Mass.) 277; *McDermott v. Clary*, 107 Mass. 501; *Aldrich v. Kinney*, 4 Conn. 380; *Rathbone v. Terry*, 1 R. I. 73; *Kerr v. Kerr*, 41 N. Y. 272; *Shumway v. Stillman*, 4 Cow. (N. Y.) 292; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148; *Borden v. Fitch*, 15 Johns. (N. Y.) 121; *Reel v. Elder*, 62 Pa. St. 308; *Noble v. Oil Co.*, 79 Pa. St. 534; *Guthrie v. Lowry*, 84 Pa. St. 533; *Wernwag v. Pawling*, 5 Gill & J. (Md.) 500; *Davis v. Smith*, 5 Ga. 274; *Millet v. Ewing*, 16 Miss. 421; *Norwood v. Cobb*, 15 Tex. 500; *Barrett v. Openheimer*, 12 Heisk. (Tenn.) 298; *Pennywit v. Foote*, 27 Ohio St. 600; *Westcott v. Brown*, 13 Ind. 83; *Lawrence v. Jarvis*, 32 Ill. 304; *Welch v. Sykes*, 3 Gilm. (Ill.) 197; *Bimeler v. Dawson*, 4 Scam. (Ill.) 536.



against a resident of another State, who was not served with process and did not appear in the action, either personally or by an authorized attorney, is not binding out of the State where rendered, although the acquisition of jurisdiction may have been by some mode (e.g., publication) recognized as valid by the laws of that State; and such absence of jurisdiction will bar an action on such judgment in any other State.<sup>1</sup> The plea of fraud is not admissible to a judgment of a sister State, unless it could be set up in

In an action on a judgment of a sister State, a plea denying the jurisdiction of the court must, by certain and positive averments, negative every fact from which the jurisdiction might arise. *Welch v. Sykes*, 3 Gilm. (Ill.) 197; *Struble v. Malone*, 3 Iowa, 586; *Shumway v. Stillman*, 4 Cow. (N. Y.) 292; *Prickett v. Pope*, 3 Ala. 552.

If the defendant traverses the fact of jurisdiction of his person, the plaintiff may produce evidence to show that jurisdiction in fact attached. *Knowles v. Gaslight Co.*, 19 Wall. (U. S.) 58; *McDermott v. Clary*, 107 Mass. 501; *Sears v. Dacey*, 122 Mass. 388.

If the record states that the defendant appeared by attorney, it is conclusive proof that the attorney did appear for him; but it is only *prima facie* evidence that the attorney was authorized to appear for him, and this latter fact the defendant is at full liberty to disprove. *Welch v. Sykes*, 3 Gilm. (Ill.) 197; *Thompson v. Emmert*, 15 Ill. 416; *Harshey v. Blackmarr*, 20 Iowa, 172; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Aldrich v. Kinney*, 4 Conn. 380; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Boylan v. Whitney*, 3 Ind. 140.

The defendant is not estopped to deny the jurisdiction, notwithstanding the record contains recitals of the facts necessary to confer jurisdiction. *Hall v. Lanning*, 91 U. S. 160; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight Co.*, 19 Wall. 58; *Pennoyer v. Neff*, 95 U. S. 714; *Dennison v. Hyde*, 6 Conn. 508; *Coit v. Haven*, 30 Conn. 190; *McDermott v. Clary*, 107 Mass. 501; *Gilman v. Gilman*, 126 Mass. 26; *Ferguson v. Crawford*, 70 N. Y. 253; *Kerr v. Kerr*, 41 N. Y. 272.

1. *Pennoyer v. Neff*, 95 U. S. 714; *Bischoff v. Wethered*, 9 Wall. (U. S.) 812; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Knowles v. Gaslight Co.*, 19 Wall. 58; *Empire v. Darlington*, 101 U. S. 87; *Thompson v. Emmert*, 4 McLean (U. S. Cir.), 96; *McVicker v. Beedy*, 31 Me. 314; *Whitler v. Wendell*, 7 N. H. 257;

*Rangeley v. Webster*, 11 N. H. 257; *Newcomb v. Peck*, 17 Vt. 302; *Prickett v. Hickok*, 37 Vt. 292; *Wood v. Watkins*, 17 Conn. 500; *Aldrich v. Kinney*, 4 Conn. 380; *Frothingham v. Barnes*, 9 R. I. 1; *Rathbone v. Terry*, 1 R. I. 73; *Carroll v. Bickford*, 13 Gray (Mass.), 591; *Pennoyer v. Brewer*, 9 Cush. (Mass.) 390; *Hoffman v. Hoffman*, 46 N. Y. 30; *Reber v. Wright*, 68 Pa. St. 471; *Scott v. Newcomb*, 72 Pa. St. 115; *Davidson v. Sharpe*, 14 Ired. (N. Car.) 14; *Miller v. Miller*, 242; *Dearing v. Bailey* (S. Car.), 242; *Ponce v. Underwood*, 55 Ga. 497; *Williams v. Preston*, 3 J. J. (Ky.) 600; *Rogers v. Coleman*, 15 Ohio (Ky.) 418; *Arndt v. Arndt*, 15 Ohio; *Zepp v. Hager*, 70 Ill. 223; *Windstetter v. Taylor*, 28 Mo. 82; *Outwhite v. Pratt*, 13 Mich. 533; *Tyler v. Pratt*, 30 Mich. 63; *Jones v. Spencer*, 15 Wis. 583; *Cook v. Cook*, 8 Cal. 449.

If jurisdiction is obtained against a non-resident by attachment of his property only, the judgment rendered there will have no extra-territorial force sufficient to bind the property attached or disposed of. *Galpin v. Page*, 18 U. S. 350; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Pennoyer v. Neff*, 95 U. S. 725; *Story Conf. of Law*, 549.

A decree of divorce, pronounced by a competent court, in favor of a citizen against a non resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both at home and abroad. *Chapman v. Wilson*, 9 Wall. (U. S.) 108; *Pennoyer v. Neff*, 95 U. S. 714; *Harding v. Auld*, 9 Me. 140; *Ditson v. Ditson*, 4 R. I. 1; *Thompson v. State*, 28 Ala. 12; *Sturges v. Schlachter*, Phill. (N. Car.) 520; *Gordon v. Crow*, 57 Mo. 200; *Tolen v. Tolson*, 407; *Beard v. Beard*, 321; *Wakefield v. Ives*, 35 Mich. 238; *Burien v. Shannon*, 115 Mass. 463; *Hood v. Hood*, 110 Mass. 463; *Wright v. Wright*, 24 Mich. 180; *Shaffer v. Shaffer*, 24 Wis. 372; *People v. Baker*, 78; 2 Bishop on Mar. & Div. 58.

courts of the State rendering the judgment.<sup>1</sup> The Statute of Limitations of the State of the *forum* may be pleaded to an action on a judgment of a sister State if the statute is so framed as to include judgments.<sup>2</sup> The reader is referred to the title JUDGMENTS for a full discussion of this subject.<sup>3</sup>

**9. Civil Rights and their Guaranties.**—The civil rights of free citizens are defined and guaranteed by the constitutions of the several States and of the Union. They were not, however, created by those instruments, but existed before them, as the inalienable rights of men under a free government. Thus the right of the people peaceably to assemble for lawful purposes, and to prefer petitions, existed long prior to the adoption of the constitutional enactments.<sup>4</sup>

164; Cooley's Const. Lim. 401, and note; 2 Kent's Comm. 110, note.

1. *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Maxwell v. Stewart*, 22 Wall. (U. S.) 77; *Anderson v. Anderson*, 8 Ohio, 108; *Bicknell v. Field*, 8 Paige (N. Y.), 440; *McRae v. Mattoon*, 13 Pick. (Mass.) 53; *Sandford v. Sandford*, 28 Conn. 6; *Granger v. Clark*, 22 Me. 128; *Benton v. Burgot*, 10 S. & R. (Pa.) 240.

2. *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Napier v. Gidiere*, 1 Spears (S. Car.) Eq. 215; *Reid v. Boyd*, 13 Tex. 241.

But where a State statute enacted that "no action shall be maintained on any judgment or decree rendered by any court without this State against . . . a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought therein," it was held that this act was unconstitutional, as it denied "full faith and credit" to the judgments of other States. *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Dodge v. Coffin*, 15 Kans. 277.

3. For the law and practice in regard to sister State judgments the following may be consulted: Bigelow on Estoppel, chap. 6; Freeman on Judgments, chap. 26; Herman on Estoppel; Wharton on Evidence, chap. 10; 2 Story on the Const. §§ 1302-1314; Story on Conf. of Laws, chap. 15. The leading cases are: *Mills v. Duryee*, 7 Cranch (U. S.), 481; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Pennoyer v. Neff*, 95 U. S. 714.

4. *United States v. Cruikshank*, 92 U. S. 542.

**Right of Petition.**—The First Amendment to the constitution prohibited Congress from abridging the right to assemble and petition, and was not intended to

limit the action of the State governments in respect to their own citizens, but to operate upon the national government alone. It left the authority of the States unimpaired, added nothing to the already existing powers of the United States, and guaranteed the continuance of the right only against congressional interference. The people, for their protection in the enjoyment of it, must therefore look to the States, where the power for that purpose was originally placed. The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and as such under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States. *United States v. Cruikshank*, 92 U. S. 542.

But a petition instigated by malice and resulting in harm to the object thereof, is not the right of any citizen. *Vanarsdale v. Lavery*, 69 Pa. St. 103.

**Freedom of Speech.**—"The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals." Cooley's Const. Lim. 422. See also 2 Story on the Const. §§ 1880-1892; 2 Kent's Comm. 17 *et seq.*

**Imprisonment for Debt.**—A constitutional provision that there shall be no

(a) *Due Process of Law.*—The American constitutions all to the citizen an immunity against the deprivation of his property except by "due process of law" or "the law of the land." The process of law in each particular case means such an exercise of the powers of government as the settled maxims of law and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.<sup>2</sup> The constitutional re-

striction against imprisonment for debt, except in case of fraud, applies only to debts growing out of contract express or implied. *Lower v. Wallick*, 25 Ind. 68; *People v. Cotton*, 14 Ill. 414.

It does not apply to imprisonment as a means of enforcing payment of fine and costs by persons convicted of misdemeanors. *Mosley v. Gallatin*, 10 Lea (Tenn.), 494; *McCool v. State*, 23 Ind. 127.

But to allow an arrest when the action is for wilful injury to person or character, is in conflict with the constitutional provision in California. *Ex parte Prader*, 6 Cal. 239.

*Quartering of Soldiers.*—The provision against quartering soldiers in private houses in times of peace is but a branch of the constitutional principle that the military shall, in time of peace, be in strict subordination to the civil power. *Cooley Const. Lim.* 309; 2 Story on the Const. § 1900.

*Suspension of Habeas Corpus.*—The provision of the Federal constitution against the suspension of the writ of *habeas corpus* applies only to the absolute denial of the writ, and has no reference to the delay involved in a review by a higher court of the judgment of a lower one upon the writ. *Macready v. Wilcox*, 33 Conn. 321.

*Oath of Allegiance.*—The statute of California providing that attorneys at law and litigants shall take an oath of allegiance to the government of the United States is not unconstitutional. *Cohen v. Wright*, 22 Cal. 293. See *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Ex parte Garland*, 4 Wall. (U. S.) 333.

1. Stimson's Amer. Statute Law, § 130; Const. U. S. XIVth Am.

2. *Cooley Const. Lim.* 356; *Ex parte Ah Fook*, 49 Cal. 403. See *Wynchamers v. People*, 13 N. Y. 432.

The term "law of the land" means general and public laws operating equally upon every individual of the community. *Jones v. Perry*, 10 Yerg. (Tenn.) 59.

"Due process of law" or the "law of the land" does not mean the general body of the law, common and statutory,

as it was at the time the constitution took effect. For that would seem to give the right of the legislature to amend or repeal the law. The term refers to fundamental rights which that jurisprudence of which ours is a development has always recognized. *Brown v. Commrs.*, 50 Miss. 468.

The terms "due process of law" and "law of the land," as constitutional provisions, are of equivalent import, and interchangeable. *Davidson v. New Orleans*, 9 S. 97; *Murray's Lessee v. Hoboken Co.*, 18 How. (U. S.) 276; *Griffin v. Briggs*, 1 Curt. (U. S. Cir.) 311; *Staten v. Cold*, (Tenn.) 234; *Appeal*, 16 Pa. St. 256; *Parsons v. Sell*, 11 Mich. 129; *Sears v. Co*, 11 Mich. 251; *Banning v. Taylor*, 10 Mich. 292.

*Does Not Mean Merely an Act of the Legislature.*—The phrase "due process of law" means more than a special law passed for the very purpose of authorizing the deprivation; it means the law in its regular course of administration through the courts of justice which hears before it condemns, passes upon inquiry, and renders judgment on trial. *Clark v. Mitchell*, 64 Mich. 1; *Atchison, etc., R. v. Baty*, 6 Mich. 1; *Taylor v. Porter*, 4 Hill (N. Y.) 4; *Hoke v. Henderson*, 4 Dev. (N. C.) 1; *Jones v. Perry*, 10 Yerg. (Tenn.) 59.

"The first matter of inquiry is the meaning of the term 'due process of law.' If it has no broader meaning than the process prescribed by act of the legislature, it is the end of the case; for such a construction would render the constitutional guaranty mere words, for it would then mean no State could deprive a person of life, liberty, or property unless the State shall choose to do so. It has repeatedly and uniformly been adjudicated that the term 'due process of law' and 'law of the land' have a broad and comprehensive meaning, and originated in that great charter of rights, Magna Charta, and operated as a restriction on each branch of government." *In re Ziebold*, 19 R. (U. S. Cir.) 742.

ment extends to executive and administrative as well as judicial proceedings.<sup>1</sup>

By the State and Federal constitutions all judicial power is vested in the courts, from whence alone process may issue to deprive a person of life, liberty, or property.<sup>2</sup> Due process of law, in judicial proceedings, implies jurisdiction and trial; that is, that a party shall be properly brought into court, and when there shall have the right to set up any lawful defence to any claim against him.<sup>3</sup> The rules of evidence cannot be regarded as being of the essence of any right which a party may seek to enforce; hence they

1. *Stuart v. Palmer*, 74 N. Y. 183.

The State cannot deprive an owner of his property without process of law through the medium of a constitutional convention any more than it can through an act of legislation. *Clark v. Mitchell*, 69 Mo. 627.

The fifth and seventh amendments to the constitution of the United States were designed as restrictions upon legislation by the Federal government, and not upon State governments in respect to their own citizens. *North Missouri R. v. Maguire*, 49 Mo. 490.

2. *Hodgson v. Millward*, 3 Grant (Pa.), 406. See *In re Hatch*, 43 N. Y. Super. Ct. 89.

When the legislature of a State enacts laws for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish parties the necessary constitutional protection of life, liberty, and property, it has performed its constitutional duty; and if one of its courts, acting within its jurisdiction, makes an erroneous decision in this respect, the State cannot be deemed guilty of violating the constitutional provision, that no State shall deprive a person of life, liberty, or property without due process of law. *Arrowsmith v. Harmoning*, 118 U. S. 194.

3. *Wright v. Cradlebaugh*, 3 Nev. 341; *Ames v. Port Huron Co.*, 11 Mich. 139; *People v. Supervisors*, 70 N. Y. 228.

**Jurisdiction.**—Due process of law, when applied to legal proceedings, means a course of legal procedure according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter, and if that involves merely a determination of the personal liability of the defendant he must be brought within its jurisdiction by service of process within the State or by his voluntary appearance. Hence a personal judgment is without

any validity if it be rendered by a State court in an action upon a money demand against a non-resident of the State who was served by a publication of the summons, but upon whom no personal service of process within the State was made, and who did not appear. But the State, having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him, and her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property. And substituted service by publication, or in any other authorized form, is sufficient to inform a non-resident of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. *Pennoyer v. Neff*, 95 U. S. 714. See *Happy v. Mosher*, 48 N. Y. 313. See § 8, (b), of this article, and cases cited.

The provisions of a statute that where two or more persons are sued in the same action, on a joint contract, and process is served on either, judgment may be rendered against all, execution shall be issued against all, and may be levied on the partnership property, do not violate the constitutional requirement of due process of law. *Brooks v. McIntyre*, 4 Mich. 316.

**Partition.**—An act providing that, in actions for partition, service of notice may be made by publication, is not unconstitutional. *Mason v. Messenger*, 17 Iowa 261.

**Actions in Rem.**—Laws authorizing proceedings *in rem* may be enforced against the property seized when the real owner may not be informed thereof. *Gray v. Kimball*, 42 Me. 299.

**Divorce against Non-Resident**, on constructive service of process, validity of, see *supra*, § 8, (b).

**Curative Statutes.**—An act of the legislature undertaking to validate a judgment of a court void for want of jurisdiction, is an attempted exercise of judicial power,

are at all times subject to modification and control by the legislature.<sup>1</sup>

Many instances of legislative interference with private rights are justifiable as exercises of the police power. The legislature may declare the possession of certain articles of property, either absolutely or in particular places and under particular circumstances, to be unlawful, because they would be injurious, dangerous, and may provide for the seizure and confiscation and destruction thereof, so it be by due legal process.<sup>2</sup>

and also contravenes the constitutional requirement of due process of law. *Pryor v. Downey*, 50 Cal. 388; *Cooley Const. Lim.* 382-3.

1. *Kendall v. Kingston*, 5 Mass. 533; *Commonwealth v. Williams*, 6 Gray (Mass.), 1; *Ogden v. Saunders*, 12 Wheat. (U. S.) 349; *Webb v. Den*, 17 How. (U. S.) 576; *Fales v. Wadsworth*, 23 Me. 533; *Hickox v. Tallman*, 38 Barb. (N. Y.) 608; *Pratt v. Jones*, 25 Vt. 303; *Karney v. Paisley*, 13 Iowa, 89; *Cooley Const. Lim.* 367.

But it is not competent for the legislative power to declare what shall be conclusive evidence of a fact. *Wantlan v. White*, 19 Ind. 470; *Little Rock, etc., R. v. Payne*, 33 Ark. 816.

While the legislature may not by the mere machinery or rules of evidence override and set at naught the restrictions of the constitution, or arbitrarily make conclusive evidence of a fact anything which in the nature of things has no connection with that fact nor reasonably tends to prove it, yet it may make that which, according to the ordinary rules of human experience, reasonably tends to prove a fact, conclusive evidence of it. *In re Linn County*, 13 Kans. 500.

The legislature has power to determine by statute what shall be received as presumptive or *prima facie* evidence in civil cases. *Hand v. Ballou*, 12 N. Y. 541; *Howard v. Moot*, 64 N. Y. 262; *Cooley Const. Lim.* 367.

The power of giving greater effect to evidence than it possesses at common law has been frequently exercised by legislatures, and such exercise is clearly constitutional. *State v. Cunningham*, 25 Conn. 195.

It is in the power of the legislature to abolish or modify the rule which excludes parol evidence to vary the terms of a written contract. *Gibbs v. Gale*, 7 Md. 76.

**Tax Deeds.**—It is in the power of the legislature to make a tax deed *prima facie* evidence that all the proceedings have been regular, and that the purchaser has acquired under them a complete title. *Hand v. Ballou*, 12 N. Y. 543; *Forbes v.*

*Halsey*, 26 N. Y. 53; *Delaplaine*, 7 Wis. 54; *Allen v. Armstrong*, 508; *Adams v. Beale*, 19 Iowa; *Berg v. Rogers*, 9 Mich. 332; *v. Cross*, 10 Wis. 289; *Lacey*, 1 Mich. 140; *Wright v. Dunham*, 414; *Abbott v. Lindenbower*, 4 Sams v. King, 18 Fla. 557.

But a statute which should make a deed conclusive evidence of a title, and preclude the owner of the title from showing its invalidity, is void, because being not a law of evidence, but an unconstitutional expropriation of property. *Groesbeck*, 13 Mich. 329; *Case v. Dean*, 16 White v. Flynn, 23 Ind. 46; *Hill*, 21 Iowa, 70; *Abbott v. Lindenbower*, 46 Mo. 291; *McCreedy*, 29 Iowa, 356; *Wright v. Crandall*, Nev. 349.

Congress and the State Legislatures have power exists in Congress to determine by law what shall or shall not be received in a State court. *Latham v. Illinois*, 29; *Bowlin v. Commonwealth*, Bush (Ky.), 5.

2. *Fisher v. McGirr*, 1 Gray (Mass.); *Beer Co. v. Massachusetts*, 97; *Fertilizing Co. v. Hyde Park*, 663; *Stone v. Mississippi*, 101.

An act which allows the seizure of liquors kept and sold without warrant of liquor is unconstitutional. *v. O'Neil*, 22 Repr. (Vt.) 58; *Bemeyer v. Iowa*, 18 Wall. (U. S.) 520; *Beer Co. v. Massachusetts*, 97; *State v. Paul*, 5 R. I. 185; *Starin*, 5 R. I. 497; *People v. B. B. Reynolds*, 330; *Reynolds v. Geary*, 179.

But if the act does not prohibit notice to the owner, nor for a time question whether the liquors seized are held in violation of law, it is consistent with the constitution. *Greene*, 2 Curt. (U. S. Cir.) 187; *State v. B. B. Reynolds*, 3 R. I. 64.

A statute authorizing the seizure and destruction of fish used in catching fish in violation of law is unconstitutional if no process

The enforced collection of taxes levied for public and lawful purposes does not deprive a person of his property without due process of law, if the owner is afforded an opportunity to contest the legality of all the essential steps.<sup>1</sup> But statutes declaring the forfeiture of lands to the State for the non-payment of taxes, without any judicial ascertainment of the fact of delinquency, are unconstitutional.<sup>2</sup> And if the law under which the tax is levied is

made for notice or trial. *Teck v. Anderson*, 57 Cal. 251; s. c., 40 Am. Rep. 115.

So of a statute allowing a police magistrate, upon information or personal knowledge, to cause a gaming table or device to be seized and destroyed without any judicial condemnation. *Lowry v. Rainwater*, 70 Mo. 152; s. c., 35 Am. Rep. 420.

The constitutional provision prohibiting the deprivation of property is not infringed by a proper law regulating a business which may render property used to carry on the business less valuable. If the business is still allowed to be carried on, and the property still allowed to exist, and its possession is not disturbed, the owner cannot be said to be deprived of his property. *Munn v. Illinois*, 69 Ill. 80; s. c., 94 U. S. 113; *Beer Co. v. Massachusetts*, 97 U. S. 32; *Stone v. Mississippi*, 101 U. S. 814; *Slaughter-house Cases*, 16 Wall. (U. S.) 36; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *New Orleans Gas-light Co. v. Louisiana Light & Heat Co.*, 115 U. S. 650.

A statute making railroad companies liable in double damages for stock killed in consequence of their neglect to fence their tracks is constitutional. *Missouri Pacific R. v. Humes*, 115 U. S. 512; *Humes v. Railroad*, 82 Mo. 221; s. c., 52 Am. Rep. 369; *Meyers v. Union Trust Co.*, 82 Mo. 237. Compare *Atchison, etc., R. v. Baty*, 6 Neb. 37. See *Black on Const. Prohibitions*, § 27; *Cooley on Const. Lim.* 579.

A statute requiring a plank-road company to remove its toll-gate beyond municipal limits is invalid, as taking property without due process of law. *Detroit v. Detroit Plank Road*, 43 Mich. 140.

1. *Kelly v. Pittsburgh*, 104 U. S. 78; *Lagar v. Reclamation District*, 111 U. S. 301; *Weimer v. Bunbury*, 30 Mich. 201; *Cooley on Taxation* (2d Ed.), 48.

A statute for raising public revenue by the assessment and collection of taxes, which gives notice of the proposed assessment to an owner of property to be affected by requiring him at a time

named to present a statement of his property, with his estimate of its value, to a designated official charged with the duty of receiving the statement; which fixes time and place for public sessions of other officials at which the statement and estimate are to be considered when the official valuation is to be made, and where the party interested has a right to be present and to be heard; and which affords him opportunity in a suit at law, for the collection of the tax, to judicially contest the validity of the proceedings, does not necessarily deprive him of his property without due process of law. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Davidson v. New Orleans*, 96 U. S. 97.

Where, as in California, the law makes no provision for notice to railroad corporations whose lines extend into more than one county, and provides no opportunity for a hearing at any stage of the proceedings relating to their assessment for taxation, the constitutional guaranty is infringed. *Santa Clara Co. v. Southern Pacific R.*, 18 Fed. Repr. 385; *San Mateo Co. v. Railroad*, 8 Sawy. (U. S. Cir.) 238. See *Moulton v. Parks*, 64 Cal. 166.

A statute is unconstitutional which requires a person who is in the possession and uninterrupted enjoyment of his property to commence an action for the vindication of his rights, or be forever barred from questioning the validity of a tax assessment or sale. *Baker v. Kelly*, 11 Minn. 480.

2. *Kinney v. Beverly*, 2 Hen. & M. (Va.) 318; *Barbour v. Nelson*, 1 Litt. (Ky.) 60; *Robinson v. Huff*, 3 Litt. (Ky.) 38; *Currie v. Fowler*, 5 J. J. Mar. (Ky.) 145; *Harlan v. Seaton*, 18 B. Mon. (Ky.) 312; *Griffin v. Mixon*, 38 Miss. 424; *St. Anthony Co. v. Greely*, 11 Minn. 321; *Baker v. Kelley*, 11 Minn. 480; *Hill v. Lund*, 13 Minn. 451. Compare *Wild v. Serpell*, 10 Gratt. (Va.) 405; *Hale v. Branscum*, 10 Gratt. (Va.) 418; *Usher v. Pride*, 15 Gratt. (Va.) 190; *Hodgdon v. Wight*, 36 Me. 326; *Adams v. Larrabee*, 46 Me. 516. See *Cooley on Taxation* (2d Ed.), 461 *et seq.*

void, any property taken to satisfy it is taken without due of law.

An ordinance authorizing the officers of a town to seize animals found running at large, without notice to the owner, is unconstitutional.<sup>2</sup>

Rights to property depend on a judicial and legal construction of the statutes existing when they vest, not on a legislative construction by a subsequent declaratory act.<sup>3</sup> The legislature has no constitutional power to pass a law subjecting the proceeds of the income of the wife's separate estate to the claims of the husband's creditors.<sup>4</sup> "Betterment laws," compensating the *bona fide* owner for permanent and beneficial improvements which have increased the value of the property, are valid and constitutional.

When property is condemned under the power of eminent domain, it cannot be said to be taken without the law of the land, but the property of a private citizen cannot, by the exercise of legislative power in any form, be taken from him and given to another private citizen.<sup>6</sup> (See also EMINENT DOMAIN.)

1. Dundee Mortgage Co. v. School District, 19 Fed. Repr. 359; Brady v. King, 53 Cal. 44; Harper v. Rowe, 53 Cal. 233.

2. Varden v. Mount, 78 Ky. 86; s. c., 39 Am. Rep. 208; Donovan v. Vicksburgh, 29 Miss. 247; Rockwell v. Nearing, 35 N. Y. 302; Halloway v. Police Jury, 16 La. Ann. 203.

**Escheat**—A statute requiring clerks of courts, after money has remained in their offices a specified time, to pay the same over to the county treasurer, is based upon the principles of the doctrine of escheat, and is free from any constitutional objections. Deaderick v. County Court, 1 Cold. (Tenn.) 202.

3. Hunt v. Hunt, 37 Me. 333; Lambertson v. Hogan, 2 Pa. St. 22; Haley v. Philadelphia, 68 Pa. St. 45; McLeod v. Burroughs, 9 Ga. 213.

The repeal of a statute of limitation of actions on personal debts does not, as applied to a debtor, the right of action against whom is already barred, deprive him of his property unduly. Campbell v. Holt, 115 U. S. 620. See Cooley v. Const. Lim. 365, and cases cited.

A statute authorizing the sale of real estate upon the petition of the life-tenant, in opposition to the wishes of the owner of the fee, when the latter is under no disability, is unconstitutional. Gossom v. McFerran, 79 Ky. 236.

The legislature cannot extinguish a mortgagor's title. Ashuelot R. v. Elliot, 58 N. H. 451.

A statute making a garnishee liable to satisfy a judgment against the defendant in case the garnishee neglects to render

a sworn account, does not deprive him of his property without due process of law. Vaughan v. Furlong, 12 N. H. 401. See Foulle v. Mann, 53 Iowa, 40.

4. George v. Ransom, 15 Cal. 401. Vested rights acquired in the property of a wife by virtue of the law existing at the time of the marriage cannot be taken away by subsequent legislation. McCarthy v. Bradt, 3 N. Y. 111; Metropolitan Bank v. Hitz, 1 Barb. 111; Holmes v. Holmes, 4 Barb. 295; White v. White, 5 Barb. 474; Westervelt v. Gregg, 12 N. Y. 401.

The legislature has no power to take away from a woman of her inchoate right of dower. Williams v. Courtney, 77 N. Y. 1. Compare Barbour v. Barbour, 4 N. Y. 111. A statute giving a deserted wife the rights of a *feme sole* trader is not a constitutional interference with the husband's interest in the wife's property prior to the act. Moore v. Ritner, 104 Pa. St. 298.

5. Brown v. Storm, 4 Vt. 37; Richardson v. Storm, 31 Vt. 306; White v. Corey, 2 N. H. 115; Bacon v. Under, 6 Mass. 303; Scott v. Mott, 1 Tex. 235; Saunders v. Wilson, 194; Fowler v. Halbert, 4 Bibb 111; Hunt v. McMahan, 5 Ohio, 111; Strong v. Jackson, 1 Blackf. (Ind.) 111; Ross v. Irving, 13 Ill. 171; Shower, 18 Iowa, 261; Pace v. Pickness, 19 Wis. 219; Cooley v. Const. Lim. 386. See Billings v. Hall, 10 N. Y. 111.

6. Beckman v. Railroad, 3 N. Y. 73; Matter of Albany S. R. Co. v. Wend, (N. Y.) 149; Matter of Jones v. Wend, (N. Y.) 659; Pittsburgh & Erie R. Co. v. Pittsburgh & Erie R. Co., 19 Wend. (N. Y.) 659; Pittsburgh & Erie R. Co. v. Pittsburgh & Erie R. Co., 19 Wend. (N. Y.) 659.



(b) *Searches and Seizures*.—The constitution of the United States provides that the people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures; and this guaranty is repeated in almost all the State constitutions.<sup>1</sup> Its main purpose was to make sacred the privacy of the citizen's dwelling and person against everything but process issued upon a showing of legal cause for invading it.<sup>2</sup>

(c) *Jury Trial (Civil)*.—It is provided by the Federal constitution that, in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.<sup>3</sup> It is well settled that this clause applies only to proceedings in the courts of the United States, and is not a restriction or limitation upon the several States, nor a regulation of the trial of actions in their courts.<sup>4</sup> But in the constitutions of a majority of

<sup>1</sup> Pa. St. 139; *Hepburn's Case*, 3 Bland (Md.), 95; *Sadler v. Langham*, 34 Ala. 311; *Cooper v. Williams*, 5 Ohio, 393; *Buckingham v. Smith*, 10 Ohio, 297; *Turner v. Althaus*, 6 Nebr. 54.

That clause of the constitution which provides that the property of no person shall be taken for public use without just compensation has reference to property taken by right of eminent domain, and not to the collection of taxes. *Nichols v. Bridgeport*, 23 Conn. 189.

<sup>2</sup> 1. Const. U. S. IVth Am.; *Stimson's Amer. Statute Law*, § 71. See *Cooley Const. Lim.* 299 *et seq.*

<sup>3</sup> *Weimer v. Bunbury*, 30 Mich. 201.

The right to be secure against unlawful searches and seizures is not derived from the constitutions, having existed long before them, as a settled principle of the common law. *United States v. Crosby*, 1 Hughes (U. S. Cir.), 448; 2 Story on the Const. § 1902; *Cooley Const. Lim.* 303.

**Concealment of Goods Held in Violation of Law**—Certain articles which are treated as property, while used for lawful purposes, may be subjects of forfeiture and destruction if their use is deemed pernicious to the best interests of the community. And when attempts to use such articles for unlawful purposes, or in an unlawful manner, are so concealed that ordinary diligence fails to make such discovery as enables the law to declare the forfeiture, statutes authorizing searches and seizures have been held legitimate. But the exercise of this power must be properly guarded, that abuses may be prevented, and that a citizen shall not be deprived of his property without having an accusation against him, setting out the nature and charge thereof, and by the judgment of his peers and the law of the land, and he shall be secure in his per-

son, house, papers, and possessions from unreasonable searches and seizures. *Gray v. Kimball*, 42 Me. 299. See *Allen v. Staples*, 6 Gray (Mass.), 491; *State v. Brennan*, 25 Conn. 278; *Hibbard v. People*, 4 Mich. 125.

**Books and Papers**.—It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment. A compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment. And it is equivalent to a compulsory production of papers to make the non-production of them a confession of the allegations which it is pretended they will prove. *Boyd v. United States*, 116 U. S. 616.

**Military Order**.—The provision of the U. S. constitution against unreasonable searches and seizures cannot be understood to prohibit a search or seizure made in attempting to execute a military order authorized by the constitution and a law of Congress, where the jury have found that the seizure was proper and reasonable. *Allen v. Colby*, 47 N. H. 544.

**Fourth Amendment** does not extend to the State governments, but was intended only for the legislature and judiciary of the United States. *Reed v. Rice*, 2 J. J. Mar. (Ky.) 45.

<sup>4</sup> Const. U. S. VIIth Amend.

<sup>5</sup> *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321; *Edwards v. Elliot*, 21 Wall. (U. S.) 532; *Walker v. Sauvinet*, 92 U. S. 90; *State v. Keyes*, 8 Vt. 57; *Commonwealth v. Whitney*, 108 Mass. 5; *Colt v. Eves*, 12 Conn. 243; *Murphy v. People*, 2 Cow. (N. Y.) 815; *Livingston v. Mayor of New York*, 8 Wend. (N. Y.) 85; *Lee*



the States there is found a guaranty that the right of trial by jury shall remain inviolate.<sup>1</sup> This means a trial according to the course of the common law, and the same in substance as that which was in use when the constitution was adopted.<sup>2</sup> But it secures the right only in cases where a jury trial was customarily used, and could legally be claimed, at the time of the adoption of the constitution.<sup>3</sup> In *equity* cases, by the laws and practice prevailing in all

*v. Tillotson*, 24 Wend. (N. Y.) 337; *Foster v. Jackson*, 57 Ga. 206; *Boring v. Williams*, 17 Ala. 510; *State v. Carro*, 26 La. Ann. 377; *State v. Anderson*, 30 La. Ann. Pt. I., 557; *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558; *Whallon v. Bancroft*, 4 Minn. 109; *Huston v. Wadsworth*, 5 Colo. 213.

The Seventh Amendment does not apply to a preliminary examination under the fugitive slave law, such a proceeding not being according to the course of the common law, but statutory. *Miller v. McQuerry*, 5 McLean (U. S. Cir.), 469.

This clause may, in just sense, be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever peculiar form they may assume to settle legal rights. *Parsons v. Bedford*, 3 Pet. (U. S.) 447.

The provision of this amendment, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, applies to facts tried by a jury in a cause in a State court. *Justices v. Murray*, 9 Wall. (U. S.) 274.

1. *Stimson's Amer. Stat. Law*, §§ 72, 73.

2. *East Kingston v. Towle*, 48 N. H. 64; *Copp v. Hemriker*, 55 N. H. 179; *Murphy v. People*, 2 Cow. (N. Y.) 815; *People v. Fisher*, 20 Barb. (N. Y.) 652; *Byers v. Commonwealth*, 42 Pa. St. 89; *Rhines v. Clark*, 51 Pa. St. 96; *Howe v. Treasurer*, 37 N. J. L. 145; *Commissioners v. Seabrook*, 2 Strobh. (S. Car.) 560; *Tims v. State*, 26 Ala. 165; *Trigally v. Mayor*, 6 Cold. (Tenn.) 382; *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558; *Ross v. Irving*, 14 Ill. 171; *Whitehurst v. Coleen*, 53 Ill. 247; *Stilwell v. Kellogg*, 14 Wis. 461; *Mead v. Walker*, 17 Wis. 189; *Whallon v. Bancroft*, 4 Minn. 109; *Koppikus v. Commissioners*, 16 Cal. 248.

3. *People v. Phillips*, 1 Edm. Sel. Cas. (N. Y.) 386; *Harper v. Commissioners*, 23 Ga. 566; *Blanchard v. Raines*, 20 Fla. 467; *Trigally v. Memphis*, 6 Cold. (Tenn.) 382; *Kimball*, 3 Kans. 414; *Ross v. Irving*, 14 Ill. 171; *Whitehurst v. Coleen*, 53 Ill. 247; *Mead v. Walker*, 17 Wis.

189; *Commissioners v. Morrison*, 22 Minn. 178.

In preserving the trial by jury "as heretofore used," the constitution does not interfere with those tribunals which, at the time of its adoption, proceeded to judgment without the intervention of a jury. *Commissioners v. Seabrook*, 2 Strobh. (S. Car.) 560; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194.

Not every case which is not a criminal case is a civil one, wherein by the constitution the right of trial by jury shall remain inviolate; but that term embraces such as were treated as civil cases when the constitution was adopted. *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558. See *Commissioners v. Morrison*, 22 Minn. 178. Compare *Plimpton v. Somerset*, 33 Vt. 283.

An act of the legislature clogging the right of trial by jury with onerous conditions will not be pronounced unconstitutional unless it totally prostrates the right, or renders it wholly unavailing. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194.

**Eminent Domain.**—In proceedings for the condemnation of property under the power of eminent domain, the property owner has no constitutional right to a trial by jury, unless, as is the case in some States, the constitution expressly gives it. *Backus v. Lebanon*, 11 N. H. 19; *Livingston v. Mayor of New York*, 8 Wend. (N. Y.) 85; *Penna. R. Co. v. First German Congregation*, 53 Pa. St. 445; *Scudder v. Trenton Co.*, 1 N. J. Eq. 694; *Buffalo Bayou R. Co. v. Ferris*, 26 Tex. 588; *Cairo, etc., R. Co. v. Trout*, 32 Ark. 17; *Dronberger v. Reed*, 11 Ind. 420; *Hymes v. Aydelott*, 26 Ind. 431; *Des Moines v. Layman*, 21 Iowa, 153; *Louisiana Plank Road Co. v. Pickett*, 25 Mo. 535; *Heyneman v. Blake*, 19 Cal. 579; *Kendall v. Post*, 8 Oreg. 141. Compare *Lamb v. Lane*, 4 Ohio St. 167.

**Collection of Taxes.**—In the assessment and collection of taxes the constitutional provisions relating to jury trial do not apply. *Grace v. Newton*, 135 Mass. 490; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455; *Harper v. Elberton*, 23 Ga. 566; *State v. Moss*, 69 Mo. 495; *Com-*

the States (except New Hampshire) before the adoption of their constitutions, a trial by jury was not used. The constitutional provision preserving the right of trial by jury does not therefore

missioners *v. Morrison*, 22 Minn. 178; *Cooley on Taxation* (2d Ed.), 45-50, 432.

**Claims against Government.**—In the trial of claims against the government, the claimant has no constitutional right to a trial by jury; he can only establish his claim in the mode pointed out by the statute. *McElrath v. United States*, 102 U. S. 426; *Bledsoe v. State*, 64 N. Car. 392; *Pelham v. State*, 30 Tex. 422.

A statute authorizing the appointment of a jury of six men to ascertain and determine, out of court, the amount of damage to property done by a mob, is constitutional. *In re Pennsylvania Hall*, 5 Pa. St. 204.

**Contested Elections.**—An act providing for the final determination of the question of the election of public officers, is not unconstitutional in not giving a trial by jury. *Ewing v. Filley*, 43 Pa. St. 384; *State v. Lewis*, 51 Conn. 113; *Allison v. State*, 17 Repr. (Ga.) 393; *State v. Gleason*, 12 Fla. 190. *Compare People v. Albany, etc.*, R. Co., 57 N. Y. 361; *State v. Burnett*, 2 Ala. 140; *State v. Head*, 22 La. Ann. 54; *People v. Ciott*, 16 Mich. 309.

**Quo Warranto.**—In a proceeding of this character, the defendant has no constitutional right to a jury trial. *State v. Lupton*, 64 Mo. 415; s. c., 27 Am. Rep. 253; *State v. Vail*, 53 Mo. 97; *State v. Johnson*, 26 Ark. 281. *Compare People v. Albany, etc.*, R. Co., 57 N. Y. 361; *State v. Burnett*, 2 Ala. 140; *People v. Doesburg*, 16 Mich. 133.

**Mandamus.**—The act of Congress concerning the practice in Territorial courts, in recognizing the right of trial by jury in cases cognizable at common law, does not include proceedings in *mandamus*. *Chumasero v. Potts*, 2 Mont. Ter. 242.

**Contempt of Court.**—The infliction of summary punishment for a contempt of court is not an infringement of the constitutional guaranty of jury trial. *State v. Doty*, 3 Vroom (N. J.), 403; *Garrigus v. State*, 93 Ind. 239.

**Remedies against Sureties.**—Sureties on certain kinds of bonds, such as sheriffs' bonds, writ of error bonds, and bonds for costs, may have judgment rendered against them on such bonds without a jury trial. *Bank of Columbia v. Okely*, 4 Wheat. (U. S.) 235; *Gildersleeve v. People*, 10 Barb. (N. Y.) 35; *Johnston v. Atwood*, 2 Stew. (Ala.) 225; *Murray v. Askew*, 6 J. J. Mar. (Ky.) 27; *Young*

*v. Wise*, 45 Ga. 81; *Whitehurst v. Coleen*, 53 Ill. 247. *Compare Hughes v. Hughes*, 4 T. B. Mon. (Ky.) 42.

A statute giving to sureties the right to recover, by summary process, money paid by them for their principal, is constitutional. *McCord v. Johnson*, 6 Litt. (Ky.) 241.

**Summary Proceedings.**—A statute authorizing summary proceedings by motion against a sheriff and his sureties for official misconduct, is not a violation of the constitutional guaranty of jury trial. *Lewis v. Garrett*, 5 How. (Miss.) 434; *Lewis v. Fellows*, 6 How. (Miss.) 261.

The legislature may give a corporation, created for the public benefit, a summary mode of collecting its debts. *Hank of Newbern v. Taylor*, 2 Murph. (N. Car.) 266.

**Supplementary Proceedings.**—Upon proceedings supplementary to execution, the debtor is not entitled to a jury trial. *Kennesaw Mills v. Walker*, 19 S. Car. 104.

An action by a judgment creditor to subject property fraudulently sold to the payment of his judgment, which but for such fraud would have been subject to levy on execution, is not a proceeding supplementary to execution, and trial by jury is a matter of right. *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

**Divorce Proceedings.**—In an action for divorce, or to annul a marriage, a trial by jury is not a constitutional right. *Coffin v. Coffin*, 55 Me. 361; *Leffel v. Leffel*, 35 Ind. 76; *Cassidy v. Sullivan*, 64 Cal. 266.

**Inquisition of Lunacy.**—An inquest of lunacy by a board of commissioners is no violation of the constitutional right of trial by jury. *Black Hawk Co. v. Springer*, 58 Iowa, 417. See *Gaston v. Babcock*, 6 Wis. 503.

**Dower.**—In an action for admeasurement of dower the defence was that the plaintiff had, by an ante-nuptial agreement, released her claim to dower. *Held*, that the defendants were entitled to a jury trial. *Kinne v. Kinne*, 2 Thomp. & C. (N. Y.) 393.

**Insolvent Laws.**—The provision of the insolvent laws which authorizes the issuing of a warrant to take possession of all the estate of the debtor, on the petition of a creditor, without a trial by jury on the facts alleged in the petition, is constitutional. *O'Neil v. Glover*, 5 Gray (Mass.), 144.

extend to such cases, and the legislature may provide that a suit in equity may be tried by the court without the intervention of a jury.<sup>1</sup> But the legislature cannot convert a legal right into an equitable one so as to infringe upon the right of jury trial.<sup>2</sup>

Compulsory references, in cases requiring the examination of long accounts, were well known and sanctioned by statute in some of the States before the adoption of their constitutions. Such references may therefore be authorized by their legislatures without contravening the constitutional guaranty of trial by jury. But in other States it is held that a compulsory reference of issues of fact to the determination of a single person is a violation of the constitutional rights of the parties. A statute authorizing

1. *Plimpton v. Somerset*, 33 Vt. 283; *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S. Cir.) 351; *Dunnell v. Keteltas*, 16 Abb. Pr. (N. Y.) 205; *McCarty v. Edwards*, 24 How. Pr. (N. Y.) 236; *Wynkoop v. Cooch*, 69 Pa. St. 450; *Lucken v. Wichman*, 5 S. Car. 411; *Kimball v. Connor*, 3 Kans. 414; *Hixon v. George*, 18 Kans. 253; *Helm v. Huntington Bank*, 91 Ind. 44; *Hearock v. Hosmer*, 109 Ill. 245; *Conran v. Sellew*, 28 Mo. 320; *Weil v. Kune*, 49 Mo. 158; *Stilwell v. Kellogg*, 14 Wis. 461; *Lake v. Tolles*, 8 Nev. 285. Compare *Marston v. Brackett*, 9 N. H. 336; *Hoit v. Burleigh*, 18 N. H. 389. See *Bellows v. Bellows*, 58 N. H. 60.

2. *Norris's Appeal*, 64 Pa. St. 275.

In a suit brought to foreclose a mortgage there is no constitutional right to a trial by jury. *Carmichael v. Adams*, 91 Ind. 526; *Middletown Bank v. Bacharach*, 46 Conn. 513; *Stilwell v. Kellogg*, 14 Wis. 461; *Conn. Ins. Co. v. Cross*, 18 Wis. 109.

Questions concerning trust funds belong to a court of equity, and do not require a jury trial. *Sands v. Kimbark*, 27 N. Y. 147.

The rule that in equitable suits a jury will not be called as a matter of right, applies to an action alleging the cancellation and delivery of a note by mistake and asking for relief. *Weil v. Kune*, 49 Mo. 158.

On petition for the allowance of a claim against property in the hands of a receiver, a jury trial is not a matter of right. *Kennedy v. Railroad*, 2 Flap. (U. S. Cir.) 704. See *Litchfield v. Degendorf*, 18 N. Y. Supr. Ct. 358.

The constitutional right of trial by jury applies to an action to abate a nuisance and recover the damages occasioned thereby, although the complaint is in form as for equitable relief, and the prayer for damages may be regarded as incidental thereto. *Hudson v. Caryl*, 44 N. Y. 553; *Hyatt v. Myers*, 73 N. Car. 232.

A suit on a guardian's bond is equitable but a common-law suit, and in a trial by jury is a matter of course. *Galway v. State*, 93 Ind. 161.

Although an action for partition is an equitable action, yet under the statute where issues of fact are presented by the pleadings, a jury trial may be demanded. *Hewlett v. Wood*, 62 N. Y. 75.

3. *Lee v. Tillotson*, 24 Wend. 337; s. c., 35 Am. Dec. 624; *Walker*, 17 Wis. 189; *Supervisors v. Dunning*, 20 Wis. 210; *Perkins v. State*, 57 N. H. 55.

But a law compelling a person to state upon a claim which properly may be the subject of an action, without assent, is contrary to the constitutional provision securing him a right to a trial by jury according to the course of the common law. *People v. Haws*, 37 Barb. 440; *McMartin v. Bingham*, 27 N. Y. 234.

The legislature has no power to require a claim to be made by individuals against a municipal corporation for damages on account of the failure of the corporation to award a contract to them, or that the damages shall be ascertained by arbitrators, to be appointed as provided in the act, without requiring the assent of the corporation. *Baldwin v. York*, 45 Barb. (N. Y.) 359.

4. *Bernheim v. Waring*, 79 N. Y. 56; *Smith v. Bryce*, 17 S. Car. 523; *Pfeiffer v. Maltby*, 38 Tex. 523; *Norris*, 19 Cal. 140; *Graves v. R. Co.*, 5 Mont. 556; s. c., 51 Am. Rep. 100.

An act making an auditor's report *prima facie* evidence of the facts in a suit by him, on the trial before the jury, is unconstitutional. *King v. Hopkinton*, 18 N. H. 334, where Foster, C. J., said: "If the jury can be compelled to base their verdict not upon the issue between the parties, but upon the question whether an auxiliary decision on an issue is right, giving to that a

actions to be tried by referees upon the consent of the parties is not repugnant to the constitutional provision securing trial by jury.<sup>1</sup>

Many cases hold that the courts have no authority to order a peremptory nonsuit against the will of the plaintiff; he has a right by law to a trial by jury, and to have the case submitted to them; he may agree to a nonsuit, but cannot be compelled to submit to it.<sup>2</sup> Statutes which authorize a justice of the peace, or other inferior court, to decide questions without a jury, but which give an appeal from his judgment to a court which tries by jury, are constitutional.<sup>3</sup>

decision as evidence of its own correctness such weight as the legislature choose to prescribe, the constitutional guaranty of trial by jury is a delusion." And see *Plimpton v. Somerset*, 33 Vt. 283; *Deverson v. Railroad*, 58 N. H. 129.

The courts of the United States cannot deprive either party of the right of trial by jury, by sending the issue to referees, without his explicit consent. *United States v. Rathbone*, 2 Paine (U. S. Cir.), 578.

1. *Home Ins. Co. v. Security Ins. Co.*, 23 Wis. 171.

2. *Doe v. Grymes*, 1 Pet. (U. S.) 469; *D'Wolf v. Rabaud*, 1 Pet. (U. S.) 476; *Mitchell v. Ins. Co.*, 6 Pick. (Mass.) 117; *Girard v. Gettig*, 2 Binn. (Pa.) 234; *Widdifield v. Widdifield*, 2 Binn. (Pa.) 248; *Irving v. Taggart*, 1 S. & R. (Pa.) 360; *Thweat v. Finch*, 1 Wash. (Va.) 219; *Ross v. Gill*, 1 Wash. (Va.) 87; *Phillips v. Jordan*, 3 Stew. (Ala.) 42; *Bacon v. Parker*, 2 Overt. (Tenn.) 57; *Scruggs v. Brackin*, 4 Yerg. (Tenn.) 528. Compare *Pratt v. Hull*, 13 Johns. (N. Y.) 334; *Stuart v. Simpson*, 1 Wend. (N. Y.) 176; *Perley v. Little*, 3 Me. 97; *Brown v. Frost*, 2 Bay (S. Car.), 126.

Facts are for the jury; the law applicable to them is for the court; hence when the court ordered a nonsuit, on the ground that, under the law as applicable to all the facts of the case that a jury could have found from the evidence, there was no liability on the part of the defendant, such order was held not to violate the constitutional right of jury trial. *Munn v. Pittsburgh*, 40 Pa. St. 364; *Naugatuck R. v. Waterbury Co.*, 24 Conn. 468.

A statute allowing the judge, on disagreement of the jury, to decide the cause is not unconstitutional. *Joseph v. Bidwell*, 28 La. Ann. 382.

A statute which enables the court to make the record conform to what was tried before the jury and found by the verdict does not infringe the right of

trial by jury. *Parks v. Boynton*, 98 Pa. St. 370.

**Directing a Verdict.**—After the evidence was in, on a trial before a jury, the court ordered a verdict for the plaintiff, subject to the opinion of the court whether, on the evidence, the defendant was liable, and then rendered judgment for the defendant. Held, that the plaintiff was unlawfully deprived of his right to a trial by jury. *Baylis v. Insurance Co.*, 113 U. S. 316.

**Assessment of Damages by Court.**—The right of trial by jury is not impaired by a law giving to the court the right to assess damages without a jury in case of default. *Hopkins v. Ladd*, 35 Ill. 178; *Seeley v. Bridgeport*, 20 Repr. (Conn.) 360; *Raymond v. Railroad*, 43 Conn. 596.

So in replevin, when plaintiff discontinues. *Campbell v. Head*, 13 Ill. 122; *Lamy v. Remuson*, 2 New Mex. 245.

In cases of debt or covenant, where the amount is liquidated by the act or deed of the parties, a court may proceed without a jury to assess the damages. *Harrison v. Chiles*, 3 Litt. (Ky.) 200.

3. *Beers v. Beers*, 4 Conn. 535; *State v. Brennan*, 25 Conn. 278. *Emerick v. Harris*, 1 Binn. (Pa.) 416; *Biddle v. Commonwealth*, 13 S. & R. (Pa.) 405; *Stuart v. Baltimore*, 7 Md. 500; *Thomas v. Bibb*, 44 Ala. 721; *Keddie v. Moore*, 2 Murph. (N. Car.) 41; *Wilson v. Simonton*, 1 Hawks (N. Car.), 482; *Monford v. Barney*, 8 Yerg. (Tenn.) 444; *State v. Beneke*, 9 Iowa, 203.

In several States there is no constitutional right to trial by jury when the amount in controversy does not exceed a certain sum. *Stimson's Amer. Stat. Law*, § 73. Hence an act which does not allow an appeal to a jury from a justice's judgment not exceeding that sum, is not unconstitutional. *Curtis v. Gill*, 34 Conn. 49.

The adoption of a State constitution providing that the right of trial by jury

The word "jury," as used in the constitutional guaranty of trial by jury, means a jury of twelve men.<sup>1</sup> Trial by jury may be waived by the parties in all civil cases.<sup>2</sup>

(d) *Liberty of Conscience.*—The constitutional guaranties for the free exercise of religious profession and worship without discrimination do not interdict all legislation connected with religion, nor do they avoid legislation tending to promote religion.<sup>3</sup> *Mo-*

"shall be preserved inviolate" does not prohibit the legislature from increasing the amount requisite to entitle a defeated party in an action before a justice to appeal and obtain a jury trial. *Guile v. Brown*, 38 Conn. 237.

A statute requiring the appellant from a magistrate's judgment to give security for the prosecution of his appeal and for costs, is not unconstitutional as infringing on jury trial. *Hapgood v. Doherty*, 8 Gray (Mass.), 373.

The repeal of a statute which gave suitors in the supreme court a second trial as of course is valid. *Matthews v. Tripp*, 12 R. I. 256.

1. Opinion of Justices, 41 N. H. 550; *People v. Justices*, 74 N. Y. 406; *People v. Kennedy*, 2 Parker (N. Y.), 312; *Dowling v. State*, 5 Sm. & Mar. (Miss.) 664; *Work v. Ohio*, 2 Ohio St. 307; *Lamb v. Lane*, 4 Ohio St. 167; *Vaughn v. Scade*, 30 Mo. 600; *Campau v. Detroit*, 14 Mich. 276; *May v. Railroad*, 3 Wis. 219.

Whenever facts are to be found in any proceeding in which a jury was not required by the common law, a jury of any number may be authorized within the discretion of the legislature. And as juries did not belong to courts held by justices of the peace, a law requiring a less number than twelve to constitute a jury in such courts would not be unconstitutional. *Work v. State*, 2 Ohio St. 296; *Knight v. Campbell*, 62 Barb. (N. Y.) 16.

A statute providing that three fourths of a jury may find a verdict in a common-law action is unconstitutional. *Kleinschmidt v. Dunphy*, 1 Mont. Ter. 118; Opinion of the Justices, 41 N. H. 550.

*Composition of the Jury.*—The constitutional provision that the right of trial by jury shall remain inviolate does not necessarily mean trial by a jury of the vicinage. Juries were originally selected from the vicinage because, being so selected, they were more likely to know about the matter for trial. That reason no longer operates. The principal reason for trial in the vicinage now is the convenience of parties and witnesses. *Taylor v. Gardiner*, 11 R. I. 182. *Com-*

*pare Swart v. Kimball*, 43 Mich. 48; See *Colt v. Eves*, 12 Conn. 243.

(*Nota bene*, that this view cannot be extended to criminal trials. See, § 10 (b).)

An act which prohibits those who are not tax-payers from serving on a jury conflicts with the Federal constitution and is void. *Reece v. Knott*, 3 Ky. 451.

Neither the right of trial by jury nor the principles of local self-government are infringed by the Michigan statute authorizing jurors to be drawn from a board of jury commissioners appointed by the governor. *People v. Hall*, 53 Mich. 48; s. c., 51 Am. Rep. 95.

2. *Leahy v. Dunlap*, 6 Colo. 194; *Flint River Steamboat Co. v. Foster*, 104 Ga. 194.

A statute providing that, in civil actions, a party shall not be entitled to a trial by jury unless he files, within a certain time prescribed, a notice that he demands such trial, is constitutional and valid. *Foster v. Morse*, 132 Mass. 354; 42 Am. Rep. 438.

*Jury Fees.*—There is no valid objection to charging a party who demands a jury trial a reasonable jury fee. *Anderson v. Corrison*, 7 Minn. 456.

A statute giving special juries to either party, on motion, by paying the costs of the same, does not violate the constitutional right of trial by jury. *King v. Stifel Brewing Co.*, 15 Mo. 125.

The Tennessee act, "to tax the party with the jury fees in all cases of civil suits," was held unconstitutional. *Neely v. State*, 4 Baxt. (Tenn.) 174.

*Affidavit of Defence.*—An act allowing judgment to be entered without a trial on the failure of the defendant to file an affidavit of defence within the specified time, does not violate the constitutional guaranty. *Lawrence v. Borm*, 8 St. 225; *Randall v. Weld*, 86 Pa. 51; *Dortic v. Lockwood*, 61 Ga. 293.

3. *Ex parte Andrews*, 18 Cal. 569; See 2 Story on the Const. §§ 1870-1871; *Cooley Const. Lim.* 467-478.

The Bill of Rights of New Hampshire (art. 6), while it empowers the le-

the States of the Union have enacted statutes prohibiting the transaction of business, or the pursuit of ordinary secular avocations, on Sunday. The constitutionality of these laws is unquestioned.<sup>1</sup> The same is true of statutes defining and punishing blasphemy.<sup>2</sup>

(e) *Right to Obtain Justice without Purchase.*—A statute which prescribes entrance fees and continuance fees for suits at law and in equity does not violate the constitutional provision that every citizen "ought to obtain justice freely and without purchase, completely and without denial, promptly and without delay."<sup>3</sup>

And it is held that a statute providing that, before any person claiming title to land sold for taxes can prosecute or defend a suit against the tax-title claimant, he shall deposit in court the amount of the purchase-money, together with all taxes and costs accruing since the sale and the value of improvements made by the purchaser, is not unconstitutional under this provision of the constitu-

ture to authorize the several towns, parishes, bodies corporate, or religious societies within the State to make adequate provision at their own expense for the support and maintenance of public Protestant teachers of religion, does not directly or by implication forbid the legislature to authorize such towns, etc., to make provision for the support of any other religious teachers besides Protestants. *Hale v. Everett*, 53 N. H. 9.

The courts will not compel an individual to attend worship in any place, nor remain connected with any church, nor to receive any one as his pastor. *Feizel v. Trustees*, 9 Kans. 592.

*Bible in the Schools.*—A statute providing that the Bible shall not be excluded from the public schools, but that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is constitutional. *Moore v. Monroe*, 64 Iowa, 367; s. c., 52 Am. Rep. 444. See *Cincinnati v. Minor*, 23 Ohio St. 211.

1. *Commonwealth v. Colton*, 8 Gray (Mass.) 488; *Neuendorff v. Duryea*, 69 N. Y. 557; *People v. Hoym*, 20 How. Pr. (N. Y.) 76; *Lindenmuller v. People*, 33 Barb. (N. Y.) 548; *Specht v. Commonwealth*, 8 Pa. St. 312; *Commonwealth v. Wolf*, 3 S. & R. (Pa.) 48; *State v. Fearson*, 2 Md. 310; *Bode v. State*, 7 Gill (Md.) 326; *State v. Williams*, 4 Ired. (N. Car.) 400; *City Council v. Benjamin*, 2 Strobb. (S. Car.) 508; *Hall v. State*, 3 Kelly (Ga.), 18; *Frolickstein v. Mayor*, 40 Ala. 725; *Gabel v. Houston*, 29 Tex. 335; *Elsner v. State*, 30 Tex. 524; *Bohl v. State*, 3 Tex. App. 683; *State v. Bott*, 31 La. Ann. 663; *Megowan v. Commonwealth*, 2 Met.

(Ky.) 3; *Shover v. State*, 5 Engl. (Ark.) 259; *States v. Anderson*, 30 Ark. 131; *McGarrick v. Wason*, 4 Ohio St. 566; *Piqua v. Zimmerlin*, 35 Ohio St. 507; *Vogelsong v. State*, 9 Ind. 112; *Eitel v. State*, 33 Ind. 201; *State v. Ambs*, 20 Mo. 214; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Hird*, 19 Cal. 130; *Ex parte Burke*, 59 Cal. 6; s. c., 43 Am. Rep. 231; *Parker v. State*, 25 Am. L. Reg. N. S. 722, and note; 2 *Bishop Criminal Law*, § 951; *Cooley Const. Lim.* 476. Compare *Ex parte Newman*, 9 Cal. 502.

2. *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 213; *People v. Ruggles*, 8 Johns (N. Y.) 290; *State v. Chandler*, 2 Harring. (Del.) 553. See *Cooley Const. Lim.* 472-3.

As the constitution of Kentucky excuses those from bearing arms who have conscientious scruples on the subject, a fine for not attending a militia muster cannot be imposed on such a person. *White v. McBride*, 4 Bibb (Ky.), 61.

The rejection of a witness as incompetent, by reason of his want of religious belief, is no violation of religious freedom. *Thurston v. Whitney*, 2 Cush. (Mass.) 104.

3. *Perce v. Hallett*, 13 R. I. 363; *Willard v. Redwood Co.*, 22 Minn. 61.

This provision does not make unconstitutional an act which authorizes the court, for cause shown, to require security for costs from a party suing in the court. Such an act is a proper safeguard against vexatious prosecutions. A person cannot be said to purchase justice when he simply secures his opponent's costs, in case he fails in the suit. *Conley v. Woonsocket Co.*, 11 R. I. 147; *Gesford v. Critzer*, 2 Gilm. (Ill.) 698.

tion.<sup>1</sup> A constitutional declaration that every person for injury done him shall have adequate remedy by due process of law, does not operate in the courts to sustain an action of which the legislature has not given the court jurisdiction; its effect is to devolve duty upon the legislature of providing juridical remedies, but until these are prescribed the courts cannot act.<sup>2</sup>

(f) *Right to Bear Arms.*—The right to bear arms is not granted by the constitution, nor is it in any manner dependent upon the instrument for its existence. The Second Amendment means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government.<sup>3</sup> A statute prohibiting the carrying of concealed weapons is no infringement of the constitutional right of the citizen; it is a measure of police, prohibiting only a particular mode of bearing arms which is found dangerous to the peace of society.<sup>4</sup>

(g) *Fourteenth and Fifteenth Amendments.*—The Fourteenth Amendment prohibits a State from depriving a person of life, liberty, or property without due process of law, and from denying any person within its jurisdiction the equal protection of the law; but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong

1. *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644; *Coats v. Hill*, 41 Ark. 149; *Smith v. Smith*, 19 Wis. 615. Compare *Reed v. Tyler*, 56 Ill. 288; *Conway v. Cable*, 37 Ill. 82; *Lassiter v. Lee*, 68 Ala. 287; *Weller v. St. Paul*, 5 Minn. 95. See *Dunn v. Snell*, 74 Me. 22; *Cooley on Taxation* (2d Ed.), 550 *et seq.*

The legislature has constitutional power to tax rights in action, and to enact that an affidavit that all taxes upon a demand in suit have been paid shall be filed before the plaintiff is allowed to proceed in the cause. *Walker v. Whitehead*, 43 Ga. 538. Compare *Lathrop v. Brown*, 10 Am. Law Reg. 638.

2. *State v. Dubuclet*, 28 La. Ann. 698.

3. *United States v. Cruikshank*, 92 U. S. 542; *Presser v. Illinois*, 116 U. S. 252; *Andrews v. State*, 3 Heisk. (Tenn.) 165. See *Cooley Const. Lim.* 350; 2 Story on the Const., §§ 1896-1898.

But in view of the fact that all citizens capable of bearing arms constitute the reserved military force of the national government, as well as in view of its general powers, the States cannot prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security. *Presser v. Illinois*, 116 U. S. 252.

4. *Wright v. Commonwealth*, 77 Pa. St. 470; *State v. Speller*, 86 N. Car. 697;

*Nunn v. State*, 1 Kelly (Ga.), 243; *Harris v. Georgia*, 53 Ga. 572; *State v. Reid*, Ala. 612; *Chatteaux v. State*, 52 Ala. 388; *State v. Jumel*, 13 La. Ann. 30; *English v. State*, 35 Tex. 472; *Ayme v. State*, 2 Humph. (Tenn.) 154; *State v. Buzzard*, 4 Pike (Ark.), 18; *Fife v. State*, 31 Ark. 455; *Wilson v. State*, 33 Ark. 557; *Haile v. State*, 38 Ark. 564; 2 42 Am. Rep. 3; *State v. Wilforth*, 74 Mo. 528; 1 c. 41 Am. Rep. 330. Compare *Bliss v. Commonwealth*, 2 Litt (Ky.), 10; *Andrews v. State*, 3 Heisk. (Tenn.) 165. But a law which should prohibit the wearing of weapons openly upon a person would be unconstitutional. *Nunn v. State*, 1 Kelly (Ga.), 243.

*Weapons not Military.*—"The provision protects only the right to keep such arms as are used for purposes of war, and such only as are distinguished from those which are employed in quarrels and brawls and fights between maddened individuals, since such only are properly known by the name of arms, and such only are adapted to promote the security of a free state. In like manner, the right to bear arms refers only to the military way of using them, not to their use in bravado and affray." 2 Bishop's Crim. Law, 124.

The language of the constitution does not include dirks, daggers, or bow-knives. *English v. State*, 35 Tex. 472; *Cockrum v. State*, 24 Tex. 394.



every citizen as a member of society. The duty of protecting all their citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.<sup>1</sup> It does not require that the State shall secure infallibility in the practical administration of its laws; nor can its failure to do so in any particular case be deemed a denial of the equal protection of the laws.<sup>2</sup> The prohibitory provisions

1. *United States v. Cruikshank*, 92 U. S. 542. The Fourteenth Amendment does not add to the privileges or immunities of citizens, but only furnishes additional protection for the privileges already existing. Thus, it does not give women the right to vote in States where the organic law forbids it. *Minor v. Happersett*, 21 Wall. (U. S.) 162.

2. *Green v. State*, 16 Repr. (Ala.) 390.

**Equal Protection of the Laws.**—A State may establish one system of law in one portion of its territory, and another system in another, provided always that it neither encroaches upon the proper jurisdiction of the United States, nor abridges the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same district. *Missouri v. Lewis*, 101 U. S. 22.

**State Regulation of Business.**—The Fourteenth Amendment applies to all citizens of the United States, and is intended to protect them in their privileges and immunities as such, against the action as well of their own State as of other States in which they may happen to be. These privileges and immunities do not consist merely in being placed on an equality with others, but embrace all the fundamental rights of a citizen of the United States as such. One of these fundamental rights is the right to pursue any lawful employment in a lawful manner, or in other words, the right to choose one's own pursuit subject only to constitutional regulations and restrictions. *Live Stock Association v. Crescent City Co.*, 1 Abb. (U. S.) 388. Compare *Munn v. People*, 69 Ill. 80.

A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provisions of the Federal constitution, if it confers upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal

sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. *Yick Wo v. Hopkins*, 118 U. S. 356.

An act providing that no corporation shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian laborer, is void, as conflicting with the treaty with China and with the Fourteenth Amendment. *In re Parrott*, 6 Sawyer (U. S. Cir.), 149. See *People v. Brady*, 40 Cal. 198.

**Service on Juries.**—Any State statute which denies to colored citizens the right or privilege of participating in the administration of the laws by serving on grand or petit juries, because of their race or color, is a discrimination against them which is forbidden by the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Green v. State*, 73 Ala. 26; *Commonwealth v. Johnson*, 78 Ky. 509.

And such discrimination is ground for quashing the panel or an indictment found by a jury so constituted. *Green v. State*, 73 Ala. 26.

In *Commonwealth v. Wright*, 79 Ky. 22; s. c., 42 Am. Rep. 203, it was held that a white man cannot complain of the exclusion, by statute, of negroes from the grand jury indicting him. Compare *Haggard v. Commonwealth*, 79 Ky. 366.

And the Nevada jury law, denying to Mongolians the right to serve as jurors, was held constitutional in *State v. Ah Chew*, 16 Nev. 50; s. c., 40 Am. Rep. 488.

A denial of a motion made by a colored man in a State court, on his being indicted for murder, that some portion of the jury be composed of his own race, was held not to be a denial of any right secured to him by the Federal constitution or any law. A mixed jury in a particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled that,



of the Fourteenth Amendment did not instantly, on the day of promulgation, vacate all offices held by persons within the cat of prohibition, and make all official acts performed by them

in the selection of jurors to pass upon his life, liberty, or property, there shall be no *exclusion* of his race and no *discrimination* against them because of color. But that is a different thing from a right to have a jury composed in part of colored men. *Virginia v. Rives*, 100 U. S. 313. See *Cavitt v. State*, 15 Tex. App. 190.

Where the State supreme court had declared unconstitutional a State statute discriminating against colored persons in the selection of a jury, and that the officer summoning the jurors should disregard race and color, it was held that a colored person prosecuted in the State court subsequent to such declaration could not claim, in advance of the trial, that any of his equal civil rights were denied; and hence he could not remove the cause to the Federal courts under U. S. Rev. Stat. § 641. *Bush v. Kentucky*, 107 U. S. 110. See *Neal v. Delaware*, 103 U. S. 370. See also *Dillon on Removal of Causes* (4th Ed.), §§ 32-36.

**Public School System.**—Under the recent amendments, the State legislature, in establishing and prescribing regulations for public schools, cannot exclude colored children from the benefit of the public-school system on account of their color only. A law providing separate schools for white and for colored children is not unconstitutional. Equality, and not identity, of rights and privileges is what is guaranteed to the citizen. But unless separate schools for colored children have been established, at the public expense, giving equal facilities for education as are afforded by the schools for whites, colored children are entitled to admission to the latter. *Ward v. Flood*, 48 Cal. 36; *People v. Gallagher*, 93 N. Y. 438; s. c., 45 Am. Rep. 232; *Cory v. Carter*, 48 Ind. 327; *Claybrook v. Owensboro*, 16 Fed. Repr. 297.

**Civil Rights Act, Constitutionality of.**—The first and second sections of the "Civil Rights Bill" of March 1, 1875,—the first section guaranteeing to all persons the full and equal enjoyment of all inns, public conveyances, places of amusement, etc., and the second section providing the punishment for violations of the provisions of the first section,—are unconstitutional and void. They cannot be sustained under either of the late amendments to the Constitution. For the legislation attempted does not profess to be corrective of any constitu

tional wrong committed by the but proceeds *ex directo* to declare certain acts committed by individuals shall be deemed offences. *Civil Cases*, 109 U. S. 3; *United States v. Washington*, 4 Woods (U. S. Cir. Cully v. Railroad, 1 Hughes (U. S. 536. Compare *United States v. Comer*, 11 Phila. (Pa.) 519.

But the act of Congress of 1866, known as the "Civil Rights Act" was held to be constitutional in its provisions, and to be an appropriate method of exercising the power conferred on Congress by the Thirteenth Amendment. *United States v. Rhodes*, (U. S.) 28; *Ex parte Turner*, 10 Dec. (U. S.) 157.

The right to make a separation between public conveyance between white and colored passengers can be upheld when the carrier in good faith furnishes accommodations equal in quality and convenience to both classes. *The S. Fed. Repr.* 843; *Logwood v. Railroad*, *Fed. Repr.* 318; *Murphy v. Railroad*, *Fed. Repr.* 637.

**Citizenship.**—Prior to the adoption of the Fourteenth Amendment, only those born within the United States were not citizens of any State nor of the United States, nor could they become citizens under the then existing laws. *Marshall v. Donovan*, 10 Bush (Ky.)

The promotion of colored persons to citizenship is an admission of their equality with the rights and privileges of white persons in the same manner and to the same extent. They cannot be distinguished from other citizens, by legislation, for the causes which previously characterized their want of citizenship. *Burns v. Alabama*, 48 Ala. 195.

No white person born within the limits of the United States and subject to its jurisdiction, or naturalized, owes any status of citizenship to the recent amendments to the Federal Constitution. *Valkenburg v. Brown*, 43 Cal. 43; *Elk v. Wilkins*, 112 U. S. 94; *Heard v. Detroit*, 26 Mich. 51.

**Corporations not Citizens.**—An incorporated company is not a citizen of the United States, nor a person, within the meaning of § 1 of the Fourteenth Amendment. *Ins. Co. v. New Orleans*, 10 (U. S. Cir.), 85.

But it is a "person" within the meaning of the Civil Rights Act. *Northern Fertilizing Co. v. Hyde Park*, (U. S. Cir.) 480.

that day null and void.<sup>1</sup> See, on the general subject, 2 Story on the Constitution, §§ 1928-1974.

The Fifteenth Amendment does not confer the right of suffrage; but it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude.<sup>2</sup>

**10. Constitutional Guaranties in Criminal Cases.**—Although the earlier amendments to the Federal constitution, having to do with criminal trials, operate only as restrictions upon the national government (see next section), yet the Fourteenth Amendment forbids any State to deprive a person of his liberty without due process of law.<sup>3</sup> And the constitutional rights of persons accused of crime are amply secured by the organic law of the several States.<sup>4</sup>

(a) *Presentment or Indictment.*—The Fifth Amendment to the constitution of the United States—that “no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury”—was not designed as a limitation upon the State governments in reference to their own citizens, but exclusively as a restriction on Federal power.<sup>5</sup> But a

**Miscegenation.**—A State statute prohibiting the intermarriage of a white person and a negro is not in violation of the Fourteenth Amendment or the Civil Rights Act. *Ex parte Kinney*, 3 Hughes (U. S. Cir.), 9; *Ex parte Francois*, 3 Woods (U. S. Cir.), 367; *Ex parte Hobbs*, 1 Woods (U. S. Cir.), 537; *State v. Gibson*, 36 Ind. 389; *Lomas v. State*, 3 Heisk. (Tenn.) 287. Compare *Burns v. State*, 48 Ala. 195.

An act providing a greater punishment for adultery between a white person and a negro than for adultery between those of the same race is constitutional, not being a discrimination against any particular race, but simply providing a penalty for an offence which could only exist when the parties were of different races. *Pace v. Alabama*, 106 U. S. 583; *Ellis v. State*, 42 Ala. 525.

1. *Cæsar Griffin's Case*, Chase's Dec. (U. S.) 368.

2. *United States v. Reese*, 92 U. S. 214. See *United States v. Rhodes*, 1 Abb. (U. S.) 28; *Wood v. Fitzgerald*, 3 Oreg. 568; *Anthony v. Halderman*, 7 Kans. 50; *Cooley Const. Lim.* 599; 2 Story on the Const. § 1972.

Constitutionality of U. S. Rev. Stats. § 5508, see *Ex parte Yarbrough*, 110 U. S. 651.

3. A statute which provides that no convict shall be discharged from the State prison until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, is in

derogation of the constitutional provision that a man shall not be deprived of his liberty without due process of law, and is for that reason void. *Gross v. Rice*, 71 Me. 241. See *Knox v. State*, 9 Baxt. (Tenn.) 202.

The Maine statute which authorizes two or more overseers of the poor, by a writing under their hands, to commit to the workhouse tramps and vagrants, is in violation of the Fourteenth Amendment. The *ex parte* determination of two overseers of the poor is not “due process of law.” *Portland v. Bangor*, 65 Me. 120.

4. See Stimson's Amer. Stat. Law, §§ 120-150.

5. *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321; *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497; *State v. Shumpert*, 1 S. Car. 85; *State v. Jackson*, 21 La. Ann. 574; *State v. Anderson*, 30 La. Ann. Pt. I. 557; *Jane v. Commonwealth* 3 Met. (Ky.) 18; *State v. Barnett*, 3 Kans. 250; *Prescott v. State*, 19 Ohio St. 184; *Boyd v. Ellis*, 11 Iowa, 97; *State v. Millain*, 3 Nev. 409.

**Infamous Crime.**—A crime punishable by imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous crime, within the meaning of the Fifth Amendment. *Mackin v. United States*, 117 U. S. 348; *United States v. Tod*, 21 Repr. (U. S. Cir.) 199.

A misdemeanor need not be prosecuted by presentment or indictment, not being an infamous crime. *Territory v. Farnsworth* 5 Mont. 303.

Embezzlement is not an infamous

similar guaranty, in equivalent language, has been incorporated in the constitutions of nearly all the States.<sup>1</sup> The terms "presentment" and "indictment" are used in constitutional phraseology in their common law sense, and necessarily presuppose and include the action of a grand jury.<sup>2</sup> But it is well settled that, as to means, the legislature may make them punishable either by indictment or information.<sup>3</sup> The constitutional provision that an indictment shall fully and plainly, substantially and formally describe the offence with which the prisoner is charged is peremptory, though it does not change the rules of the common law.

crime. *United States v. Reilly*, 20 Fed. Repr. 46.

An affidavit made solely upon information derived from others whose names are not given, by a person who swears that he has good reason to believe, and does believe, that a certain person, naming him, has committed an offence against the laws, describing it, does not meet the requirements of the constitution. *In re* Rule of Court, 3 Woods (U. S. Cir.), 502.

1. Stimson's Amer. Stat. Law, § 128.

The Missouri Bill of Rights provides that offences shall be prosecuted by indictment or information. *Held*, that Mo. Rev. Stat. §§ 2025-6, authorizing prosecutions based on an information in the form of an affidavit of a private person, are unconstitutional. *State v. Briscoe*, 80 Mo. 643.

Neither the provision of the Wisconsin constitution that no person shall be held to answer for a criminal offence "without due process of law," nor the Fourteenth Amendment, has the effect to prevent the State from punishing felonies by criminal information, without presentment or indictment by a grand jury. *Rowan v. State*, 30 Wis. 129.

A statute which directs that when the accused is indicted under a wrong name, and he gives his true name when arraigned, it shall be entered on the minutes and the prisoner tried under his true name, is not unconstitutional. *People v. Kelly*, 6 Cal. 210.

2. *Eason v. State*, 6 Engl (Ark.) 481. See 2 Story on the Const. § 1784.

3. *State v. Ebert*, 40 Mo. 186; *King v. State*, 17 Fla. 183.

A statute relating to juvenile offenders, and purporting to give to inferior tribunals jurisdiction of offences punishable by infamous punishment, is unconstitutional. *Commonwealth v. Horregan*, 127 Mass. 450.

**Quo Warranto.**—An information in the nature of a *quo warranto*, brought to try the right to an office or franchise, though

in form a criminal proceeding, is the nature of a civil remedy, and belongs not within the constitutional requirement of presentment or indictment. *State v. Hardie*, 1 Ired. (N. Car.) 42; *Baugh v. Vincennes v. State*; 1 Blackf. (Ind.) 4.

4. *Commonwealth v. Davis*, 11 Mass. 438; *State v. Learned*, 4 Mass. 426; *Murphy v. State*, 28 Miss. 637.

**Sufficiency of Indictment.**—An indictment which fails to charge the essential elements of a crime is insufficient, though its form is that prescribed by statute. *Williams v. State*, 12 Tex. 395.

An act which authorizes a criminal prosecution upon a complaint against a person in particular, and not containing a charge of the substantive facts necessary to constitute the offence, is unconstitutional. *Greene v. Briggs*, 1 U. S. Cir. 311.

A statute providing that, in indictments for conspiracy, the particular offence designed to be committed need not be alleged, is unconstitutional. *State v. State*, 79 Ind. 198.

But an act providing that "in an indictment for murder it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused" is not unconstitutional. *State v. Schnelle*, 24 W. Va. 11.

An act providing that any person indicted for a felony and acquitted of the offence charged, and convicted of the residue, may be adjudged guilty of the offence (if any) substantially charged in the residue of the indictment is valid. *Commonwealth v. Lane*, 11 Gray (Mass.) 11.

A statute purporting to make the offence of theft include the incomplete offence of embezzlement is unconstitutional and void; and notwithstanding provisions of the code, a conviction for embezzlement cannot be had upon an indictment for theft. *Huntsman v. State*, 12 Tex. App. 619 (overruling *White v. State*, 11 Tex. App. 414).

(b) *Trial by Jury*.—The Sixth Amendment to the Federal Constitution, securing the right of trial by jury in criminal cases, does not restrict the State governments, but only applies to the Federal government and its officers.<sup>1</sup> The constitutional guaranties in the various States, that the right of trial by jury shall be preserved, or shall remain inviolate, refer to the right as it existed at the adoption of the constitution.<sup>2</sup> Where the right of trial by jury is secured by the fundamental law, it invariably means a jury of twelve men, unless expressly otherwise indicated.<sup>3</sup> It is also the constitutional right of the accused to be tried by an impartial jury. But an act allowing the court to admit a juror as competent although he has formed and expressed an opinion of the guilt or innocence of the accused, if the court is satisfied that he will render an impartial verdict, is no violation of this right.<sup>4</sup> Further, the trial

A substantial statement of the offence, in an indictment for a misdemeanor, or certainty to a common intent, is all that is required. *Gallagher v. State*, 26 Wis. 423.

If an indictment is lost after a defendant has pleaded thereto, it may be supplied by substitution. The statute authorizing this practice is not unconstitutional. *Schultz v. State*, 15 Tex. App. 258.

1. *Murphy v. People*, 2 Cow. (N. Y.) 815.

The power given to courts-martial to punish by fine is not within the provisions of the Federal constitution securing jury trial. *Rawson v. Brown*, 6 Shep. (Me.) 216.

Upon the general subject of trial by jury in criminal cases, see Cooley's *Const. Lim.* 309 *et seq.*; 2 Story on the *Const.* §§ 1779-1782. See an article on "The Right of Trial by Jury," in 5 *Criminal Law Mag.* 771. See also Bishop on *Criminal Procedure*.

2. *State v. McClear*, 11 Nev. 39.

The phrase "trial by jury," as used in the New York constitution, refers as well to all other incidents of the trial as to the number of men necessary to constitute the jury. The trial must be upon indictment or presentment of a grand jury, and in a court of record with common-law jurisdiction. *People v. Fisher*, 20 Barb. (N. Y.) 652.

3. *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Brown v. State*, 8 Blackf. (Ind.) 561; *Hill v. People*, 16 Mich. 351; *People v. Kennedy*, 1 Park. (N. Y.) 312; *May v. Railroad*, 3 Wis. 219; *State v. Cox*, 3 Engl. (Ark.) 436; *People v. O'Neil*, 48 Cal. 257. See *State v. Starling*, 15 Rich. (S. Car.) 120.

A statute which provides for the drawing of the names of seventeen persons to

serve as grand jurors, and that not more than seventeen nor less than fifteen persons shall be sworn on any grand jury, is constitutional. *Brucker v. State*, 16 Wis. 333.

4. *Cooper v. State*, 16 Ohio St. 328; *McHugh v. State*, 42 Ohio St. 154; *Palmer v. State*, 42 Ohio St. 596. See *Eason v. State*, 6 Baxt. (Tenn.) 466.

A statute prohibiting exceptions to the rulings of inferior courts, in refusing to set aside an indictment for a defect in the formation of the grand jury, is unconstitutional. The legislature may prescribe the time and manner of determining objections to the qualifications of jurors, but it cannot take away the right of objecting. *Palmore v. State*, 29 Ark. 248.

A statute providing that no person shall sit as a juror in a capital case who has opinions which would preclude him from returning a verdict of guilty or fixing the punishment at death is constitutional. *Greenley v. State*, 60 Ind. 141.

The right to an impartial jury is one that belongs to the government as well as the accused. *Jewell v. Commonwealth*, 22 Pa. St. 94.

The defendant was tried by a jury of Mexicans, who did not understand English, and the proceedings were all interpreted to them. *Held*, no violation of the constitutional right of trial by jury. *Territory v. Romine*, 2 New Mex. 114.

**Challenges to Jurors**.—States which limit and restrict the number of peremptory challenges to be allowed to the defendant are not unconstitutional. *Dowling v. State*, 5 Sm. & Mar. (Miss.) 664.

Neither are statutes which allow peremptory challenges to the prosecution. *Walter v. People*, 32 N. Y. 147; *Jones v. State*, 1 Ga. 610; *Hudgins v. State*, 2 Ga. 173; *Warren v. Commonwealth*, 37 Pa.

must be speedy. By a speedy trial is intended a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice.<sup>1</sup> Whether or not it is expressly provided in the constitution that in criminal actions the accused shall have the right to be tried by a jury of the vicinage, still it is incident to the right to a jury trial when such right is secured in other terms.<sup>2</sup> The constitutional guaranty of jury trial in criminal

St. 45; *Hartzell v. Commonwealth*, 40 Pa. St. 462.

1. *Stewart v. State*, 8 Engl. (Ark.) 720; *Nixon v. State*, 10 Miss. 497; *United States v. Fox*, 3 Mont. 512.

The circuit court was adjourned because of bad weather, backwardness in gathering the crops, and a belief that the public interests would be best served by such adjournment. A prisoner confined under an indictment for murder demanded a trial, and upon refusal and adjournment, applied upon *habeas corpus* to the chancery court to be set at liberty. The chancellor refused to discharge him, but admitted him to bail, although ordinarily he would not have been entitled to bail. It was held that, although the adjournment without affording the prisoner an opportunity for trial was objectionable, yet that his rights had been preserved by the action of the chancellor. *Ex parte Caples*, 58 Miss. 358.

**Continuances.**—A statute giving trial judges discretionary power to refuse continuances in criminal cases neither deprives the citizen of compulsory process for his witnesses nor of the right of trial by jury. *Lillard v. State*, 17 Tex. App. 114. See *Venters v. State*, 20 Cent. Law Jour. 493; 1 Tex. Ct. Repr. 90.

Public excitement alone is not a sufficient ground for the continuance of a criminal case. *Brinkley v. State* 54 Ga. 371; *Thomas v. State*, 27 Ga. 287. See *John v. State*, 1 Head (Tenn.). 49.

2. *Swart v. Kimball*, 44 Mich. 443.

**Place of Trial.**—An offence against the United States, committed within the territorial jurisdiction thereof, must be tried in the State and district where committed. *United States v. Bird*, 1 Sprague (U. S. Dist.), 299.

The constitutional requirement that "the district shall have been previously ascertained by law" means that it shall be so ascertained before the commission of the offence for which a party is held for trial in such district. *United States v. Maxon*, 5 Blatch. (U. S. Cir.) 360.

A provision in a State constitution, securing to criminals a public trial within the county or district where the offence

was committed, in its enforcement, covers cases arising under State laws as well as matter within the jurisdiction of Federal courts. *Gut v. State* (U. S.) 35.

A statute providing that offences committed within one hundred rods of a dividing line between two counties may be prosecuted in either county, does not infringe the constitutional provision for trial in the county where the offence was committed. *State v. Robinson*, 447; *State v. Stewart* 60 Wis. 50 Am. Rep. 386. Compare *Brinkley v. People*, 110 Ill. 29; *State v. West* Va. 782; s. c., 45 Am. Rep. 782.

An act authorizing the trial of a person guilty of larceny in the State, of any vessel in the course of a voyage to be had in any county through which such vessel shall pass, or at which the voyage shall terminate, is constitutional. *Steerman v. State*, 10 Mo. 50; *v. Hulse*, 3 Hill (N. Y.) 309; *Cameron*, 2 Chand. (Wis.) 172.

Where an offence against the United States is committed on the high seas, the offender must be tried in the district where he was first apprehended and brought into legal custody. *United States v. Bird*, 1 Sprague (U. S. Dist.) 299; *United States v. Thorpe*, 1 Sumn. (U. S. Cir.) 168.

**Jury of the Vicinage.**—The right to a jury of the vicinage imports that only the traverse jury trying a case shall be the grand jury indicting him, and that the vicinage or neighborhood shall be the same. *People*, 89 Ill. 90.

But this provision applies to a person charged with a crime, and not to a convicted felon, and does not oust a term of imprisonment in a penitentiary. *Ruffin v. State*, 21 G. 790.

**Change of Venue.**—When a person has a right to be tried in the county where the offence was committed is secured by the constitution, he cannot be deprived of that right except by his own consent in open court. When there is a change of venue the record must show that the prisoner applied for a change and the reasons assigned therefor.

includes the right to have the deliberations of the jury continued, when once they have begun the trial and heard any evidence, until the occurrence of a sufficient legal reason for their discharge, and the chance of a verdict of acquittal at their hands during all that time; and hence the unauthorized discharge of the jury is equivalent to an acquittal.<sup>1</sup> And if the legislature cannot take away the right of trial by jury, neither can it impose such impediments as unreasonably to impair it, in criminal prosecutions.<sup>2</sup> A statute which authorizes a criminal trial without jury in the first instance, but gives the defendant an unqualified and unfettered right of appeal and a trial by jury in the appellate court, is not unconstitutional.<sup>3</sup>

In most of the States it is held that the constitutional guaranty of trial by jury was not intended to apply to the prosecution of minor and trivial offences, such as breaches of police regulations, disorderly conduct, vagrancy, disturbing religious meetings, and ordinary breaches of the peace.<sup>4</sup> Nor does it apply to offences created by statute since the adoption of the constitution, except in the specified cases.<sup>5</sup> It seems that, in criminal cases, a trial by jury cannot be waived by the defendant; the court has no jurisdiction unless aided by a jury.<sup>6</sup>

*State v. Denton*, 6 Cold. (Tenn.) 539; *Wheeler v. State*, 24 Wis. 52; *Ex parte Rivers*, 40 Ala. 712. Compare *People v. Long Island R. Co.*, 4 Park. (N. Y.), 150; *People v. Baker*, 3 Park. (N. Y.), 181; *People v. Webb*, 1 Hill (N. Y.), 179; *State v. Miller*, 15 Minn. 344. See *Smith v. Judge*, 17 Cal. 547; *Wheeler v. State*, 42 Ga. 307.

It is the right of the prosecution, as well as of the defendant, to have the trial take place in the county where the crime was committed, and when the accused applies to change the venue, he must make a clear case that by reason of popular passion or prejudice he cannot have a fair and impartial trial in that county. *People v. Sammis*, 3 Hun (N. Y.), 560.

A statute which requires a defendant, after change of venue, to be tried on a certified copy of the indictment, does not impair any of his constitutional rights. *Bramlett v. State*, 31 Ala. 376.

1. *McCauley v. State*, 26 Ala. 135; *Grant v. People*, 4 Park. (N. Y.) 527; *Geiger v. State*, 25 Ga. 667. Compare *Price v. State*, 36 Miss. 531.

2. *Saco v. Wentworth*, 37 Me. 165; *Greene v. Briggs*, 1 Curt. (U. S. Cir.) 311. See *State v. Wright*, 13 Mo. 243.

3. *Jones v. Robbins*, 8 Gray (Mass.), 329; *Emporia v. Volmer*, 12 Kans. 622.

4. *State v. Conlin*, 1 Williams (Vt.), 318; *In re Dougherty*, 1 Williams (Vt.), 325; *People v. Webb*, 16 Hun (N. Y.), 43; *Duffy v. People*, 1 Hill (N. Y.), 355;

*People v. Justices*, 74 N. Y. 406; *Byers v. Commonwealth*, 42 Pa. St. 89; *In re Glenn*, 54 Md. 572; *Commissioners v. Harris*, 7 Jones (N. Car.), 281; *State v. Gutierrez*, 15 La. Ann. 190; *State v. Noble*, 20 La. Ann. 325; *Monroe v. Meuer*, 35 La. Ann. 1192; *Trigally v. Memphis*, 6 Cold. (Tenn.), 382; *Inwood v. State*, 42 Ohio St. 186; *State v. McCarty*, 2 Blackf. (Ind.), 5; *State v. Benicke*, 9 Iowa, 203; *Bryan v. State*, 4 Iowa, 349; *Ex parte Ah Peen*, 51 Cal. 280.

An act providing that keepers of houses of ill fame may be punished summarily as disorderly persons is unconstitutional and void; the offence being indictable at common law, the accused has the right of trial by jury. *Warren v. People*, 3 Park. (N. Y.) 544.

A jury in a police magistrate's court does not fall under the constitutional provision for trial by jury, and any number of jurors that the legislature may deem proper to fix may compose the jury. *State v. Gutierrez*, 15 La. Ann. 190.

For a contempt of court the party may be committed to prison without a jury trial. *Ex parte Grace*, 12 Iowa, 208.

5. *Tims v. State*, 26 Ala. 165.

6. *State v. Carman*, 17 Repr. (Iowa) 711; *State v. Stewart*, 17 Repr. (N. Car.) 725; *Brimmingsstool v. People*, 1 Mich. N. P. 260; *State v. Lockwood*, 43 Wis. 403; *State v. Davis*, 66 Mo. 684; *Williams v. State*, 12 Ohio St. 403; *Tyra v. Commonwealth*, 2 Met. (Ky.) 1; *State v.*



Under a constitutional guaranty that in all criminal prosecutions the accused shall have a right to compulsory process for obtaining witnesses in his favor, he cannot claim from the State payment of the fees of the witnesses summoned in the defence.<sup>1</sup> His constitutional right "to be heard in person and by counsel" means only a hearing upon the facts duly presented in evidence.<sup>2</sup>

(d) *Right to be Present at Trial.*—In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he is absent, there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce judgment.<sup>3</sup> And the record must affirmatively show that the accused was personally present. But

**Evidence of Deceased Witness.**—The admission of testimony in a criminal trial before a jury to prove what a deceased witness testified at the preliminary examination of the accused before a magistrate, is constitutional. *Commonwealth v. Richards*, 18 Pick. (Mass.) 434; *State v. Horman*, 27 Mo. 120. See also *State v. Frederic*, 69 Me. 400; *State v. Polson*, 29 Iowa, 133.

**Dying Declarations.**—The admission of dying declarations as evidence in a murder trial is not repugnant to the constitutional provision giving the accused the right to be confronted with the witnesses against him. *Green v. State*, 66 Ala. 40; s. c., 41 Am. Rep. 744; *Robbins v. State*, 8 Ohio St. 131; *Walston v. Commonwealth*, 16 B. Mon (Ky.) 15.

**Documentary Evidence.**—This provision of the constitution does not apply to the proof of facts in their nature documentary and which can only be proved by the original or by a copy officially authenticated in some way. *People v. Jones*, 24 Mich. 215. See *Johns v. State*, 55 Md. 350.

1. *State v. Waters*, 39 Me. 54.

2. *Wilson v. State*, 3 Heisk. (Tenn.) 332.

A witness was fully cross-examined by the prisoner's counsel, and then permission was refused for the prisoner to examine him himself. *Held*, that this was no violation of the constitutional right of defence by himself, his counsel, or both. *Roberts v. State*, 14 Ga. 18.

3. *Cooley Const. Lim.* 319; *Andrews v. State*, 2 Sneed (Tenn.), 550; *Jacobs v. Cone*, 5 S. & R. (Pa.) 335; *Witt v. State*, 5 Cold (Tenn.) 11; *State v. Alman*, 64 N. Car. 364; *Gladde v. State*, 12 Fla. 577; *Maurer v. People*, 43 N. Y. 1.

Where a prisoner who is convicted of a felony is not present in court when the jury return their verdict, such

verdict and the judgment thereon are void. *Stewart v. State*, 7 Cold. (Tenn.) 338; *State v. Bray*, 67 N. Car. 283; *State v. Ford*, 30 La. Ann. 311; *State v. Johnson*, 35 La. Ann. 208.

The absence of the defendant from the court-room during the argument of counsel to the jury, the trial being for an offence not capital, is not ground for a new trial unless it clearly appears that he was prejudiced thereby. *State v. Paylor*, 89 N. Car. 539.

A motion for a new trial upon an indictment, after verdict and before sentence, may be made in the absence of the defendant. *Territory v. Chenoweth*, 19 Repr. (New Mex.) 347; 1 *Bishop's Crim. Proc.* § 276.

He need not be present at proceedings touching change of venue. *State v. Elkins*, 63 Mo. 159. Compare *Ex parte Bryan*, 44 Ala. 404.

Nor when the jury, in charge of an officer, are sent to visit the scene of the alleged crime. *State v. Adams*, 20 Kans. 311.

**Prisoner Sick.**—Where a defendant is taken sick during his trial on a charge of felony, and is too unwell to be present in court at every stage of the trial, the cause should either be temporarily continued to await his convalescence, or a juror withdrawn and the case continued. *Brown v. State*, 38 Tex. 482.

**Prisoner Unruly.**—Where a prisoner, on trial for perjury, was so disorderly in his conduct that it became necessary to remove him from the court-room during a portion of the trial, after the jury had been impanelled, *held*, on a motion in arrest of judgment and for a new trial, that no error was committed. *United States v. Davis*, 6 Blatchf. (U. S. Cir.) 464.

4. *State v. Jones*, 61 Mo. 232; *State v. Johnson*, 35 La. Ann. 208.



a charge of a mere misdemeanor or breach of a municipal ordinance may be tried in the absence of the accused person if he has been legally arrested.<sup>1</sup>

(e) *Cruel and Unusual Punishments.*—The provision of the Federal constitution which forbids the imposition of cruel and unusual punishments does not apply to the States, but to national legislation.<sup>2</sup> While no person can be twice lawfully punished for the same offence, yet he may be twice lawfully punished for the same act, when it is of such a character as to constitute two distinct offences.<sup>3</sup>

(f) *Ex Post Facto Laws.*—By the provisions of the Federal constitution the passage of any *ex post facto* law is expressly prohibited both to the Federal Congress and to the legislatures of the several States.<sup>4</sup> The term is a technical one, and relates only to legislative and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively.<sup>5</sup> Acts regulating criminal procedure do not generally

1. *Bloomington v. Heiland*, 67 Ill. 278. Compare *Slacovitch v. State*, 46 Ala. 227.

2. *Pervear v. Commonwealth*, 5 Wall. (U. S.) 475; *Commonwealth v. Hitchings*, 5 Gray (Mass.), 482.

Whipping is not a "cruel or unusual punishment." *Foot v. State*, 59 Md. 264; *Garcia v. Territory*, 1 New Mex. 415. On the general topic, see *Cooley Const. Lim.* 328-330; *Barker v. People*, 3 Cow. (N. Y.) 686; *Dane v. People*, 5 Park (N. Y.) 364; 2 *Story on the Const.* §§ 1903-4.

A. obtained three dollars by false pretences, was convicted, and sentenced to the penitentiary for two years. The statute under which the sentence was imposed named two years as the minimum term of imprisonment and omitted to name any maximum term. It was held that the argument that A. might have been sentenced to imprisonment for life, and that such a punishment would have been cruel and unusual, within the constitutional inhibition, afforded no ground for interference with the sentence imposed. *State v. Williams*, 77 Mo. 310.

Where a general act prescribed a certain punishment for a particular crime, and a special act authorized the infliction by the recorder of a certain city of a greater punishment for the same crime, held that this was not a cruel and unusual punishment. *In re Bayard*, 25 Hun (N. Y.), 546.

3. *State v. Inness*, 53 Me. 536.

The damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong done to the public, but are

called punitive damages by way of distinction from pecuniary damages, and are to characterize them as a punishment for the wrong done to the individual. Hence such damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offence, although the defendant is liable to a criminal prosecution for the act on account of which the damages are given. *Hendrick v. Kingsbury*, 21 Iowa, 379; *Chiles v. Metc.* (Ky.) 146.

4. Const. U. S. art. I, §§ 9, 10; *son's Amer. Stat. Law*, § 142.

On the general subject of *ex post facto* laws, see *Black on Constitution* Inhibitions, §§ 222-247; *Cooley's Const. Lim.* 264-273; 2 *Story on the Const.* §§ 1344-6; also an article in 5 *Crim. Mag.* 325.

5. *Watson v. Mercer*, 8 Pet. 88; *Baltimore & Susquehanna R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Case v. Pennsylvania*, 17 How. (U. S.) 133; *Locke v. New Orleans*, 4 Wall. 172; *Locke v. Dane*, 9 Mass. 360; *Port v. Hubbell*, 5 Conn. 240; *Van Kleeck*, 7 Johns. (N. Y.) 47; *Ex parte School Distr.*, 57 Pa. St. 433; *Ex parte Receivers*, 3 N. J. Eq. 114; *Ex parte Nelson*, 9 Gill (Md.), 299; *Tufts v. Harris*, 13 Ga. 1; *Commonwealth v. Bailey*, 81 Ky. 395.

An act which prohibits the sale of intoxicating liquors which may have been manufactured previous to its passage is not an *ex post facto* law. *State v. Keeran*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 185.

Neither is a statute authorizing

take of this character unless they alter the situation of the accused to his disadvantage.<sup>1</sup> The prohibition extends to the aggravation of punishments; but the legislature may lawfully substitute a different punishment for past offences, which may be less or equal to the penalty prescribed when the offence was committed, but must not be greater.<sup>2</sup> Statutes establishing a test-oath of past loyalty,

for crimes happening prior to its passage. *Carson v. Carson*, 40 Miss. 349. Compare *Dickinson v. Dickinson*, 3 Murph. (N. Car.) 327. See 1 Bishop Mar. & Div. § 698.

Nor an act altering the compensation of public officers. *Commonwealth v. Bailey*, 81 Ky 395.

Nor a registry act, although retrospective. *Tucker v. Harris*, 13 Ga. 1.

**Definition.**—In the leading case it is said: "I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition. (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was when committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. . . . But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." *Calder v. Bull*, 3 Dall. (U. S.) 390.

A statute cannot be *ex post facto* if its operation is prospective only. *Kring v. Missouri*, 107 U. S. 221.

1. A statute creating a new court, or giving jurisdiction to an existing court, to try past offences, is not an *ex post facto* law. *Commonwealth v. Phillips*, 11 Pick. (Mass.) 28.

Nor is an act reviving the jurisdiction of a superior court, so as to enable it to try persons for offences committed during a period when an inferior court had exclusive jurisdiction to try them. *State v. Sullivan*, 14 Rich. (S. Car.) 281.

Nor an act changing the venue in a criminal trial, though passed after the commission of the offence or the finding of the indictment. *Gut v. Minnesota*, 9

Wall. (U. S.) 35. See also *Potter v. State*, 42 Ark. 29.

Nor an act allowing an amendment to a pending indictment. *State v. Manning*, 14 Tex. 402. See *State v. Johnson*, 81 Mo. 60, *Martin v. State*, 22 Tex. 214. See Black on Const. Prohibitions, § 232.

Or the correction of an erroneous sentence. *Ex parte Bethurum*, 66 Mo. 545.

A statute allowing to the State a reasonable number of peremptory challenges to petit jurors in criminal actions, although it expressly extends to the trial of cases where the offence was committed, or the indictment found, prior to its passage, is not an *ex post facto* law. *State v. Ryan*, 13 Minn. 370, *Walston v. Commonwealth*, 16 B. Mon. (Ky.) 15; *State v. Wilson*, 48 N. H. 398, *Commonwealth v. Dorsey*, 103 Mass. 412.

But an act providing that the rule of law prohibiting a conviction in a criminal case on the uncorroborated evidence of an accomplice should not apply to misdemeanors, is inoperative in a trial for a misdemeanor committed before its passage. *Hart v. State*, 40 Ala. 32. See *Robinson v. State*, 84 Ind. 452.

A law repealing the Statute of Limitations, or extending the time previously limited for the prosecution of criminal offences, is unconstitutional as applied to a case where the period prescribed by the law as it stood when the offence was committed has already completely expired, because *ex post facto*. *Moore v. State*, 13 Vroom (N. J.), 203; *u. c.*, 39 Am. Rep. 558; *State v. Sneed*, 25 Tex. (Supp.) 66; *State v. Keith*, 63 N. Car. 140; *Commonwealth v. Duffy*, 96 Pa. St. 506. See Wharton on Crim. Law, § 444 a, note b.

2. *State v. Kent*, 65 N. Car. 311; *Turner v. State*, 40 Ala. 21; *Caldwell v. State*, 55 Ala. 133.

**Mitigation of Punishment.**—Any change in the law which reduces or mitigates the punishment for past offences cannot be regarded as *ex post facto*. *State v. Arlin*, 39 N. H. 179; *Hair v. State*, 16 Nebr. 601; *Boston v. Cummins*, 16 Ga. 102; *Strong v. State*, 1 Blackf. (Ind.) 193; *Keen v. State*, 3 Chand. (Wis.) 109; *Woart v. Winnick*, 3 N. H. 473; *Clarke*

and making it a condition precedent to the right to hold public office, serve as a juror, practise as an attorney, or act as a professor, teacher, or clergyman, are unconstitutional and void, as partaking of the nature both of bills of attainder and *ex post facto* laws.<sup>1</sup>

**11. Constitutional Limitations on the Taxing Power.**—The power of taxation is an essential and inherent attribute of sovereignty, and belongs as matter of right to every independent political commu-

*v. State*, 23 Miss. 261; *Maul v. State*, 25 Tex. 166.

A statute which imposes anything else for the death penalty is a mitigation of the punishment. *Commonwealth v. Gardner*, 11 Gray (Mass.) 438; *Commonwealth v. Wyman*, 12 Cush. (Mass.) 237; *Black on Const. Prohibitions*, § 240. *Compare* *Shepherd v. People*, 25 N. Y. 706.

The substitution of whipping for a long term of imprisonment is also regarded as a mitigation. *State v. Williams*, 2 Rich. (S. Car.) 418. *Compare* *Herber v. State*, 7 Tex. 69. See *Strong v. State*, 1 Blackf. (Ind.) 193.

"It would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offences; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline, or penal administration, as its primary object, might also be made to take effect on past as well as future offences, as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering." *Hartung v. People*, 22 N. Y. 95, 105. See *Ratzky v. People*, 29 N. Y. 124; *Shepherd v. People*, 25 N. Y. 406; *Kuckler v. People*, 5 Park. (N. Y.) 212.

**Punishment of Second Offences.**—A law is not objectionable as *ex post facto* which, in providing for the punishment of future offences, authorizes the offender's conduct in the past to be taken into account, and the punishment to be graduated ac-

cordingly. Thus, a statute providing that where a person has been once convicted of a penitentiary offence, he shall, on a repetition of the crime, receive a punishment in addition to the one prescribed by law for the last offence, is not *ex post facto* as applied to a case where the second offence was committed after the passage of the law. *Ross's Case*, 2 Pick. (Mass.) 165; *Rand v. Commonwealth*, 9 Gratt. (Va.) 738; *Ex parte Gutierrez*, 45 Cal. 430; *People v. Butler*, 3 Cow. (N. Y.) 347; *Cooley Const. Lim.* 273.

**Right to have Jury fix Penalty.**—Where the law imposes upon the jury the duty of fixing the penalty, within certain limits, by their verdict, it confers upon the prisoner a valuable right, which cannot constitutionally be taken away by *ex post facto* legislation. *Marion v. State*, 16 Nebr. 349. See *Garvey v. People*, 6 Colo. 559; s. c., 45 Am. Rep. 531; *Kring v. Missouri*, 107 U. S. 221.

1. *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Ex parte Garland*, 4 Wall. (U. S.) 333; *Pierce v. Carskadon*, 16 Wall. (U. S.) 234. For full discussion see *Black on Const. Prohibitions*, § 244.

A statute which denies the right of suffrage, as a consequence of conduct that precedes the statute, is not properly speaking, an *ex post facto* law. *Washington v. State*, 75 Ala. 582; s. c., 51 Am. Rep. 479; *Anderson v. Baker*, 23 Md. 531; *Blair v. Ridgely*, 41 Mo. 63; *State v. Woodson*, 41 Mo. 227; *State v. Neal*, 42 Mo. 119; *Randolph v. Good*, 3 W. Va. 551. *Compare* *Green v. Shumway*, 39 N. Y. 418.

A statute prescribing certain qualifications for all those who propose to follow a particular avocation within the State, e. g., medicine, and prohibiting all who do not possess such qualifications from so doing, under a penalty, must make an exception in favor of those who, at the time of its passage, may be lawfully engaged in such business; otherwise it will be, as to them, *ex post facto* and void. *Byrne v. Stewart*, 3 Desau. (S. Car.) 466; *Commonwealth v. Wasson*, 29 Pitts. L. J. 434; *Fox v. Territory*, 5 West Coast Repr. 339.

nity.<sup>1</sup> But, from the composition of the American Union, the individual State cannot tax the property, agencies, or operations of the Federal government, nor so adjust its revenue system as to obstruct, embarrass, or nullify those operations or functions.<sup>2</sup> Real property owned by the United States, though situated within the territorial limits of a State, cannot be taxed by that State; and this disability remains effective until the United States has made

1. Cooley Const. Lim. 479; Fox's Appeal, 112 Pa. St. 337, 352; McCulloch v. Maryland, 4 Wheat. (U. S.) 428.

The Federal courts are without power to control or restrain the taxing power of a State exercised within constitutional limits. Bank of Commerce v. New York, 2 Black (U. S.), 620.

2. McCulloch v. Maryland, 4 Wheat. (U. S.) 428; Crandall v. Nevada, 6 Wall. (U. S.) 35; Dobbins v. Commissioners, 16 Pet. (U. S.) 435; Bank Tax Case, 2 Wall. (U. S.) 200; Cooley on Taxation, 83.

Without permission of the Federal government the States cannot tax the national banks. Van Allen v. Assessors, 3 Wall. (U. S.) 573; Austin v. Boston, 14 Allen (Mass.), 359; State v. Newark, 39 N. J. L. 380; Nat'l Bank v. Mobile, 62 Ala. 284.

But it is within the constitutional power of Congress to waive the right of exempting public stocks from State taxation, and this has been done by the act of 1864, so far as stockholders in national banks can be considered as the owners of public stocks held by such banks. Utica v. Churchill, 33 N. Y. 161; Van Allen v. Assessors, 3 Wall. (U. S.) 573; Nat'l Bank v. Commonwealth, 9 Wall. (U. S.) 353.

The State cannot tax the salaries or emoluments of national officers. Dobbins v. Commissioners, 16 Pet. (U. S.) 435. See Melcher v. Boston, 9 Metc. (Mass.) 73.

Nor the loans of the United States, raised for its own purposes. Weston v. Charleston, 2 Pet. (U. S.) 449; Bank Tax Case, 2 Wall. (U. S.) 200; People v. Commissioners, 4 Wall. (U. S.) 244; Bank v. Supervisors, 7 Wall. (U. S.) 26; German Bank v. Burlington, 54 Iowa, 609. See State v. Jackson, 33 N. J. L. 450; Commonwealth v. Hamilton Mfg. Co., 12 Allen (Mass.), 298.

Nor revenue stamps or treasury notes. Palfrey v. Boston, 101 Mass. 329; Montgomery Co. v. Elston, 32 Ind. 27; Bank of New York v. Supervisors, 7 Wall. (U. S.) 26; Ogdan v. Walker, 59 Ind. 460; Horne v. Green, 52 Miss. 452.

Nor telegraphic messages sent by the government. Telegraph Co. v. Texas, 105 U. S. 460.

But the State may include the property of Federal agencies in its general taxation, when there is no act of Congress to the contrary, and when such taxation will not injuriously affect the operations of the national government. Thomson v. Pacific R. Co., 9 Wall. (U. S.) 579; Railroad Co. v. Peniston, 18 Wall. (U. S.) 5.

**Federal Taxation.**—Conversely, Congress has no power to lay taxes upon the property, officers, agencies, or operations of the State governments, so as to defeat or embarrass their functions. Cooley on Taxation (2d Ed.), 86; Ward v. Maryland, 12 Wall. (U. S.) 418; Railroad Co. v. Peniston, 18 Wall. (U. S.) 5; Freedman v. Siegel, 10 Blatch. (U. S. Cir.) 327; Warren v. Paul, 22 Ind. 276; State v. Gaston, 32 Ind. 1; Fifield v. Close, 15 Mich. 505; Union Bank v. Hill, 3 Cold. (Tenn.) 325; Smith v. Short, 40 Ala. 385; Jones v. Keep, 19 Wis. 390; Sayles v. Davis, 22 Wis. 217; Moore v. Quirk, 105 Mass. 49; s. c., 7 Am. Rep. 499.

Congress has no power to require a revenue stamp to be affixed to process of the State courts. Cooley Const. Lim. 483; Smith v. Short, 40 Ala. 385; Warren v. Paul, 22 Ind. 279; Jones v. Keep, 19 Wis. 390; Fifield v. Close, 15 Mich. 505; Union Bank v. Hill, 3 Cold. (Tenn.) 325. Compare Hoyt v. Benner, 22 La. Ann. 353.

Nor to declare that a written instrument shall not be received in evidence in a State court unless stamped. Atkins v. Plympton, 44 Vt. 21; Griffin v. Ranney, 35 Conn. 239; Green v. Holway, 101 Mass. 250; Moore v. Moore, 47 N. Y. 467; Hale v. Wilkinson, 21 Gratt. (Va.) 75; Haight v. Grist, 64 N. Car. 739; McElvain v. Mudd, 44 Ala. 48; Davis v. Richardson, 45 Miss. 499; Holt v. Hart, 33 La. Ann. 673; Hunter v. Cobb, 6 Bush (Ky.), 239; Sporrer v. Eifer, 1 Heisk. (Tenn.) 633; Bumpas v. Taggart, 26 Ark. 398; Craig v. Dimmock, 47 Ill. 308; Clemens v. Conrad, 19 Mich. 170; Duffy v. Hobson, 40 Cal. 240.

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prohibition against legislation impairing the obligation of contracts is also a limitation upon the taxing power of the States.<sup>1</sup> Finally, it is always an implied limitation that taxation can only be laid for a public purpose.<sup>2</sup>

**12. Laws Impairing the Obligation of Contracts.**—The constitution of the United States prohibits the several States from passing any law impairing the obligation of contracts.<sup>3</sup> If a State adopts a new constitution, and any of its provisions are found to impair the validity of existing contracts, such provisions will be as much within the prohibition as would a simple act of the legislature.<sup>4</sup> But there is nothing in the constitution which forbids Congress to pass laws impairing the obligation of contracts.<sup>5</sup> Nor does the prohibition apply to any laws which have a prospective operation only.<sup>6</sup>

(a) *Contracts of the State with Corporations.*—The charter of a private corporation is a contract, within the meaning of the constitution of the United States, between the State granting the charter and the corporation created by it, and any constitutional provision or act of the legislature that impairs it, whether by enlarging the power of the State over the body corporate, or by abridging its franchises, or otherwise altering it in a material point, is repugnant to the constitution and void.<sup>7</sup> But if the

1. *Murray v. Charleston*, 96 U. S. 432; *Hartman v. Greenhow*, 102 U. S. 672. See, *infra*, § 12 *et seq.*

2. *Loan Association v. Topeka*, 20 Wall. (U. S.) 655. See, in general, *Cooley on Taxation* (2d Ed.) 103 *et seq.*

3. Const. U. S. art. 1, § 10. On the general subject of laws impairing the obligation of contracts, see *Black on Constitutional Prohibitions*, §§ 1-170; 2 *Story on the Const.* §§ 1374-1399; *Cooley Const. Lim.* 273-294; *Wade on Retroactive Laws*.

4. *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Railroad Co. v. McClure*, 10 Wall. (U. S.) 511; *White v. Hart*, 13 Wall. (U. S.) 646; *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Clay Co. v. Savings Society*, 104 U. S. 579; *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650, 972; *New Orleans Water Works v. Rivers*, 115 U. S. 674; *Fisk v. Police Jury*, 116 U. S. 131; *Lehigh Valley R. v. McFarlan*, 31 N. J. Eq. 706; *Grigsby v. Peak*, 57 Tex. 142; *Delmas v. Insurance Co.*, 14 Wall. (U. S.) 661.

And the fact that the new constitution was sanctioned by Congress does not affect the question. *Gunn v. Barry*, 15 Wall. (U. S.) 610.

Nor is it permitted to impair the obligation of contracts by an amendment to the State constitution. *State v. Young*, 29 Minn. 474.

An ordinance passed by a municipal corporation is void if it impairs the obligation of existing contracts. *Hestonville R. v. Philadelphia*, 89 Pa. St. 210.

But an act in force before the adoption of the Federal constitution cannot be regarded as within the prohibition. *Owings v. Speed*, 5 Wheat. (U. S.) 420. See *League v. De Young*, 11 How. (U. S.) 185; *Herman v. Phalen*, 14 How. (U. S.) 79.

5. *Evans v. Eaton*, 1 Pet. C. C. 322, 327. See *Hopkins v. Jones*, 22 Ind. 310.

6. *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *People's Savings Bank v. Tripp*, 13 R. I. 621; *Churchman v. Martin*, 54 Ind. 380. See *Wartman v. Philadelphia*, 33 Pa. St. 202.

7. *Fletcher v. Peck*, 6 Cranch (U. S.), 133; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Planters' Bank v. Sharp*, 6 How. (U. S.) 301; *Trustees v. Indiana*, 14 How. (U. S.) 268; *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *Bridge Proprietors v. Hoboken*, 1 Wall. (U. S.) 116; *Hawthorne v. Calf*, 2 Wall. (U. S.) 10; *The Binghamton Bridge*, 3 Wall. (U. S.) 51; *Miller v. State*, 15 Wall. (U. S.) 478; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Greenwood v. Freight Co.*, 105 U. S. 13; *New Orleans Gas Light Co. v. Louis-*

State has reserved the right to repeal, alter, or amend the charter of the corporation, the exercise of this power does not impair the

iana Light and Heat Co., 115 U. S. 650; New Orleans Water Works v. Rivers, 115 U. S. 674; Lincoln Bank v. Richardson, 1 Me. 79; Yarmouth v. North Yarmouth, 34 Me. 411; Coffin v. Rich, 45 Me. 507; State v. Noyes, 47 Me. 189, 205; Backus v. Lebanon, 11 N. H. 19; Grammar School v. Burt, 11 Vt. 632; Wales v. Stetson, 2 Mass. 146; King v. Bank, 15 Mass. 447; Nichols v. Bertram, 3 Pick. (Mass.) 342; Central Bridge v. Lowell, 15 Gray (Mass.), 106; Brighton v. Wilkinson, 2 Allen (Mass.), 27; Washington Bridge Co. v. State, 18 Conn. 53; Lothrop v. Stedman, 42 Conn. 583; People v. Manhattan Co., 9 Wend. (N. Y.) 351; Brown v. Hummel, 6 Pa. St. 86; Commonwealth v. Cullen, 13 Pa. St. 133; Iron City Bank v. Pittsburgh, 37 Pa. St. 340; Chincelamouche Lumber Co. v. Commonwealth, 100 Pa. St. 438; Zabriskie v. Railroad, 18 N. J. Eq. 178; Lehigh Valley R. v. McFarlan, 31 N. J. Eq. 706; Bailey v. Railroad, 4 Harr. (Del.) 389; Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 1; Norris v. Trustees, 7 Gill & J. (Md.) 7; Regents v. Williams, 9 Gill & J. (Md.) 365; Bank of the Dominion v. McVeigh, 20 Gratt. (Va.) 457; Mills v. Williams, 11 Ired. (N. Car.) 558; Bank of State v. Bank of Cape Fear, 13 Ired. (N. Car.) 75; Attorney General v. Bank of Charlotte, 4 Jones Eq. (N. Car.) 287; State v. Heywood, 3 Rich. (S. Car.) 389; Young v. Harrison, 6 Ga. 130; State v. Tombeckbee Bank, 2 Stew. (Ala.) 30; Commercial Bank v. State, 6 Sm. & Mar. (Miss.) 569; New Orleans, etc., R. v. Harris, 27 Miss. 517; Mayaville Turnpike Co. v. How, 14 B. Mon. (Ky.) 426; Louisville v. University, 15 B. Mon. (Ky.) 642; Edwards v. Jagers, 19 Ind. 407; Bruce v. Schuyler, 4 Gilm. (Ill.) 221; Bruffett v. Railroad, 25 Ill. 353; Miners' Bank v. United States, 1 Greene (Iowa), 553; Gorman v. Railroad, 26 Mo. 441; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225; People v. Jackson Plank Road, 9 Mich. 285; Flint Plank Road Co. v. Woodhull, 25 Mich. 99; McRoberts v. Washburne, 10 Minn. 23. *Compare* Mechanics' Bank v. Debolt, 1 Ohio St. 591; Toledo Bank v. Bond, 1 Ohio St. 622. But see Morgan v. Auditor, 5 Ohio St. 444; Ross Bank v. Lewis, 5 Ohio St. 447.

**Three Contracts Involved.**—Besides the contract of the State with the corporation, there is to be considered the contract subsisting between the shareholders

themselves, as also any contract existing between the corporation and any third party. None of these may be impaired by the legislature. See 2 Morawetz on Corp. § 1047; Black on Const. Prohibitions, § 15.

**Corporate Powers.**—A corporation is protected by the constitution in the use and enjoyment of all such rights and powers as are specifically granted by its charter, and any legislation which takes away those rights or curtails those powers is invalid. *Planters' Bank v. Sharp*, 6 How. (U. S.) 301; *Commonwealth v. Erie Trans. Co.*, 107 Pa. St. 112; *Pennsylvania R. v. B. & O. R.*, 60 Md. 263.

The same is true of the rights and powers incidental to the company's business, and proper and necessary to carry into effect the powers granted by the charter. *Planters' Bank v. Sharp*, 6 How. (U. S.) 301; *Bank of the Republic v. Hamilton*, 21 Ill. 53; *Payne v. Baldwin*, 3 Sm. & Mar. (Miss.) 661. See *The Binghamton Bridge*, 3 Wall. (U. S.) 51.

A statute arbitrarily dissolving the corporation would be illegal for this reason. *Black on Const. Prohibitions*, § 18; 2 Morawetz on Corp. § 1048. See *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225.

**Forfeiture of Charter.**—An act making that a cause of forfeiture of charters which was not previously so, is invalid as applied to existing corporations. *State v. Tombeckbee Bank*, 2 Stew. (Ala.) 30; *Aurora Turnpike Co. v. Holthouse*, 7 Ind. 59; *People v. Jackson, etc., Co.*, 9 Mich. 285.

But this does not prevent the legislature from altering the remedy for enforcing a forfeiture against a corporation, for any cause of forfeiture existing at the time of granting the charter. *Aurora Turnpike Co. v. Holthouse*, 7 Ind. 59. And see *Mobile & Ohio R. v. State*, 29 Ala. 573.

**Corporate Elections.**—When the charter of a corporation prescribes the method of conducting elections of officers and directors, and regulates the manner in which the stockholder may use his votes, or when the same is established by a general law in force at the organization of the company, the rule cannot be changed by an act of the legislature without the consent of the corporation. *Hays v. Commonwealth*, 82 Pa. St. 518; *Sheriff v. Loundes*, 16 Md. 357; *State v. Greer*, 78 Mo. 188.

**Grant when Revocable.**—A grant of a

obligation of the contract.<sup>1</sup> And the legislature may authorize

mere license or gratuity to an incorporated company, which imposes no new duty or additional burden upon it, and is without consideration, is revocable at the will of the legislature. *Philadelphia Passenger Co.'s Appeal*, 102 Pa. St. 123. See *Derby Turnpike Co. v. Parks*, 10 Conn. 522; *Gregory v. Shelby College*, 2 Met. (Ky.) 589; *State v. Morris*, 77 N. Car. 512.

So long as the contract remains executory, it may be revoked by the legislature, if not founded on an executed consideration. *Trustees v. Rider*, 13 Conn. 87; *Chincelamouche Lumber Co. v. Commonwealth*, 100 Pa. St. 438; *Slack v. Railroad*, 13 B. Mon. (Ky.) 1.

**Corporations Subject to General Laws.**—Corporations, like natural persons, are subject to the operation of the general laws of the land. And their constitutional immunity from legislative interference cannot be carried so far as to exempt them from the proper and reasonable control of the State in cases where their privileges have been perverted or abused, or the rights of third persons are in danger of being compromised through their actions. *Black on Const. Prohibitions*, § 23; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *Bank of the Republic v. Hamilton*, 21 Ill. 53; *Rodemacher v. Railroad*, 41 Iowa, 301; 2 *Morawetz on Corp.* § 1061.

Ample power resides in the legislature to regulate and control a corporation in the use of its franchises and powers whenever their exercise trenches upon the public health, morals, or safety. *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650, 672; *Gorman v. Railroad*, 26 Mo. 450.

The legislature has power to reasonably limit and regulate the tariff of tolls and charges to be exacted by public carriers for hire for transportation within the State. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Stone v. Illinois Cent. R.*, 116 U. S. 347; *Beekman v. Railroad*, 3 Paige (N. Y.), 45, 75.

But not to render it illegal for the corporation to exact any toll, or to lay any charge upon a designated class of persons or property. *Pingry v. Washburn*, 1 Aik. (Vt.) 264; *Attorney-General v. Turnpike Co.*, 55 Pa. St. 466; *Powell v. Sammons*, 31 Ala. 552.

Nor to reduce the tolls below a reasonable limit. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307.

The legislature has power to require all existing railroad corporations to fence their tracks and to maintain cattle-

guards, under penalty of damages for loss occasioned by neglect. *Gorman v. Railroad*, 26 Mo. 441; *Thorpe v. Railroad*, 27 Vt. 140; *Norris v. Railroad*, 39 Me. 273; *Madison, etc., R. v. White-neck*, 8 Ind. 217; *Kansas Pacific R. v. Mower*, 16 Kans. 573; *Penna. R. v. Riblet*, 66 Pa. St. 164; *New Albany, etc., R. v. Tilton*, 12 Ind. 3; *Cooley Const. Lim.* 579.

And to require locomotives to whistle or ring. *Galena, etc., R. v. Appleby*, 28 Ill. 283.

And to regulate crossings. *Pittsburgh, etc., R. v. Southwest R.*, 77 Pa. St. 173.

**Personal Liability of Stockholders.**—The legislature may constitutionally pass a law imposing a personal liability on stockholders of existing corporations for debts contracted by the company after the law takes effect. *Coffin v. Rich*, 45 Me. 507; *Shufeldt v. Carver*, 8 Ill. App. 545; *Fogg v. Sidwell*, 8 Ill. App. 551; *Child v. Coffin*, 17 Mass. 64; *Gray v. Coffin*, 9 Cush. (Mass.) 200; *Stanley v. Stanley*, 26 Me. 196; *Hathorn v. Calef*, 53 Me. 471.

Or taking away this liability where it already exists. *Coffin v. Rich* 45 Me. 507.

**Remedies against Corporations.**—In furtherance of the due administration of justice, the legislature has power to enact laws changing, modifying, repealing, or adding to the remedies against existing corporations for the enforcement of rights against them or the redress of wrongs attributable to them. *Black on Const. Prohibitions*, § 28. See *Gowen v. Railroad*, 44 Me. 140; *Reapers' Bank v. Willard*, 24 Ill. 433; *Portland, etc., R. v. Grand Trunk R.*, 46 Me. 69; *Ex parte Northeast R.*, 37 Ala. 679; *Sanders v. Ins. Co.*, 44 N. H. 238; *Louisville Co. v. Ballard*, 2 Met. (Ky.) 165; *Union Canal Co. v. Gilfillan*, 93 Pa. St. 95; *Grannahan v. Railroad*, 30 Mo. 546; *Branin v. Railroad*, 31 Vt. 214; *Peters v. Railroad*, 23 Mo. 107; *Southwestern R. v. Paulk*, 24 Ga. 356.

A statute which continues the life of a business corporation for a limited period after the expiration of its charter, for the purpose of winding up its affairs, is valid and constitutional. *Foster v. Essex Bank*, 16 Mass. 245; 2 *Morawetz on Corp.* § 1076.

It is no infringement of the constitutional rights of a corporation to levy a tax on its capital stock or other property. *Portland Bank v. Apthorp*, 12 Mass. 252; *Coffin v. Rich*, 45 Me. 507.

1. *Perrin v. Oliver*, 1 Minn. 302; *As-*



corporation to alter its original enterprise or exercise changes or powers, and such a change in its charter, threatening its most essential features, if accepted by the corporation, impair no contract.<sup>1</sup>

<sup>1</sup> *R. v. Elliott*, 58 N. H. 451; *Griffin v. Co.*, 3 Bush (Ky.), 592; *Miners' v. United States*, 1 Morris (Iowa), *Commonwealth v. Fayette Co. R.*, 1 St. 452.

As power may be reserved in the constitution. *Delaware R. v. 2*, 5 Harr. (Del.) 454.

If several charters are granted in it, it is enough if the power of reserve is reserved in any part of the same provided the language of the clause is sufficiently comprehensive to include the whole act. *Ferguson v. Bank*, 31 (Tenn.), 609.

the power may be reserved by a general law applicable to all corporations. *Miller v. State*, 15 Wall. (U. S.) *State v. Comm'r of Railroad Tax*, 37 N. J. L. 228; *State v. Person*, 1 J. L. 134.

The power of the legislature to alter a charter, when the power to do so is expressly reserved to the State, may be exercised in all cases, to any extent, to carry out the original purposes of the corporation, and to secure the due administration of justice in respect to the claims of the creditors of the corporation and the proper disposition of its assets. See *Hyatt v. McMahon*, 25 (N. Y.) 457; *Worcester v. Railroad*, 109 Mass. 103; *Fitchburg R. v. Junction R.*, 4 Allen (Mass.), 198; *Valley Water Works v. Schottler*, 1 S. 347; *In re Oliver Lee & Co.'s*, 21 N. Y. 9; 2 Morawetz on Corp. 11.

If the reservation of this right does not authorize the legislature to force the corporation into new enterprises not within the original objects of its incorporation. *Zabriskie v. Railroad*, 18 N. 178; *Ames v. Railroad*, 21 Minn. *Miller v. Railroad*, 21 Barb. (N. Y.)

Where two irrepealable charters are consolidated, a new company is thereby created, which becomes subject to any law of amendment existing in the statute at the date of the consolidation. *Atlantic & Gulf R. v. Georgia*, 1 S. 359; *Shields v. Ohio*, 95 U. S.

Where the right to repeal or amend a charter depends upon some contingency, the act or omission of the company, it is the right to judge whether that con-

tingency has occurred belongs to the legislature, not to the courts. *Erie R. v. Casey*, 26 Pa. St. 287, 302; *Bank v. United States*, 1 G. (Iowa), 553; *Lothrop v. Stedman*, Conn. 583; *McLaren v. Pennington*, Paige (N. Y.), 102; *Crease v. Babcock*, 23 Pick. (Mass.) 334, 344. *Flint Plank Road Co. v. Woodhull*, Mich. 99; *State v. Noyes*, 47 Me. *Canal Co. v. Railroad Co.*, 4 Gill (Md.) 122; *Regents v. Williams*, 9 & J. (Md.) 365.

1. *Pennsylvania College Cases*, 1 Wall. (U. S.) 190; *Ehrenzeller v. U. Canal Co.*, 1 Rawle (Pa.), 181; *Attorney General v. Clergy Society*, 10 Rich. (Car.) 604; *Zabriskie v. Railroad*, 1 J. Eq. 178; 2 Morawetz on Corp. § 11.

And the assent of the corporation to the proposed alteration of its charter may be inferred from such acts or omissions as would raise a similar presumption in the case of natural persons. *United States v. Dandridge*, 12 W. (U. S.) 64; *Bangor, etc., R. v. State*, 47 Me. 34; *Commonwealth v. Cullen*, Pa. St. 133; *Vermont & Canada R. v. Vermont Cent. R.*, 34 Vt. 2; *Palfray v. Paulding*, 7 La. Ann. 363; *State v.oley*, 25 Minn. 387; *Covington v. Road*, 10 Bush (Ky.), 69.

**Power of Majority of Corporation to Accept Amendment.**—If no power to alter or amend the charter is reserved to the legislature, and if the amendment proposed is of such a nature as to effect a radical and fundamental change in the structure, functions, or field of operation of the corporation, then the assent of the amendment by a majority of the stockholders will have the effect to bind only those assenting thereto, and the dissenting minority will be discharged from their contract of subscription. *Clearwater v. Meredith*, 1 V. (U. S.) 25, 40; *Railway Co. v. Allen*, 18 Wall. (U. S.) 233; *Printing House Trustees*, 104 U. S. 711; *Mowre v. Railroad*, 4 Biss. (U. S. Cir.) 86; *As v. Burbank*, 2 Dill. (U. S. Cir.) *Old Town R. v. Veazie*, 39 Me. *Union Locks v. Towne*, 1 N. H. *Stevens v. Railroad*, 29 Vt. 546; *Midsex Turnpike Co. v. Locke*, 8 Mass. *Troy, etc., R. v. Kerr*, 17 Barb. (N. 581; *Buffalo R. v. Potter*, 18 Barb. Y.) 21; *Hartford, etc., R. v. Crossw*

The prohibitory clause of the Federal constitution applies only to private rights and private contracts; and the charters of such bodies as are essentially public in their nature and purposes are not contracts, nor protected from legislative interference.<sup>1</sup>

Hill (N. Y.), 383; Indiana Turnpike Co. v. Phillippe, 2 Pen. & W. (Pa.) 184; Brown v. Fairmount Min. Co., 10 Phila. (Pa.) 32; Lanman v. Railroad, 30 Pa. St. 43; Turnpike Co. v. Arndt, 31 Pa. St. 317; Kean v. Johnson, 9 N. J. Eq. 407; Black v. Delaware Canal Co., 24 N. J. Eq. 455, 466; Charlotte Bank v. Charlotte, 85 N. Car. 433; Thompson v. Guion, 5 Jones Eq. (N. Car.) 113; Winter v. Railroad, 11 Ga. 438; Waring v. Mobile, 24 Ala. 701; New Orleans, etc., R. v. Harris, 27 Miss. 517; Hester v. Railroad, 32 Miss. 380; State v. Accommodation Bank, 26 La. Ann. 288; Fry v. Railroad, 2 Met. (Ky.) 314; Witter v. Railroad, 20 Ark. 488; Marietta, etc., R. v. Elliott, 10 Ohio St. 57; McCray v. Railroad, 9 Ind. 358; Booe v. Railroad, 10 Ind. 93; Shelbyville Turnpike Co. v. Barnes, 42 Ind. 498; Tuttle v. Michigan Air Line, 35 Mich. 247; Kenosha, etc., R. v. Marsh, 17 Wis. 13.

But those changes in the charter which are not calculated to exert any material influence upon the contract subsisting between the shareholders; which, without directly extending or abridging the powers of the corporation, yet invest it with additional privileges, immunities, and opportunities in the exercise of its corporate functions; which are useful to the public and beneficial to the company and in furtherance of the understanding of the subscribers as to the object to be effected; and which, in brief, are not radical and fundamental,—these may be accepted by a majority of the corporators with the effect to bind all the stockholders whether assenting or not. Bank v. Richardson, 1 Me. 79; Bucksport R. v. Buck, 68 Me. 81; Fall River Iron Works v. Railroad, 5 Allen (Mass.), 221; Agricultural R. v. Winchester, 13 Allen (Mass.), 29; Poughkeepsie Plank Road Co. v. Griffin, 24 N. Y. 150; Irvine v. Turnpike Co., 2 Pen. & W. (Pa.) 466; Clark v. Monongahela Nav. Co., 10 Watts (Pa.), 364; Everhart v. Railroad, 28 Pa. St. 339; Taggart v. Railroad, 24 Md. 564; Wilton v. Railroad, 33 Ga. 470; Waring v. Mobile, 24 Ala. 701; State v. Accommodation Bank, 26 La. Ann. 288; Fry v. Railroad, 2 Met. (Ky.) 322; Woodfork v. Bank, 3 Cold. (Tenn.) 488; Greeneville, etc., R. v. Johnson, 8 Baxt. (Tenn.)

332; Peoria v. Preston, 35 Iowa, 115; Joy v. Railroad, 11 Mich. 155.

An amendment to the charter of a railroad company, whereby the general course or direction of the roadway, or its terminus, is sought to be altered, is radical and fundamental, and releases dissenting subscribers. Middlesex Turnpike Co. v. Locke, 8 Mass. 267; Plank Road Co. v. Arndt, 31 Pa. St. 317; Thompson v. Guion, 5 Jones Eq. (N. Car.) 113; Stephens v. Railroad, 29 Vt. 545; Hester v. Railroad, 32 Miss. 380; Champion v. Railroad, 35 Miss. 692; Winter v. Railroad, 11 Ga. 45; Buffalo R. v. Potter, 18 Barb. (N. Y.) 21; Marietta, etc., R. v. Elliott, 10 Ohio St. 57.

But not an extension of the time for completing the road. Agricultural R. v. Winchester, 13 Allen (Mass.), 33.

Consolidation with another company is a radical and fundamental change. Clearwater v. Meredith, 1 Wall. (U. S.) 25; Pearce v. Railroad, 21 How. (U. S.) 441; Mowrey v. Railroad, 4 Biss (U. S. Cir.) 83; Knoxville v. Railroad 22 Fed. Repr. 758; Tuttle v. Michigan Air Line, 35 Mich. 247; New Jersey, etc., R. v. Strait, 35 N. J. L. 322, McCray v. Railroad, 9 Ind. 358; Lanman v. Railroad, 30 Pa. St. 42.

But a dissenting stockholder may, by his conduct, estop himself to object to the amendment. Bedford R. v. Bowser, 48 Pa. St. 29; Houston v. Jefferson College 63 Pa. St. 428; Danbury, etc., R. v. Wilson, 22 Conn. 435; Hayworth v. Railroad, 13 Ind. 348; Gifford v. Railroad, 10 N. J. Eq. 176; Zabriskie v. Railroad, 18 N. J. Eq. 178.

1. Black on Const. Prohibitions, §§ 44-50; 3 Parsons on Contr. \*529; Rader v. Road Distr., 36 N. J. L. 273; Berlin v. Gorham, 31 N. H. 266; Marietta v. Fearling, 4 Ohio, 427; Trustees v. Talman, 13 Ill. 27; Louisville v. University, 15 B. Mon. (Ky.) 642, Cooley Const. Lim. 192.

As regards municipalities, it has always been held that the law of the State creating them and conferring upon their officers a part of the sovereign authority as mandatories of the government is not a contract, and consequently the legislature may amend, modify, or repeal their charters at its pleasure. Brown v. Hummel, 6 Pa. St. 86; Moers v. Reading, 21

It is within the power of the legislature, when not forbidden by the organic law of the State, to grant to a corporation exclusive rights and privileges in the pursuit of its business, and such a grant constitutes a contract which no subsequent legislature can revoke or impair.<sup>1</sup> It is also competent for the legislature to exempt the property of a corporation, or a part thereof, from all future taxation, or from all assessment beyond a certain amount, or during a certain period, and such an engagement, if express and positive, constitutes an irrevocable and inviolable contract under the Federal constitution.<sup>2</sup>

Pa. St. 188; *Philadelphia v. Fox*, 64 Pa. St. 169; *Yarmouth v. North Yarmouth*, 34 Me. 411; *Berlin v. Gorham*, 34 N. H. 266; *Paterson v. Society*, 24 N. J. L. 385; *Bass v. Fontleroy*, 11 Tex. 698; *Moore v. New Orleans*, 32 La. Ann. 726; *Marietta v. Fearing*, 4 Ohio, 427; *St. Louis v. Russell*, 9 Mo. 507.

But not so as to relieve the municipality from the payment of its just debts already accrued, nor change the existing means for the enforcement and collection of those debts in such a manner as to materially impair the rights of the creditors. *Williams' Appeal*, 72 Pa. St. 214; *St. Louis v. Russell*, 9 Mo. 507; *Trustees v. Aberdeen*, 13 Sm. & Mar. (Miss.) 645; *Smith v. Morse*, 2 Cal. 524. Compare *Wallace v. Sharon*, 84 N. Car. 164.

1. *West River Bridge v. Dix*, 6 How. (U. S.) 531; *Binghamton Bridge*, 3 Wall. (U. S.) 51; *Bridge Co. v. Hoboken Land Co.*, 13 N. J. Eq. 181; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 N. Y. 87; *Boston & Lowell R. v. Salem & Lowell R.*, 2 2 Gray (Mass.). 1; *State v. Noyes*, 47 Me. 189; *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650; *New Orleans Water Works v. Rivers*, 115 U. S. 674.

A municipality cannot ordinarily grant monopoly privileges to a corporation. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Birmingham & Pratt Mines St. R. v. Birmingham St. R.*, 22 Repr. (Ala.) 712.

**Rule of Construction.**—A grant is to be construed strictly against the corporation and in favor of the State; nothing will pass against the State by implication; the State will not be presumed to have parted with any portion of its sovereign power; and the privileges granted in an act of incorporation will not be deemed exclusive, unless it appears from the charter, in terms too clear and explicit to be mistaken, that it was the actual and deliberate intention of the legislature to

preclude the State from granting similar franchises to any subsequent corporation. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Rice v. Railroad*, 1 Black (U. S.) 358; *Ruggles v. Illinois*, 108 U. S. 536; *De Lancey v. Ins. Co.*, 52 N. H. 581; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 N. Y. 87, 92; *Dyer v. Tuskaloosa Bridge*, 2 Port. (Ala.) 296; *Collins v. Sherman*, 31 Miss. 679; *Gaines v. Coates*, 51 Miss. 335; *State v. Southern, etc.*, R., 24 Tex. 80.

If the rights and privileges granted to a corporation are not made exclusive by the specific terms of the grant, the legislature is not debarred from conferring similar franchises upon a rival company, notwithstanding the effect of the latter grant may be to injure the business and diminish the profits of the first company. *Washington Turnpike Co. v. Maryland*, 3 Wall. (U. S.) 210; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Matter of Hamilton Avenue*, 14 Barb. (N. Y.) 405; *Thompson v. Railroad*, 3 Sandf. Ch. (N. Y.) 679; *Mohawk Bridge Co. v. Railroad*, 6 Paige (N. Y.) 554; *Turnpike Co. v. Railroad Co.*, 10 Gill & J. (Md.) 392; *Tuckahoe Canal Co. v. Tuckahoe R.*, 11 Leigh (Va.), 42; s. c., 36 Am. Dec. 374; *Shorter & Smith*, 9 Ga. 517.

2. *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133; *McGee v. Mathis*, 4 Wall. (U. S.) 143; *Wilmington, etc., R. v. Reid*, 13 Wall. (U. S.) 264; *Humphrey v. Pegues*, 16 Wall. (U. S.) 244; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Pacific R. v. Maguire*, 20 Wall. (U. S.) 36; *Erie R. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Northwestern University v. People*, 99 U. S. 309; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362; *Iron City Bank v. Pittsburgh*, 37 Pa. St. 340; *Commonwealth v. Pottsville Water Co.*, 94 Pa. St. 516; *Commonwealth v. Girard Bank*, 1 Pears. (Pa.) 323; *Seymour v. Hartford*, 21 Conn. 481;

The exercise by the State, at any time, of its police power can never be construed into a violation of the Federal constitution, as impairing the obligation of contracts, notwithstanding its effect may be to repeal existing charters or otherwise invade the terms of legislative engagements.<sup>1</sup>

*Atwater v. Woodbridge*, 6 Conn. 223; *Osborne v. Humphrey*, 7 Conn. 335; *O'Donnell v. Bailey*, 24 Miss. 386; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Memphis & Little Rock R. v. Berry*, 41 Ark. 436; *State v. Crittenden County Court*, 19 Ark. 360.

**Rule of Construction.**—It is never to be presumed that the legislature has, in this respect, fettered its power in the future except upon clear and irresistible evidence that the engagement was in the nature of a private contract, as distinguished from a mere act of general legislation, and that such, in the particular instance, was the actual and deliberate intention of the State authorities. *Dela-ware Railroad Tax*, 18 Wall. (U. S.) 206; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Philadelphia & Wilmington R. v. Maryland*, 10 How. (U. S.) 376; *Wilmington, etc., R. v. Reid*, 13 Wall. (U. S.) 264; *Erie R. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Union Passenger R. v. Philadelphia*, 101 U. S. 528; *Vicksburg, etc., R. v. Dennis*, 116 U. S. 665; *People v. Roper*, 35 N. Y. 629; *State v. Newark*, 26 N. J. L. 519; *Jones Mfg. Co. v. Commonwealth*, 69 Pa. St. 137.

But if the charter provides that the corporation shall pay to the State a certain percentage on its stock or profits, "which shall be in lieu of all taxes" to which the company or its stockholders would otherwise be subject, this is an express renunciation by the State of the right to impose further duties, and a subsequent act increasing the measure of taxation is unconstitutional. *Farrington v. Tennessee*, 95 U. S. 679; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Piqua Branch Bank v. Knoop*, 16 How. (U. S.) 369.

**Necessity of Consideration.**—The grant of a privilege against taxation must have been founded upon an adequate consideration. If none such exists, the exemption is a mere spontaneous concession on the part of the legislature, does not constitute a contract, and may be revoked at will. *Christ Church v. Philadelphia*, 24 How. (U. S.) 300; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430; *People v. Comm'rs of Taxes*, 47 N. Y. 501; *Washington University v. Rowse*, 42 Mo. 208.

**Exemption not Transferable.**—Immuni-

ty from taxation conferred on a corporation by the legislature is not a franchise. It is personal to the corporation, and does not inhere in the property so as to pass by a transfer of it. *Chesapeake & Ohio R. v. Miller*, 114 U. S. 176; *Morgan v. Louisiana*, 93 U. S. 217.

1. *Stone v. Mississippi*, 101 U. S. 814; *Boyd v. Alabama*, 94 U. S. 645; *Farmers' L. & T. Co. v. Stone*, 20 Fed. Repr. 270; *Baker v. Boston*, 12 Pick. (Mass.) 184; *Thorpe v. Railroad*, 27 Vt. 149; *Lake Hill v. Cemetery Co.*, 70 Ill. 191.

**Constitutional Limits of Police Power.**—The public health and the public morals are the two subjects embraced within the strict and constitutional meaning of the term "police power;" and the grant by the State to an individual or a corporation of the privilege (whether exclusive or not) of pursuing any species of business, the conduct of which must necessarily be attended with more or less injury to one or both of these subjects, is not a contract; and a subsequent statute revoking the grant or burdening it with restrictions is not invalid. *Black on Const. Prohibitions*, §§ 62, 63; *Cooley Const. Lim.* 577; *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650. See *Beer Co. v. Massachusetts*, 97 U. S. 32; *Fertilizing Co. v. Hyde Park*, 97 U. S. 663; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Boyd v. Alabama*, 94 U. S. 645; *People v. Jackson Plank Road*, 9 Mich. 307.

The police power does not extend to matters affecting the mere convenience of the public. *Black on Const. Prohibitions*, § 64.

Prohibitory liquor laws are constitutional, notwithstanding their effect is to repeal or impair charter rights or annul previous contract obligations. *Beer Co. v. Massachusetts*, 97 U. S. 25; *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497; *People v. Hawley*, 3 Mich. 330; *Reynolds v. Geary*, 26 Conn. 179; *Rowland v. State*, 12 Tex. App. 418; *Santo v. State*, 2 Iowa. 165; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Gutzwiller v. People*, 14 Ill. 142.

Under the police power the legislature may authorize the suppression of lotteries, notwithstanding contract rights. *Stone v. Mississippi*, 101 U. S. 814. Or

A franchise granted to an incorporated company is a species of property, and may be taken by the State under the power of eminent domain, subject to the conditions necessary for the legal exercise of that power; and when adequate compensation is provided, the obligation of the contract is not impaired, but recognized.<sup>1</sup>

(b) *Legislative Contracts with Private Persons.*—The prohibitory clause of the Federal constitution, protecting the obligation of contracts from impairment, applies equally to all classes of contractual engagements, including those to which the State itself is a party, and whether the other party be one of its individual citizens, or a corporation, or another State.<sup>2</sup> That a State may make a valid and binding engagement, in the nature of a contract, with one of its own citizens, is well settled. Rights once vested, privileges once granted or sanctioned by the law of the State, if within

the removal or discontinuance of slaughter-houses. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746. Or the discontinuance of ancient cemeteries. *Coates v. Mayor of New York*, 7 Cow. (N. Y.) 585.

Without repealing the charter, the legislature may, under the police power, so direct the affairs of the corporation that the use of its franchise and privileges shall not be detrimental to the health or safety of the people. Black on Const. Prohibitions, § 69; *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650, 671. See *Baker v. Boston*, 12 Pick. (Mass.) 184; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383.

1. *West River Bridge v. Dix*, 6 How. (U. S.) 507; *Richmond R. v. Louisa R.*, 13 How. (U. S.) 71; *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650, 673; *Enfield Toll Bridge Co. v. Railroad*, 17 Conn. 40; *Backus v. Lebanon*, 11 N. H. 19; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 474; *Boston Water Power Co. v. Railroad*, 23 Pick. (Mass.) 360; *In re Citizens' Passenger R.*, 2 Pitts. (Pa.) 10; *In re Towanda Bridge*, 91 Pa. St. 216; *In re Twenty-second Street*, 102 Pa. St. 108; *Benson v. New York*, 10 Barb. (N. Y.) 223; *Sharter v. Smith*, 9 Ga. 517; *Cooley Const. Lim.* 281; 3 *Parsons on Contracts*, \*537; 2 *Morawitz on Corp.* § 1086; Black on Const. Prohibitions, § 72.

An exclusive bridge franchise may be condemned; or a toll bridge may be made free to the public. *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35;

*West River Bridge v. Dix*, 6 How. (U. S.) 507; *In re Towanda Bridge*, 91 Pa. St. 216; *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 474.

The right of the State to open streets in cities, for the accommodation of public travel, in the exercise of its power of eminent domain, will not be lost because an act of the legislature has granted to a certain corporation perpetual immunity against the opening of streets through its cemetery. *In re Twenty-second Street*, 102 Pa. St. 108.

A franchise consisting of the privilege of exemption from taxation may also be condemned under the power of eminent domain. 3 *Parsons on Contracts*, \*543.

There is nothing in the nature of the case to distinguish a grant of a monopoly to a corporation, as respects its appropriation by the State under the power of eminent domain, from an ordinary franchise not in terms made exclusive; except this, that the exclusiveness of the grant is simply one element of value, to be taken into account in assessing the compensation for its resumption. Black on Const. Prohibitions, § 76; *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650, 673; *Cooley Const. Lim.* 281.

Where a radical change in the charter is proposed, the dissenting minority of stockholders may be worked out by condemning their stock under the eminent domain. *Black v. Delaware Canal Co.*, 24 N. J. Eq. 455. See 2 *Morawitz on Corp.* § 1089.

2. *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Canal Co. v. Railroad Co.*, 4 Gill & J. (Md.) 1; *United States v. Great Falls Co.*, 21 Md. 119.

the constitutional limits, may be forfeited, but cannot be arbitrarily divested or withdrawn by any future legislation.<sup>1</sup>

When a State or city puts into operation a plan for the finding of its floating debt, this constitutes, when accepted, a new contract with each individual creditor, substantially beyond the further control of the legislature, and not to be altered or impaired by any subsequent modification or repeal.<sup>2</sup> Where the charter of a State bank makes its paper receivable for all debts to the State, this provision cannot be repealed as to bills in circulation at the time.<sup>3</sup> An act of the legislature forbidding a city to levy taxes to pay judgments against it is unconstitutional when, as the law stands, the effect of such legislation is to deprive the creditor of the only effectual means of collecting his debt.<sup>4</sup>

1. *Woodruff v. State*, 3 Pike (Ark.), 285; *Brooklyn, etc., R. v. Railroad*, 32 Barb. (N. Y.) 358; *Drew v. Railroad*, 32 P. F. Smith (Pa.), 46; *Winter v. Jones*, 10 Ga. 190; *Commercial Bank v. Chambers*, 8 Sm. & Mar. (Miss.) 9; *Bruce v. Schuyler*, 4 Gilm. (Ill.) 221; *Stannire v. Taylor*, 3 Jones (N. Car.), 207; *Warren v. Lyons*, 22 Iowa, 351; *State v. Barker*, 4 Kans. 379; *Georgia Penitentiary Co. v. Nelms*, 71 Ga. 301.

A mere promise or offer on the part of the State, while it remains unaccepted and before any consideration has passed, may be revoked and annulled without the violation of any constitutional sanction. *Durkee v. Board of Liquidation*, 103 U. S. 646; *Brinsfield v. Carter*, 2 Kelly (Ga.), 143; *Montgomery v. Kasson*, 16 Cal. 189; *People v. Auditor*, 9 Mich. 327; *Cooley Const. Lim.* 284.

2. *People v. Woods*, 7 Cal. 579; *People v. Bond*, 10 Cal. 563; *Babcock v. Middleton*, 20 Cal. 643; *People v. Otis*, 90 N. Y. 48; *McCracken v. Moody*, 33 Ark. 81; *Dillingham v. Hook*, 32 Kans. 185; *Gurnee v. Speer*, 68 Ga. 711; *Smith v. Appleton*, 19 Wis. 468; *State v. Young*, 29 Minn. 474; *Edwards v. Williamson*, 70 Ala. 145; *Youngs v. Hall*, 9 Nev. 212; *Amy v. Shelby Co.*, 114 U. S. 387; *Murray v. Charleston*, 96 U. S. 432; *Brewer v. Otoe*, 1 Nebr. 373; *New Orleans v. City Hotel*, 28 La. Ann. 423.

**Virginia Coupon Cases.**—*Antoni v. Wright*, 22 Gratt. (Va.) 833; *Wise v. Rogers*, 24 Gratt. (Va.) 169; *Clarke v. Tyler*, 30 Gratt. (Va.) 137; *Hartman v. Greenhow*, 102 U. S. 672; *Antoni v. Greenhow*, 107 U. S. 766; *Virginia Coupon Cases*, 114 U. S. 270; *Royall v. Virginia*, 116 U. S. 572; *Harvey v. Virginia*, 20 Fed. Repr. 411. For full discussion see *Black on Const. Prohibitions*, § 87. See also article by Prof. Pomeroy in 17 Am. Law Review, 684.

3. *Woodruff v. Trapnall*, 10 How. (U. S.) 190; *Curran v. Arkansas*, 15 How. (U. S.) 304; *Graniteville Co. v. Roper*, 15 Rich. (S. Car.) 138; *Keith v. Clark*, 97 U. S. 454. See *Tennessee v. Snead*, 96 U. S. 69; *South Carolina v. Gaillard*, 101 U. S. 433.

4. *Souter v. Madison*, 15 Wis. 30; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Favrot v. East Baton Rouge*, 34 La. Ann. 491; *Wood v. Mayor*, 6 Rob. (N. Y.) 463; *Hadfield v. Mayor*, 6 Rob. (N. Y.) 501. Compare *Sharp v. Contra Costa County*, 34 Cal. 284. See *New Orleans v. Morris*, 105 U. S. 600; *New Orleans v. Holmes*, 13 La. Ann. 502; *Louisiana v. New Orleans*, 102 U. S. 203.

But this does not apply to the case of raising money by taxation to pay a judgment founded on a tort, because a judgment in tort is not a contract. *Louisiana v. Mayor of New Orleans*, 109 U. S. 285.

After an appropriation has been made by the legislature to meet the requirements of a contract entered into by the State, and after the funds have been received into the treasury, it cannot deprive the party entitled thereto of the funds by repealing the appropriation. *McCauley v. Brooks*, 16 Cal. 11; *Dodd v. Miller*, 14 Ind. 433. Compare *Young v. Territory*, 1 Oreg. 213.

When a municipal corporation, having general power to levy taxes to pay its debts, enters into a contract, the legislature cannot take away or substantially impair the right to compel the corporation, by *mandamus*, to exert its taxing power. *Rahway Tax Assessors v. State*, 44 N. J. L. 395.

Nor repeal or modify the taxing power of the corporation to such an extent as to deprive the holder of the contract of all adequate and efficacious remedy. *Louisiana v. Police Jury*, 111 U. S. 716; *Goodale v. Fennell*, 27 Ohio St. 426.

There are certain cases in which the State has been allowed to depart from the express terms of its contracts, on the ground that such change is expedient for the public economy, or necessary for the due regulation of its internal affairs.<sup>1</sup> Permission accorded to sue the State is not a contract, and may be revoked at will.<sup>2</sup>

The appointment or election of a public officer does not create any contract between the government and himself, within the meaning of the prohibitory clause, that he shall continue the incumbent of that office for the period named, or that his duties shall remain the same, or that the emoluments of the office shall not be changed.<sup>3</sup>

1. The legislature has constitutional power to pass an act changing the location of the seat of justice of a county, although a contract for the purchase of a particular site had already been made by the commissioners. *State v. Jones*, 1 Ired. (N. Car.) 414.

A right of exemption from jury duty by five years' service in certain fire companies, chartered with that right, may be repealed by the legislature even in reference to a person who has performed that service. *Dunlap v. State*, 76 Ala. 460.

The legislature may take away an immunity given from working the roads. *Ex parte Thompson*, 20 Fla. 887.

Where the legislature had conferred power upon the board of supervisors to publish the delinquent tax list of the county, and the board had contracted with the publisher of a newspaper for such publication, but before publication the act conferring that power upon the board was repealed, it was held that the repealing act was not in violation of the contract for publishing, and that the publisher in entering into the contract must be deemed to have acted with reference to the fact that the matter of publishing the list was within the control of the legislature. *Pott v. Sheboygan Co.*, 25 Wis. 506.

2. *Beers v. Arkansas*, 20 How. (U. S.) 527. See *Western Arkansas Bank v. Sebastian Co.*, 5 Dill. (U. S. Cir.) 414.

3. *Butler v. Pennsylvania*, 10 How. (U. S.) 402; *Conner v. New York*, 5 N. Y. 285; *Benford v. Gibson*, 15 Ala. 521; *State v. Smedes*, 26 Miss. 47; *Supervisors v. Luck*, 9 Va. Law Jour. 186; *Farewell v. Rockland*, 62 Me. 206; *State v. Hermann*, 11 Mo. App. 43; *People v. Banvard*, 27 Cal. 470; *People v. Haskell*, 5 Cal. 357; *Commonwealth v. Bailey*, 81 Ky. 395; *Barker v. Pittsburgh*, 4 Pa. St. 49; *Harvey v. Rush Co.*, 32 Kans. 159; *People v. Devlin*, 33 N. Y. 269; *Coffin v. State*, 7 Ind. 157; *Donahue v. Will Co.*, 100 Ill. 94. Compare *King v. Hunter*, 65 N. Car. 603; *Cotten v. Ellis*, 7 Jones (N. Car.),

545; *Brown v. Turner*, 70 N. Car. 93; *Vann v. Pipkin*, 77 N. Car. 408.

Where a particular office has been created by statute, the legislature may, in their discretion, abolish the office, without regard to the tenure or expectations of the incumbent. *State v. Hermann*, 11 Mo. App. 43; *Bryan v. Cuttell*, 15 Iowa, 538; *Conner v. New York*, 2 Sandf. (N. Y.) 355.

Or may pass an act lengthening or abridging the term of office. *Territory v. Pyle*, 1 Oreg. 149; *People v. Van Gaslin*, 5 West Coast Repr. 651.

Or increasing the burdens or duties of the office without enhancing the compensation, or diminishing the compensation without lessening the duties. *Turpen v. Comm'rs*, 7 Ind. 172; *Conner v. New York*, 2 Sandf. (N. Y.) 355; *Bryan v. Cuttell*, 15 Iowa, 538.

Or declaring the office vacant and appointing another person to fill the vacancy. *People v. Banvard*, 27 Cal. 470; *Attorney-General v. Squires*, 14 Cal. 13; *People v. Haskell*, 5 Cal. 357; *Bryan v. Cuttell*, 15 Iowa, 538.

Or reducing the salary or compensation of a statutory officer after he has entered upon his term of service. *Commonwealth v. Bacon*, 6 S. & R. (Pa.) 322; *People v. Devlin*, 33 N. Y. 269; *Commonwealth v. Bailey*, 81 Ky. 395; *State v. Smedes*, 26 Miss. 47; *Harvey v. Rush Co.*, 32 Kans. 159; *Barker v. Pittsburgh*, 4 Pa. St. 49; *Foster v. Jones*, 79 Va. 642.

If the emoluments of the office are derived from fees, the legislature has authority to abolish some of the fees and reduce others, or do to away with them altogether and substitute a compensation by salary. *Conner v. New York*, 2 Sandf. (N. Y.) 355.

But salary actually earned before the change may be recovered. *Fisk v. Police Jury*, 116 U. S. 131; *Butler v. Pennsylvania*, 10 How. (U. S.) 402.

**Constitutional Offices.**—When the constitution of the State provides for the

(c) *Legislative Interference with Contracts between Individuals.*—The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms.<sup>1</sup> And any statute is unconstitutional, as impairing the obligation of contracts, which introduces a change into the express terms of the contract, its legal construction, its validity, its discharge, or (within certain limits) the remedy for its enforcement.<sup>2</sup>

election or appointment to a particular office, or fixes the term or salary, the legislature has no power to change it in any of these respects. *Warner v. People*, 2 Denio (N. Y.), 272; *Howard v. State*, 10 Ind. 99; *State v. Draper*, 11 Am. Law Reg. 552.

But although the legislature cannot abolish, either directly or virtually, a constitutional office, yet it is held that when an office is created by the constitution and defined as to term and salary, the people in their sovereign capacity may, by the adoption of a new constitution, terminate both, without regard to the rights, interests, or expectations of the incumbent. *Conner v. New York*, 2 Sandf. (N. Y.) 355; *Coffin v. State*, 7 Ind. 157.

But when the tenure and salary of an office are fixed by a statute, though the office itself is created by the constitution, it is equally within the legislative control, as to such tenure and compensation, as in the case of offices created by statute, except that the office could not be virtually abolished by a colorable reduction of the compensation, or by taking it away altogether. *Conner v. New York*, 2 Sandf. (N. Y.) 355; *Warner v. People*, 2 Denio (N. Y.), 272.

1. *Van Hoffman v. Quincey*, 4 Wall. 535; 2 Story on the Const. § 1385.

2. Black on Const. Prohibitions, § 102; 2 Story on the Const. § 1385.

The extent of the change is immaterial; any deviation from the terms of the contract impairs its obligation. *Green v. Biddle*, 8 Wheat. (U. S.) 1, 84; *Winter v. Jones*, 10 Ga. 190.

**Laws changing Terms of Contract.**—Any provision in a statute substantially defeating the ends contemplated by the parties to a contract, as by making necessary the performance of new conditions, not required by the law of the contract, impairs its obligation. *Robinson v. Magee*, 9 Cal. 81. See *Nelson v. Allen*, 1 Yerg. (Tenn.) 360.

A statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period for redemption beyond the

time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Howard v. Bugbee*, 24 How. (U. S.) 461; *Coddington v. Bispham*, 36 N. J. Eq. 574; *Malony v. Fortune*, 14 Iowa, 417; *Mundy v. Monroe*, 1 Mann. (Mich.) 68. Compare *Heyward v. Judd*, 4 Minn. 483; *Berthold v. Holman*, 12 Minn. 335; *Berthold v. Fox*, 13 Minn. 501.

The same is true of laws extending the time for redemption from tax sales. *Dikeman v. Dikeman*, 11 Paige (N. Y.), 484; *Robinson v. Howe*, 13 Wis. 341.

An act changing the legal rate of interest cannot affect contracts entered into before its passage, although they may become due and payable after the enactment. *Roberts v. Cocke*, 28 Gratt. (Va.) 207; *Cecil v. Deyerle*, 28 Gratt. (Va.) 775; *Myrick v. Battle*, 5 Fla. 345. See *Conn. Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51; *Wood v. Kennedy*, 19 Ind. 68.

The legislature has no power, by retrospective statute, to dispense with the requirement of due notice to drawers and indorsers of notes and bills, or to change the time within which notice must be given. 2 *Daniel on Nego. Instr.* § 970 a, citing *Duerson v. Alsop*, 27 Gratt. (Va.) 230; *Farmers' Bank v. Gunnell*, 26 Gratt. (Va.) 144; *Cook v. Googins*, 126 Mass. 410.

But a law under which the signer of a note made in one State and payable generally to a citizen of another State or order may be charged as the trustee of the payee, is not unconstitutional as impairing contracts. *Philbrick v. Philbrick*, 39 N. H. 468.

There is no constitutional provision guarding the common-law right of dower; it is not a part of the marriage contract, but results from the operation of laws existing at the time of the husband's death. Consequently a law affecting this subject may constitutionally apply to cases where the marriage was contracted before its passage, but the death of the husband occurred after it went into operation. *Melizet's Appeal*, 17 Pa. St. 449;



A State insolvent law discharging the person and property of the debtor, upon his compliance with its requirements, is valid and constitutional when applied to contracts made subsequently to its passage, within the State, and wholly between citizens thereof; but it can have no effect upon contracts entered into by the debtor before its passage, or with a citizen of another State, or not to be performed within the State.<sup>1</sup>

*Barbour v. Barbour*, 46 Me. 9; *Lawrence v. Miller*, 1 Sandf. (N. Y.) 516; *Magee v. Young*, 40 Miss. 164.

**Laws Affecting Construction of Contracts**—No act of the legislature can alter the nature and legal effect of an existing contract, to the prejudice of either party, nor give to such contract a judicial construction which shall be binding on the parties or on the courts. *King v. Bank*, 15 Mass. 447; *Weaver v. Maillot*, 15 La. Ann. 395.

But a law which merely establishes a rule of evidence with respect to certain past transactions cannot be said to impair the obligation of contracts. *Herbert v. Easton*, 43 Ala. 547.

A law requiring a written promise to revive a debt barred by bankruptcy may apply to past transactions. *Kingley v. Cousins*, 47 Me. 91; *Cooley Const. Lim.* 293.

So of a statute making the protest of an inland promissory note evidence of the facts therein stated. *Fales v. Wadsworth*, 23 Me. 553.

So of an act allowing the defence of want of consideration to be pleaded to all actions on sealed contracts. *Williams v. Haines*, 27 Iowa, 251.

Or a statute providing that a creditor may compound or compromise with a joint-contractor or co obligor without releasing the others, and that the right of contribution shall not be affected thereby. *Yuille v. Wimbish*, 77 Va. 308.

**Laws Impairing Validity of Contracts.**—An act declaring that certain circumstances which, at the making of the contract, would have rendered its consideration illegal, and so prevented its enforcement by process of law, shall no longer constitute a defence to an action upon it, is valid. *Hill v. Smith*, 1 Morris (Iowa), 70.

A statute which repeals existing usury laws, and destroys defences to existing contracts on the ground of usury, does not deprive parties of vested rights nor impair the obligation of contracts. *Ewell v. Daggs*, 108 U. S. 143; *Curtis v. Leavitt*, 15 N. Y. 9; *Bank v. Allen*, 28 Conn. 97; *Welch v. Wadsworth*, 30 Conn. 149; *Andrews v. Russell*, 7 Blackf. (Ind.) 474;

*Wood v. Kennedy*, 19 Ind. 68; *Danville v. Pace*, 25 Gratt. (Va.) 1; *Parmelee v. Lawrence*, 48 Ill. 331; *Woodruff v. Scruggs*, 27 Ark. 26.

But the legislature cannot declare that certain facts shall be a defence to actions brought on previously existing contracts. *Cornell v. Hichens*, 11 Wis. 353; *McNealey v. Gregory*, 13 Fla. 417; *McElvain v. Mudd*, 44 Ala. 48; *Fitzpatrick v. Hearne*, 44 Ala. 171; *Curry v. Davis*, 44 Ala. 282; *Calhoun v. Calhoun*, 2 S. Car. 283; *Henderson v. Ins. Co.*, 25 La. Ann. 343; *Forcheimer v. Holly*, 14 Fla. 239.

A law requiring previously executed conveyances to be recorded, in order to be valid against subsequent purchasers, does not impair the obligation of contracts. *Jackson v. Lamphire*, 3 Pet. (U. S.) 280, 290; *Stafford v. Lick*, 7 Cal. 479; *Rochereau v. Delacroix*, 26 La. Ann. 584; *Vance v. Vance*, 32 La. Ann. 186.

So of a law requiring a judgment to be docketed in each county where it is sought to bind real estate of the defendant. *Tarpley v. Hamer*, 9 Sm. & Mar. (Miss.) 310.

Or requiring the acknowledgment of deeds and mortgages. *Parrott v. Kumpf*, 102 Ill. 423.

**Discharge of Contracts.**—Statutes which change the rules relating to the discharge of contracts, the medium of payment, or the measure of damages, are unconstitutional if applied to contracts made before their passage. *Dundas v. Bowler*, 3 McLean (U. S. Cir.), 397; *Abercrombie v. Baxter*, 44 Ga. 36. See *Swift v. Fletcher*, 6 Minn. 556.

But the legislature may, after a contract is made, change the laws, which determine the amount of costs recoverable in an action upon it, or take away all costs. *Rader v. Road District*, 36 N. J. L. 273; *Gardenshire v. McCombs*, 1 Sneed (Tenn.), 83.

1. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *McMillan v. McNeil*, 4 Wheat. (U. S.) 209; *Farmers' & Mechanics' Bank v. Smith*, 6 Wheat. (U. S.) 131; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Boyle v. Zacharie*, 6 Pet. (U. S.) 348; *Frey v. Kirk*, 4 Gill & J. (Md.) 509; *Baldwin v. Hale*, 1 Wall. (U. S.) 223.

Marriage is not a contract within the constitutional prohibition.<sup>1</sup> And the legislature may constitutionally authorize divorces to be granted by the courts, dissolving marriages previously contracted, for causes happening before the passage of the act, and which, at the time of their occurrence, furnished no ground for such a proceeding.<sup>2</sup> Judgments cannot be considered as contracts within the meaning of the clause.<sup>3</sup>

(d) *Remedies and Remedial Process.*—The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature, in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts.<sup>4</sup> But if the parties to a contract include in it, in express

State insolvent laws cannot affect debts contracted before their passage. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Farmers & Mechanics' Bank v. Smith*, 6 Wheat. (U. S.) 131; *Golden v. Prince*, 3 Wash. (U. S. Cir.) 313; *Roosevelt v. Cebra*, 17 Johns. (N. Y.) 108; *Smith v. Mead*, 3 Conn. 253; *Hammett v. Anderson*, 3 Conn. 304; *Medbury v. Hopkins*, 3 Conn. 472.

They are invalid as against foreign creditors. *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Cook v. Moffatt*, 5 How. (U. S.) 295; *Sloane v. Chimiquy*, 22 Fed. Repr. 213; *Donnelly v. Corbett*, 7 N. Y. 500; *Hicks v. Hotchkiss*, 7 Johns. (N. Y.) Ch. 297; *Larrabee v. Talbot*, 5 Gill (Md.) 426; *Guernsey v. Wood*, 130 Mass. 503; *Felch v. Bugbee*, 48 Me. 9; *Whitney v. Whiting*, 35 N. H. 467; *Pratt v. Chase*, 44 N. Y. 597.

Although the contract was made and, by its terms, expressly to be performed, in the State where the debtor resides and where he obtains his discharge in insolvency, yet, if the creditor be a citizen of another State, the debt is not discharged. *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Gilman v. Lockwood*, 4 Wall. (U. S.) 409; *Stoddard v. Harrington*, 100 Mass. 88; *Guernsey v. Wood*, 130 Mass. 503; *Kelley v. Drury*, 9 Allen (Mass.), 28; *Pratt v. Chase*, 44 N. Y. 597; *Newmarket Bank v. Butter*, 45 N. H. 236; *Felch v. Bugbee*, 48 Me. 9; *Chase v. Flagg*, 48 Me. 182.

But foreign creditors may submit their claims to the jurisdiction of the insolvency court, and are then bound. *Whitney v. Whiting*, 35 N. H. 457; *Pratt v. Chase*, 44 N. Y. 597; *Keating v. Vaughn*, 61 Tex. 518.

1. *Adams v. Palmer*, 51 Me. 480; *Cronise v. Cronise*, 54 Pa. St. 255; *Cabell*

*v. Cabell*, 1 Met. (Ky.) 319; *Maguire v. Maguire*, 7 Dana (Ky.), 181; *Carson v. Carson*, 40 Miss. 349; *Noel v. Ewing*, 9 Ind. 37; *Rugh v. Ottenheimer*, 6 Oreg. 231; *Starr v. Hamilton*, Deady (U. S. Cir.), 268; *Ditson v. Ditson*, 4 R. I. 87; *Cooley Const. Lim.* 284, *Black Const. Prohibitions*, § 125; 2 *Wharton on Contr.* § 1069; 3 *Parsons on Contr.* § 545; 1 *Bishop, Mar. & Div.* § 667. *Compare Ponder v. Graham*, 4 Fla. 23; *Bryson v. Bryson*, 44 Mo. 232.

2. *Carson v. Carson*, 40 Miss. 349; *Maguire v. Maguire*, 7 Dana (Ky.), 181; *Berthelemy v. Johnson*, 3 B. Mon. (Ky.), 90; *Jones v. Jones*, 2 Tenn. 2; *West v. West*, 2 Mass. 223; *Smith v. Smith*, 3 S. & R. (Pa.) 248; *Bigelow v. Bigelow*, 108 Mass. 38; *Hunt v. Hunt*, 9 Hun (N. Y.), 662; 1 *Bishop, Mar. & Div.* § 696. *Compare Clark v. Clark*, 10 N. H. 380.

3. *Garrison v. New York*, 21 Wall. (U. S.) 196; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285; *State v. New Orleans*, 32 La. Ann. 709; *Sprott v. Reid*, 3 Greene (Iowa), 489; *McAfee v. Covington*, 71 Ga. 272; s. c., 51 Am. Rep. 263; *Black on Const. Prohibitions*, §§ 129-133. *Compare Weaver v. Lapsley*, 43 Ala. 224.

4. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 200; *Bronson v. Kinzie*, 1 How. (U. S.) 311, 315; *Van Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Walker v. Whitehead*, 16 Wall. (U. S.) 314; *Tennessee v. Sneed*, 96 U. S. 69; *Edwards v. Kearzey*, 96 U. S. 595; *Memphis v. United States*, 97 U. S. 293; *Louisiana v. New Orleans*, 102 U. S. 203; *Penniman's Case*, 103 U. S. 714; *Antoni v. Greenbow*, 107 U. S. 766; *Oriental Bank v. Freeze*, 18 Me. 109; *Long's Appeal*, 87 Pa. St. 114; *Huntsinger v. Brock*, 3 Grant (Pa.), 243; *Cutts v. Hardee*, 38 Ga. 350; *Rathbone v. Bradford*, 1 Ala.

terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is, as to them, inoperative.<sup>1</sup>

It is competent for the legislature to pass a statute requiring suit to be brought, or other steps to be taken, upon causes of action already accrued at the date of its passage, within a less period of

312; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Ward v. Hubbard*, 62 Tex. 559; *Williams v. Waldo*, 3 Scam. (Ill.) 264; *Templeton v. Horne*, 82 Ill. 491; *Holland v. Dickerson*, 41 Iowa, 367; *Penrose v. Erie Canal Co.*, 56 Pa. St. 48; *Woodruff v. Scruggs*, 27 Ark. 26; *James v. Stull*, 9 Barb. (N. Y.) 482; *Rader v. Road District*, 36 N. J. L. 273; *Heyward v. Judd*, 4 Minn. 483.

Statutes taking away all remedy on a contract are unconstitutional. *Johnson v. Bond*, 1 Hempst. (U. S. Cir.) 533; *Bruce v. Schuyler*, 4 Gilm. (Ill.) 221. *Robinson v. Magee*, 9 Cal. 81.

But parties have no vested right to a particular remedy, and the legislature may take away the specific remedy previously existing and substitute for it another and equally substantive remedy. *Lockett v. Usry*, 28 Ga. 345; *Bruce v. Schuyler*, 4 Gilm. (Ill.) 221; *Van Rensselaer v. Snyder*, 13 N. Y. 209; *Paschall v. Whitset*, 11 Ala. 472; *Story v. Furman*, 25 N. Y. 214; *Leathers v. Bank*, 40 Me. 386.

Although the new remedy substituted by the legislature for the one in existence when the contract was made may be deemed less convenient and easy of execution than the old one, and may in some degree render the collection of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Penrose v. Erie Canal Co.*, 56 Pa. St. 48; *James v. Stull*, 9 Barb. (N. Y.) 482; *State v. Wiley*, 19 Repr. (N. J.) 122.

But a statute which imposes upon an existing remedy so many and such radical conditions or restrictions for its prosecution as to render it practically worthless, and leaves the right of the creditor not worth pursuing, is unconstitutional and void as applied to previous contracts. *Huntzinger v. Brock*, 3 Grant (Pa.), 243; *Smith v. Morse*, 2 Cal. 524; *Canal Co. v. Railroad Co.*, 4 Gill. & J. (Md.) 1; *Johnson v. Winslow*, 64 N. Car. 27; *Oatman v. Bond*, 15 Wis. 20.

There is a distinction in favor of the constitutionality of an act which prolongs or revives a remedy, as compared with one which cuts off or takes away the rem-

edy. *Caperton v. Martin*, 4 West Va. 138; *Hope v. Johnson*, 2 Yerg. (Tenn.) 125; *United States v. Samperyac*, 1 Hempst. (U. S. Cir.) 118; *Hepburn v. Curtis*, 7 Watts (Pa.), 300; *Bolton v. Johns*, 5 Pa. St. 145; *Blann v. State*, 39 Ala. 353; *Bartlett v. Lang*, 2 Ala. 401.

Where a just right or moral obligation already exists, the legislature has constitutional power to devise and provide a remedy for it. *Lycoming v. Union*, 15 Pa. St. 166; *Sutherland v. DeLeon*, 1 Tex. 250.

Special or extraordinary remedies, placed in the hands of a particular class of creditors, may be taken away by a retroactive statute, if a substantive remedy remains. *South Carolina v. Gailard*, 101 U. S. 433; *Stocking v. Hunt*, 3 Denio (N. Y.), 274; *Deichman's Appeal*, 2 Whart. (Pa.) 395; *Chattaroi R. Co. v. Kinner*, 81 Ky. 221; *Memphis, etc., R. Co. v. Tennessee*, 101 U. S. 337; *South & North Alabama R. Co. v. Alabama*, 101 U. S. 832.

The legislature has constitutional power to change and regulate the practice and modes of procedure in civil actions in the courts, and such modifications may well apply to past transactions, and even to the future steps of actions already instituted. *United States v. Conway*, 1 Hempst. (U. S. Cir.) 313; *Lewis and Nelson's Appeal*, 67 Pa. St. 153; *Cairo, etc., R. Co. v. Hecht*, 92 U. S. 168; *New Albany, etc., R. Co. v. McNamara*, 11 Ind. 543; *Levering v. Washington*, 3 Minn. 323.

And to pass statutes regulating the joinder of parties to suits on causes of action already accrued. *Woods v. Bine*, 5 How. (Miss.) 285; *McMillan v. Sprague*, 4 How. (Miss.) 647; *Hancock v. Ritchie*, 11 Ind. 48; *Augusta Bank v. Augusta*, 49 Me. 507; *Crawford v. Bank*, 7 How. (U. S.) 279.

1. *Billmeyer v. Evans*, 40 Pa. St. 324; *Breitenbach v. Bush*, 44 Pa. St. 313; *Lewis v. Lewis*, 47 Pa. St. 127; *Hunt v. Thomas*, 3 Phila. (Pa.) 121; *Taylor v. Stearns*, 18 Gratt. (Va.) 244; *Pool v. Young*, 7 B. Mon. (Ky.) 588; *Boice v. Boice*, 27 Minn. 371. Compare *Conkey v. Hart*, 14 N. Y. 22.

time than was by law allowed for such action at the time when the contract was made or liability incurred, provided the period be not so unreasonably shortened as practically to deprive parties of a remedy altogether.<sup>1</sup>

Statutes closing the courts or suspending the operation of civil process or the rendition of judgments, for a reasonable time, are not unconstitutional; for they affect the remedy only, and not so injuriously as to render it worthless.<sup>2</sup> But statutes are unconsti-

1. *Jackson v. Lamphire*, 3 Pet. (U. S.) 280; *Hawkins v. Barney*, 5 Pet. (U. S.) 457; *Phalen v. Virginia*, 8 How. (U. S.) 163; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Sohn v. Waterson*, 17 Wall. (U. S.) 596; *Terry v. Anderson*, 95 U. S. 628; *Vance v. Vance*, 108 U. S. 514; *Mitchell v. Clark*, 110 U. S. 633; *Lewis v. Broadwell*, 3 McLean (U. S. Cir.), 568; *Samples v. Bank*, 1 Woods (U. S. Cir.), 523; *Barker v. Jackson*, 1 Paine (U. S. Cir.), 559; *Beal v. Nason*, 14 Me. 344; *Cummings v. Maxwell*, 45 Me. 190; *Sampson v. Sampson*, 63 Me. 328; *Willard v. Harvey*, 24 N. H. 344; *Bell v. Roberts*, 13 Vt. 582; *Call v. Hagger*, 8 Mass. 423; *Rexford v. Knight*, 11 N. Y. 308; *Butler v. Palmer*, 1 Hill (N. Y.), 324; *Miller v. Commonwealth*, 5 Watts & S. (Pa.) 488; *Kenyon v. Stewart*, 44 Pa. St. 179; *Korn v. Browne*, 64 Pa. St. 55; *State v. Jones*, 21 Md. 432; *Griffin v. McKinzie*, 7 Ga. 163; *McKenny v. Compton*, 18 Ga. 170; *George v. Gardner*, 49 Ga. 441; *Briscoe v. Anketell*, 28 Miss. 361; *State v. Bermudez*, 12 La. Ann. 352; *DeCordova v. Galveston*, 4 Tex. 470; *Lockhart v. Yeiser*, 2 Bush (Ky.), 231; *Lewis v. Harbin*, 5 B. Mon. (Ky.) 564; *Pearce v. Patton*, 7 B. Mon. (Ky.) 162; *Walker v. Bank*, 2 Engl. (Ark.) 500; *Blackford v. Peltier*, 1 Blackf. (Ind.) 36; *Webb v. Moore*, 25 Ind. 4; *Newland v. Marsh*, 19 Ill. 376; *Stearns v. Gittings*, 23 Ill. 387; *Mattby v. Cooper*, 1 Morris, (Iowa), 59; *Stephens v. Bank*, 43 Mo. 385; *Holcomb v. Tracy*, 2 Minn. 241; *Stone v. Bennett*, 13 Minn. 153; *Smith v. Packard*, 12 Wis. 371.

The rule is the same in regard to a statute prescribing a new period of limitation where none before existed. *Willard v. Harvey*, 24 N. H. 344; *Kenyon v. Stewart*, 44 Pa. St. 179; *Korn v. Browne*, 64 Pa. St. 55.

But if the statute so reduces the period of limitation that the time will already have run against a particular cause of action, this will be tantamount to an entire extinguishment of the remedy, and therefore unconstitutional. *Chapman v. Douglas Co.*, 107 U. S. 348; *Price v. Hopkins*, 13 Mich. 318; *Osborn v. Jaines*, 17 Wis.

573; *Cook v. Kendall*, 13 Minn. 324; *Auld v. Butcher*, 2 Kans. 125.

As to what is a reasonable time to allow for suit on existing causes of action, see *Berry v. Ransdall*, 4 Met. (Ky.) 292; *Pearce v. Patton*, 7 B. Mon. (Ky.) 162; *Morris v. Carter*, 46 N. J. L. 260; *Black on Const. Prohibitions*, § 153.

When a right of action has once become barred by the Statute of Limitations in force when the liability was incurred, it is not competent for the legislature, by repealing the statute altogether, or by extending the time beyond its original limits, to revive such right of action. *Wright v. Oakley*, 5 Met. (Mass.) 400; *Kinsman v. Cambridge*, 121 Mass. 558; *Davis v. Minor*, 1 How. (Miss.) 183; *Sprecker v. Wakely*, 11 Wis. 432; *Hill v. Kricke*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 245; *Parish v. Eager*, 15 Wis. 532; *Woart v. Winnick*, 3 N. H. 473; *Cooley Const. Lim.* 365. See *Swickard v. Bailey*, 3 Kans. 507.

But the statute may be repealed or extended before any rights have become barred. *Billings v. Hall*, 7 Cal. 1; *Pleasants v. Rohrer*, 17 Wis. 577; *Power v. Telford*, 60 Miss. 195.

2. *Grimball v. Ross*, Charl. (Ga.) 175; *Ex parte Woods*, 40 Ala. 75; *Halloway v. Sherman*, 12 Iowa, 282; *Baumbach v. Badle*, 9 Wis. 599; *Starkweather v. Hawes*, 10 Wis. 125; *Johnson v. Duncan*, 3 Mart. (La.) 530; *Newkirk v. Chapron*, 17 Ill. 344; *Barkley v. Glover*, 4 Metc. (Ky.) 44. Compare *Coffman v. Bank*, 40 Miss. 29; *Hill v. Boyland*, 40 Miss. 618; *Wood v. Wood*, 14 Rich. (S. Car.) 148; *State v. Carew*, 13 Rich. (S. Car.) 498. See *Black on Const. Prohibitions*, §§ 156-161.

An act providing that no civil process should be issued or enforced against any person in the military service of the State or of the United States during the term he should be engaged in such service (the term being definitely limited) was no infringement of constitutional rights. *Coxe v. Martin*, 44 Pa. St. 322; *Breitenbach v. Bush*, 44 Pa. St. 313. Compare *Hasbrouck v. Shipman*, 16 Wis. 296. See *Clark v. Martin*, 3 Grant (Pa.), 393.

tutional, as impairing the obligation of contracts, which purport to grant a stay of execution to debtors upon judgments rendered before the passage of the act, or upon judgments to be subsequently recovered upon contracts formed before it went into operation.<sup>1</sup> The legislature may pass a law abolishing imprisonment for debt on contracts made or judgments rendered when imprisonment of the debtor was one of the remedies to which his creditor was by law entitled to resort.<sup>2</sup> But an act increasing the amount or value of the debtor's property which is exempt from levy and sale on execution cannot constitutionally be made to apply to the collection of judgments entered before its passage.<sup>3</sup>

1. *Webster v. Rose*, 6 Heisk. (Tenn.) 93; *Jacobs v. Smallwood*, 63 N. Car. 112; *McClain v. Easley*, 4 Baxt. (Tenn.) 520; *Ex parte Woods*, 40 Ala. 70; *Hudspeth v. Davis*, 41 Ala. 389; *Luter v. Hunter*, 30 Tex. 688; *Canfield v. Hunter*, 30 Tex. 712; *Culbreath v. Hunter*, 30 Tex. 713; *Johnson v. Duncan*, 3 Mart. (La.) 530; *Stevens v. Andrews*, 31 Mo. 205; *Thorne v. San Francisco*, 4 Cal. 127; *Townsend v. Townsend*, Peck (Tenn.), 1; *Baily v. Gentry*, 1 Mo. 164.

In some jurisdictions an attempt is made to discriminate in favor of remedial statutes which grant a stay of execution for a period that is neither indefinite nor unreasonable in its extension. Thus the opinion is advanced that a law postponing the collection of judgments for a prescribed term (as a year), and when adequate security is furnished does not amount to such an invasion of the remedy as will leave it practically worthless. *United States v. Conway*, 1 Hempst. (U. S. Cir.) 313; *Farnsworth v. Vance*, 2 Cold. (Tenn.) 108; *Chadwick v. Moore*, 8 Watts & S. (Pa.) 50; *Breitenbach v. Bush*, 44 Pa. St. 313; *Bunn v. Gorgas*, 41 Pa. St. 441; *Williams's Appeal*, 72 Pa. St. 214. But see *Black on Const. Prohibitions*, §§ 157, 158.

An act granting a stay of execution is of course constitutional and binding so far as it relates to future contracts. *Barry v. Iseman*, 14 Rich. (S. Car.) 129.

If the agreement of the parties, by its express terms, provides that judgment may be entered without stay of execution after the day of payment, it is not competent for the legislature, by a subsequent act, to disregard this stipulation and grant a stay. *Lewis v. Lewis*, 47 Pa. St. 127; *White v. Crawford*, 84 Pa. St. 433; *Breitenbach v. Bush*, 44 Pa. St. 313.

2 *Penniman's Case*, 103 U. S. 714; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Beers v. Haughton*, 9 Pet. (U. S.) 329; *Sturges v. Crowninshield*, 4 Wheat. (U. S.)

200; *Gray v. Munroe*, 1 McLean (U. S. Cir.), 528; *Woodfin v. Hooper*, 4 Humph. (Tenn.) 13; *Fisher v. Lackey*, 6 Blackf. (Ind.) 373; *Newton v. Tibbatts*, 2 Engl. (Ark.) 150; *Bronson v. Newberry*, 2 Dougl. (Mich.) 38; *Ware v. Miller*, 9 S. Car. 13; *Brown v. Dillahunty*, 4 Sm. & Mar. (Miss.) 713; *People v. Carpenter*, 46 Barb. (N. Y.) 619.

3. *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Edwards v. Kearzey*, 96 U. S. 595; *Baldwin v. Flagg*, 43 N. J. L. 495; *Barnes v. Barnes*, 8 Jones (N. Car.), 366; *Wilson v. Brown*, 58 Ala. 62; *Johnson v. Fletcher*, 54 Miss. 628; *Lessley v. Phipps*, 49 Miss. 790; *Homestead Cases*, 22 Gratt. (Va.) 266; *Vedder v. Alkenbrack*, 6 Barb. (N. Y.) 327; *Quackenbush v. Danks*, 1 Denio (N. Y.), 128; *Danks v. Quackenbush*, 1 N. Y. 129; *Forsyth v. Marbury*, R. M. Charl. (Ga.) 324.

But in some States it is held that if the exemption is not unreasonable in amount it is not open to constitutional objections. *Morse v. Gould*, 11 N. Y. 281; *Harde-man v. Downer*, 39 Ga. 425; *Hill v. Kessler*, 63 N. Car. 437; *Stephenson v. Osborne*, 41 Miss. 119; *Cusic v. Douglas*, 3 Kans. 123; *Root v. McGrew*, 3 Kans. 215; *Coriell v. Ham*, 4 Greene (Iowa), 455; *Rockwell v. Hubbell*, 2 Dougl. (Mich.) 197.

But a statute exempting the debtor's whole property is invalid. *State v. Bank of the State*, 1 S. Car. 63; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46; *Lockhart v. Tinley*, 15 Ga. 496.

**Appraisement Laws.**—Where a contract is solvable in money, and, by the law in force when it was made, the debtor's property is liable to be seized and sold on execution to the highest bidder to satisfy any judgment recovered on the contract, a subsequent statute which forbids property to be sold on execution unless it will bring two thirds of the valuation set upon it by appraisers, pursuant to directions contained in the law, though professing to act only on the

**13. Retroactive Laws.**—There is nothing in the constitution of the United States to prohibit the several States from passing retroactive laws so long as they do not impair the obligation of contracts or partake of the nature of *ex post facto* laws or bills of attainder.<sup>1</sup> But retroactive laws, under that specific name, are forbidden by the constitutions of seven States.<sup>2</sup> It is an inflexible

remedy, amounts practically to a denial of the rights secured by the contract, or to so serious an obstruction as to render it obnoxious to the constitutional prohibition. *McCracken v. Hayward*, 2 How. (U. S.) 608; *Moore v. Fowler*, 1 Hempst. (U. S. Cir.) 536; *Rawley v. Hooker*, 21 Ind. 144; *Robards v. Brown*, 40 Ark. 423; *Willard v. Longstreet*, 2 Dougl. (Mich.) 172. Compare *Williams v. Waide*, 3 Scam. (Ill.) 264. See *Sproul v. Reid*, 3 Greene (Iowa), 489; *Chadwick v. Moore*, 8 Watts & S. (Pa.) 49; *Jones v. Davis*, 6 Neb. 33; *Contin v. Munger*, 1 Tex. 598; *Black on Const. Prohibitions*, § 168.

1. *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380; *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 539; *Baltimore & Susquehanna R. v. Nesbit*, 10 How. (U. S.) 395; *Carpenter v. Pennsylvania*, 17 How. (U. S.) 456; *Locke v. New Orleans*, 4 Wall. (U. S.) 172; *Drehman v. Stifle*, 8 Wall. (U. S.) 595; *Randall v. Krieger*, 23 Wall. (U. S.) 137; *Beach v. Woodhull*, Pet. C. C. 2; *Albee v. May*, 2 Paine (U. S. Cir.), 74; *People v. Supervisors*, 63 Barb. (N. Y.) 85; *Grim v. School Dist.*, 57 Pa. St. 433; *Lane v. Nelson*, 79 Pa. St. 407; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Baughner v. Nelson*, 9 Gill (Md.), 299; *Reed v. Beall*, 42 Miss. 472; *State v. New Orleans*, 32 La. Ann. 709; *State v. Squires*, 26 Iowa, 340.

2. *Colorado, Louisiana, Missouri, New Hampshire, Ohio, Tennessee, and Texas*. See *Black on Const. Prohibitions*, § 172.

In those States where retroactive laws are specifically and formally prohibited there are nevertheless certain classes of statutes of that character which are held valid and constitutional as being salutary and wholesome regulations and not within a just construction of the inhibition. See *Rich v. Flanders*, 39 N. H. 304; *Simpson v. Bank*, 56 N. H. 466; *Rairden v. Holden*, 15 Ohio St. 207; *Trustees v. McCaughy*, 2 Ohio St. 152; *Butler v. Toledo*, 5 Ohio St. 225; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Wynne v. Wynne*, 2 Swan (Tenn.), 405; *De Cordova v. Galveston*, 4 Tex. 470; *Sutherland v. De Leon*, 1 Tex. 250; *New Orleans v. Cordeviollie*, 13 La. Ann. 268; *New Orleans v. Poutz*, 14 La. Ann. 853;

*Hughes v. Cannon*, 2 Humph. (Tenn.) 589; *Morris v. State*, 62 Tex. 778; *Chesnut v. Shane*, 16 Ohio, 599; *Jones v. Jones*, 2 Tenn. 2.

But whether or not retroactive laws are specially prohibited, the legislature cannot pass any law divesting settled rights of property. *Benson v. New York*, 10 Barb. (N. Y.) 223; *Bay v. Gage*, 36 Barb. (N. Y.) 447; *Kenyon v. Stewart*, 44 Pa. St. 179; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Coffin v. Rich*, 45 Me. 507; *Hinton v. Hinton*, Phill. (N. Car.) 410; *Houston v. Boyle*, 10 Ired. (N. Car.) 496; *Commercial Bank v. Chambers*, 8 Sm. & Mar. (Miss.) 9; *Paschal v. Perez*, 7 Tex. 348; *Chesnut v. Shane*, 16 Ohio, 599; *Wright v. Marsh*, 2 Greene (Iowa), 94; *Tilton v. Swift*, 40 Iowa, 78.

"But suppose that a retroactive law, without coming under any of the heads already adverted to, is objected to on the ground that it is contrary to the spirit of the constitution and the implications necessarily drawn from it, or to the fundamentals of justice and good government, or to those cardinal principles of the social compact which antedate all laws, and enter into the very framework of representative government. If, in the particular State, there exists no prohibition against retroactive laws, is it within the province of the judiciary to declare such an act unconstitutional? This question is by no means free from doubt. But the preponderance of authority returns an affirmative answer." *Black on Const. Prohibitions*, § 177; *Regents v. Johnson*, 9 Gill & J. (Md.) 365; *Welch v. Wadsworth*, 30 Conn. 149, 155; *Goshen v. Stonington*, 4 Conn. 225; *Calder v. Bull*, 3 Dall. (U. S.) 386; *Wilkinson v. Leland*, 2 Pet. (U. S.) 657; *Terrett v. Taylor*, 9 Cranch (U. S.) 43; *Benson v. New York*, 10 Barb. (N. Y.) 244; *Bowman v. Middleton*, 1 Bay (S. Car.), 252; *Ham v. McClaws*, 1 Bay (S. Car.), 98. Compare *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147, 161; *Commonwealth v. McCloskey*, 2 Rawle (Pa.), 369; *Bridgeport v. Railroad*, 15 Conn. 475; *Louisville, etc., R. v. County Court*, 1 Sneed (Tenn.), 687. See *Cooley Const. Lim.* 164 *et seq.*

rule that a statute will be construed as prospective and operating *in futuro* only unless the intention of the legislature to give it a retroactive effect is expressed in language too clear and explicit to admit of a reasonable doubt.<sup>1</sup> And where the retroactive character of a statute is clearly indicated on its face, and although it is free from constitutional objections, yet it will always be subjected to the most circumscribing construction that can possibly be made consistent with the intention of the legislature.<sup>2</sup>

(a) *The Invalid Classes of Retroactive Laws.*—The legislature has no power to pass a law impairing vested rights of property.<sup>3</sup>

1. *Auffmordt v. Rasin*, 102 U. S. 620; *United States v. Starr*, 1 Hempst. (U. S. Cir.) 469; *Torrey v. Corliss*, 32 Me. 33; *Coffin v. Rich*, 45 Me. 507; *Atkinson v. Dunlop*, 50 Me. 111; *Colony v. Dublin*, 32 N. H. 432; *Briggs v. Hubbard*, 19 Vt. 86; *Whitman v. Hapgood*, 13 Mass. 461; *Medford v. Learned*, 16 Mass. 215; *Goshen v. Stonington*, 4 Conn. 209; *Perkins v. Perkins*, 7 Conn. 558; *Plumb v. Sawyer*, 21 Conn. 351; *Hubbard v. Brainerd*, 35 Conn. 576; *State v. Smith*, 38 Conn. 397; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; *Watkins v. Haight*, 18 Johns. (N. Y.) 138; *Quackenbush v. Danks*, 1 Denio (N. Y.) 128; *Sayre v. Wisner*, 8 Wend. (N. Y.) 661; *Ray v. Gage*, 36 Barb. (N. Y.) 447; *Norris v. Beryea*, 13 N. Y. 273; *New York, etc., R. v. Van Horn*, 57 N. Y. 473; *Jarvis v. Jarvis*, 3 Edw. Ch. (N. Y.) 462; *Oliphant v. Smith*, 6 Watts (Pa.), 449; *Bedford v. Shilling*, 4 S. & R. (Pa.) 401; *Ogle v. Turnpike Co.*, 13 S. & R. (Pa.) 256; *Kenyon v. Stewart*, 44 Pa. St. 179; *Tyson v. School Directors*, 51 Pa. St. 9; *Haley v. Philadelphia*, 68 Pa. St. 137; *State v. Scudder*, 32 N. J. L. 203; *Vreeland v. Bramhall*, 39 N. J. L. 1; *Baugh v. Nelson*, 9 Gill (Md.), 299; *Clark v. Baltimore*, 29 Md. 277; *Williams v. Johnson*, 30 Md. 500; *Merwin v. Ballard*, 66 N. Car. 398; *Ex parte Graham*, 13 Rich. (S. Car.) 277; *Davis v. Minor*, 1 How. (Miss.) 183; *Garrett v. Beaumont*, 24 Miss. 377; *Oyon's Succession*, 6 Rob. (La.) 504; *Slack v. Railroad*, 13 B. Mon. (Ky.) 1; *Allbyer v. State*, 10 Ohio St. 588; *Lewis v. Brackenridge*, 1 Blackf. (Ind.) 220; *State v. Barbee*, 3 Ind. 258; *Aurora Turnpike Co. v. Holthouse*, 7 Ind. 59; *Garrett v. Doe*, 1 Scam. (Ill.) 335; *Guard v. Rowan*, 2 Scam. (Ill.) 499; *Bruce v. Schuyler*, 4 Gilm. (Ill.) 221; *Thompson v. Alexander*, 11 Ill. 54; *Conway v. Cable*, 37 Ill. 82; *Bartruff v. Remy*, 15 Iowa 257; *Bennett v. Fisher*, 26 Iowa 497; *State v. Auditor*, 41 Mo. 25; *State v. Blakeman*, 52 Mo. 578; *State v. Ferguson*, 62 Mo. 77; *State v.*

*Atwood*, 11 Wis. 422; *Von Schmidt v. Huntington*, 1 Cal. 55; *Thorne v. San Francisco*, 4 Cal. 127; *Cooley Const. Lim.* 370.

But a statute applying to future transactions does not operate retroactively merely because they relate to antecedent events, or because part of the requisites of its action are drawn from time before its passage. *Johnston v. United States*, 17 Ct. of Cl. 157.

2. *Hedger v. Remaker*, 3 Metc. (Ky.) 255.

To a statute explicitly retroactive to a certain extent and for a certain purpose, the court will not, by construction, give a retroactive operation to any greater extent or for any other purpose. *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550.

3. *Benson v. New York*, 10 Barb. (N. Y.) 223; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Norman v. Heist*, 5 W. & S. (Pa.) 171; *Houston v. Bogle*, 10 Ired. (N. Car.) 496; *Commercial Bank v. Chambers*, 8 Sm. & Mar. (Miss.) 9; *Paschal v. Perez*, 7 Tex. 348; *Chesnut v. Shane*, 16 Ohio. 599; *Wright v. Marsh*, 2 Greene (Iowa), 94.

**What are Vested Rights**—A statute is not objectionable as retroactive because it purports to operate on prior contingent or qualified rights, but only where it operates to divest settled and vested rights. *Clarke v. McCreary*, 12 Sm. & Mar. (Miss.) 547.

A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than such a mere expectation of future benefit or interest as may be founded upon an anticipated continuance of the existing general laws. *Merrill v. Sherburne*, 1 N. H. 213; *Cooley Const. Lim.* 359.

But a statute regulating the descent and distribution of property cannot be so modified by subsequent enactment as to divest estates which have already passed to the heir. *Rock Hill College v. Jones*, 47 Md. 1.

A will does not take effect, nor are

An act of the legislature declaring the interpretation to be placed upon a previous statute, is not obligatory upon the courts with respect to the application of the first statute to transactions which

there any rights acquired under it, until the death of the testator, and its construction must depend upon the law as it stands at the time of that event; hence a statute passed after the making of a will, but before the death of the testator, by which the common law in this respect is changed, will operate upon the will. *Loveren v. Lamprey*, 22 N. H. 434. See *Blackman v. Gordon*, 2 Rich. Eq. (S. Car.) 43.

The husband's interest in the wife's personalty, owned at the time of marriage, is a vested right which cannot be disturbed by subsequent legislation. *Metropolitan Bank v. Hitz*, 1 Mackey (Dist. Columb.), 111. See *Holmes v. Holmes*, 4 Barb. (N. Y.) 295; *White v. White*, 5 Barb. (N. Y.) 474; *Westervelt v. Gregg*, 12 N. Y. 208.

But it is otherwise as to his expectant interest in the after-acquired personalty of the wife; this is not vested until acquisition. *Westervelt v. Gregg*, 12 N. Y. 208; *Norris v. Beryea*, 13 N. Y. 273. Compare *Dunn v. Sargeant*, 101 Mass. 336.

Tenancy by the courtesy is not a vested right until it has become initiate by the birth of a possible heir. *Cooley Const. Lim.* 361; *Strong v. Clem*, 12 Ind. 37; *Wyatt v. Smith*, 25 W. Va. 813; *Tong v. Marvin*, 15 Mich. 60.

The wife has no vested right of any kind to dower in the estate of her husband before his decease; and until that event her right may be modified or abolished by the legislature. *Barbour v. Barbour*, 46 Me. 9; *Talbot v. Talbot*, 14 R. I. 57.

When a party, by statutory provisions, becomes entitled to recover a judgment, in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount which may be recovered does not become a vested right until judgment is obtained; hence a repeal of the statute conferring the right will purge all past transactions of their penal character under it, unless they have already passed to judgment. *Oriental Bank v. Freeze*, 18 Me. 109; *Pierce v. Kimball*, 9 Me. 54; *Confiscation Cases*, 7 Wall. (U. S.) 454; *United States v. Tynen*, 11 Wall. (U. S.) 88; *West Troy Fire Dept. v. Ogden*, 59 How. Pr. (N. Y.) 21; *Engle v. Schurtz*, 1 Mich. 150; *Washburn v. Franklin*, 35 Barb. (N. Y.) 599; *Welch v. Wadsworth*, 30 Conn. 149;

*Bank of St. Mary's v. State*, 12 Ga. 475. Compare *Dow v. Norris*, 4 N. H. 16; *Lakeman v. Moore*, 32 N. H. 410.

A right to a threefold forfeiture of all the interest reserved on a contract, on account of usury, is not a vested right. *Parmelee v. Lawrence*, 44 Ill. 405.

"When the period prescribed by the Statute of Limitations has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant or any species of assurance." *Cooley Const. Lim.* 365.

A statute abolishing tenure in tail, and changing estates so held into estates in fee-simple, is valid and constitutional. *De Mill v. Lockwood*, 3 Blatch. (U. S. Cir.) 56.

And a statute making joint heirs tenants in common may constitutionally embrace estates existing at its passage; it impairs no vested rights, but renders the tenure more beneficial. *Stevenson v. Cofferin*, 20 N. H. 150; *Holbrook v. Finney*, 4 Mass. 567; *Anable v. Patch*, 3 Pick. (Mass.) 363.

The right of a creditor to any particular remedy is not a vested right. The State is bound to afford substantive and available remedies to the suitors in her courts; but no party can claim a vested right in the permanence of a particular system of courts, or the continuance of a special mode of procedure, or the perpetuation of any remedy or remedial process which can be modified or abolished without impairing or taking away the right itself, when public policy or the convenience of justice demands a change. *Black on Const. Prohibitions*, § 192; *De Cordova v. Galveston*, 4 Tex. 470; *Paschal v. Perez*, 7 Tex. 348; *Rairden v. Holden*, 15 Ohio St. 207; *Rich v. Flanders*, 39 N. H. 304; *Henchall v. Schmidtz*, 50 Mo. 454; *Bird v. Keller*, 77 Me. 270; *Searcy v. Stubbs*, 12 Ga. 437; *Chaffee v. Aaron*, 62 Miss. 29.



occurred, or rights of action which accrued, prior to the second.<sup>1</sup> In regard to statutes attempting to reverse judicial proceedings, granting new trials or appeals, or opening or annulling judgments, see, *supra*, § 4 (a). A statute which, operating upon facts existing at the time of its passage, attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the act, is in violation of the constitutional prohibitions.<sup>2</sup>

(b) *The Valid Classes of Retroactive Laws.*—Curative and confirmatory statutes, within certain limits, are valid and constitutional. The rule is thus stated: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.<sup>3</sup> Statutes conferring authority upon the

1. *Union Iron Co. v. Pierce*, 4 Biss. (U. S. Cir.) 327; *Kelsey v. Kendall*, 48 Vt. 24; *Greenough v. Greenough*, 11 Pa. St. 494; *West Branch Boom Co. v. Dodge*, 31 Pa. St. 285; *Reiser v. Saving Assn.*, 39 Pa. St. 137; *Haley v. Philadelphia*, 68 Pa. St. 45; *Dequindre v. Williams*, 31 Ind. 444; *McManning v. Farrar*, 46 Mo. 376; *Lincoln Building Assn. v. Graham*, 7 Nebr. 173. Compare *Baker v. Herndon*, 17 Ga. 568.

Retroactive declaratory statutes must not be allowed to affect vested rights. *Lambertson v. Hogan*, 2 Pa. St. 22; *Haley v. Philadelphia*, 68 Pa. St. 45; *McLeod v. Burroughs*, 9 Ga. 213.

2. *Ryan v. State*, 5 Nebr. 276; *Towle v. Railroad*, 18 N. H. 547.

But where a moral obligation exists, the legislature may give it legal effect by a retroactive statute. *Lycoming v. Union*, 15 Pa. St. 166; *New Orleans v. Clark*, 95 U. S. 654.

3. *Cooley Const. Lim.* 371; *Green v. Abraham*, 43 Ark. 420; *Exchange Bank Tax Cases*, 21 Fed. Repr. 99.

**Curative Acts.**—If the judicial proceedings which the confirmatory act is designed to remedy were absolutely void, for want of jurisdiction or other reason, then the attempted cure cannot be effected, and the rights of the parties must stand as they were. *McDaniel v. Corell*, 19 Ill. 226; *Denny v. Mattoon*, 2 Allen (Mass.), 361; *Lane v. Nelson*, 79 Pa. St. 407; *Richards v. Rote*, 68 Pa. St. 248; *Pryor v. Downey*, 50 Cal. 388; *Israel v. Arthur*, 7 Colo. 5; *Sherwood v. Fleming*, 25 Tex.

(Supp.) 408; *Wright v. Hawkins*, 28 Tex. 452; *Yeatman v. Day*, 79 Ky. 186; *Dupy v. Wickwire*, 1 D. Ch'p. (Vt.) 237.

But in cases where the jurisdiction has attached and there has been a formal defect in the proceedings, where the equity of the party is complete and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect and to provide a remedy for the legal right. *Lane v. Nelson*, 79 Pa. St. 407; *State v. Union*, 33 N. J. L. 350; *Selsby v. Redlon*, 19 Wis. 17; *Beach v. Walker*, 6 Conn. 197; *Booth v. Booth*, 7 Conn. 350; *Mather v. Chapman*, 6 Conn. 54; *Hannibal, etc., R. v. Marion Co.*, 36 Mo. 294.

Statutes passed for the purpose of healing defects in the acknowledgments of prior deeds or other conveyances, or excusing other informalities in their execution or registration, are constitutional. *Chesnut v. Shane*, 16 Ohio, 599; *Ferguson v. Williams*, 58 Iowa, 717; *Brinton v. SeEVERS*, 12 Iowa, 389; *Barton v. Morris*, 15 Ohio, 408; *Journey v. Gibson*, 56 Pa. St. 57; *Barnet v. Barnet*, 15 S. & R. (Pa.) 72; *Maxey v. Wise*, 25 Ind. 1; *Dulany v. Tilghman*, 6 Gill & J. (Md.) 461.

It is said that if the defects in the deed were such as to render it positively ineffectual to convey the grantor's title, a subsequent curative statute would be objectionable as depriving the party of his property without due process of law. *Russell v. Rumsey*, 35 Ill. 362; *Alabama Ins. Co. v. Boykin*, 38 Ala. 510; *Orton*

courts to grant divorces for causes occurring before the passage of the authorizing statute, and which, at the time of their happening, furnished no ground for the dissolution of the marriage relation, are not objectionable on account of their retroactive operation.<sup>1</sup>

*v. Noonan*, 23 Wis. 102. But compare *Barnet v. Barnet*, 15 S. & R. (Pa.) 72; *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Davis v. Bank*, 7 Ind. 316; *Dentzel v. Waldie*, 30 Cal. 138; *Goshorn v. Purcell*, 11 Ohio St. 641.

But such statutes cannot be allowed to affect the vested rights of third parties. *Cooley Const. Lim.* 378; *Meighen v. Strong*, 6 Minn. 177; *Green v. Drinker*, 7 Watts & S. (Pa.) 440.

Statutes are valid which confirm deeds that are irregular only through an imperfect compliance with the peculiar statutory provisions governing the acknowledgments of married women. *Johnson v. Richardson*, 44 Ark. 365; *Barnet v. Barnet*, 15 S. & R. (Pa.) 72. See *Russell v. Rumsey*, 35 Ill. 362; *Pearce v. Patton*, 7 B. Mon. (Ky.) 162; *Goshorn v. Purcell*, 11 Ohio St. 641; *Chesnut v. Shane*, 16 Ohio, 599; *Dentzel v. Waldie*, 30 Cal. 138.

But if the invalidity of the conveyance arises from a want of power in the grantor to convey the particular estate, and not from any informality in its execution, nor merely from a disability imposed by the policy of the law, it is not in the power of the legislature to confer retroactive efficacy on the deed; both because the rights of third parties are necessarily involved, and because the legislature could not, in advance, have authorized such a conveyance. *Black on Const. Prohibitions*, § 211; *Shonk v. Brown*, 61 Pa. St. 320; *Routson v. Wolf*, 35 Mo. 174.

Laws passed to remedy the defective execution of powers, when intended to carry out the manifest intention of the parties, and not affecting vested rights, are constitutional. *State v. Newark*, 27 N. J. L. 185; *Smith v. Callaghan*, 24 N. W. Repr. (Iowa) 50.

The legislature has constitutional authority to pass a statute affecting the execution of wills, and to give it a retrospective effect upon testaments already made at the time of its passage, but which have not yet taken effect by the death of the testator. *Long v. Zook*, 13 Pa. St. 400; *American Baptist Union v. Peck*, 10 Mich. 341; *Loveren v. Lamprey*, 22 N. H. 434. See *McCarty v. Hoffman*, 23 Pa. St. 507; *Greenough v. Greenough*, 11 Pa. St. 489; *State v. Warren*, 28 Md. 338; *Southard v. Railroad*, 26 N. J. L. 13.

And to remedy the defective exercise

of corporate powers. *Syracuse Bank v. Davis*, 16 Barb. (N. Y.) 188; *Mitchell v. Deeds*, 49 Ill. 416; *Morris v. State*, 62 Tex. 728; *Gardner v. Haney*, 86 Ind. 17; *Schenley v. Commonwealth*, 36 Pa. St. 29.

And to cure irregularities and defects in the previous assessments of property for taxation and the levy of taxes thereon. *Boardman v. Beckwith*, 18 Iowa, 292; *Musselman v. Logansport*, 29 Ind. 533; *Chamberlain v. Taylor*, 36 Hun (N. Y.), 24; *Butler v. Toledo*, 5 Ohio St. 225; *Strauch v. Shoemaker*, 1 Watts & S. (Pa.) 175; *Montgomery v. Meredith*, 17 Pa. St. 42; *Walter v. Bacon*, 8 Mass. 472; *Locke v. Dane*, 9 Mass. 360; *Patterson v. Philbrook*, 9 Mass. 153; *Brevoort v. Detroit*, 23 Mich. 322; *State v. Newark*, 34 N. J. L. 237.

But if the fault is in the nature of the tax itself, it cannot be obviated by subsequent act. *May v. Holdridge*, 23 Wis. 93; *Cooley Const. Lim.* 382.

Where a person has designed and attempted to enter into a particular contract, but has failed to bind himself, in the contemplation of the law, either in consequence of a personal disability on his part, or of considerations of public policy existing at that time, or by reason of the neglect of some legal formality or requirement, he cannot complain of a subsequent statute validating the contract and fixing his liability. See *Mechanics' Bank v. Allen*, 28 Conn. 97; *Andrews v. Russell*, 7 Blackf. (Ind.) 474; *Grimes v. Doe*, 8 Blackf. (Ind.) 371; *Thompson v. Morgan*, 6 Minn. 292; *Parmelee v. Lawrence*, 48 Ill. 331; *Curtis v. Leavitt*, 17 Barb. (N. Y.) 309; *State v. Norwood*, 12 Md. 195; *Gibson v. Hubbard*, 13 Mich. 215; *Harris v. Rutledge*, 19 Iowa, 389; *Lewis v. McElvain*, 16 Ohio, 347; *Estep v. Hutchman*, 14 S. & R. (Pa.) 435; *New Orleans v. Clarke*, 95 U. S. 644.

The legislature may legalize irregular marriages. *Goshen v. Stonington*, 4 Conn. 209; *Brower v. Bowers*, 1 Abb. App. Dec. (N. Y.) 214.

1. *Jones v. Jones*, 2 Tenn. 2; *Berthelemy v. Johnson*, 3 B. Mon. (Ky.) 90; *Carson v. Carson*, 40 Miss. 349; *West v. West*, 2 Mass. 223; *Bigelow v. Bigelow*, 108 Mass. 38; 1 Bishop Mar. & Div. §§ 670-680, and 696-700. Compare *Clark v. Clark*, 10 N. H. 387; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Jarvis v. Jarvis*, 3 Edw. Ch. (N. Y.) 462; *Given v. Marr*, 27

A State may constitutionally pass a retroactive law impairing her own rights.<sup>1</sup>

**CONSTRAINT.**—Compulsion; restraint; abridgment of liberty or hindrance of the will.<sup>2</sup>

**CONSTRUCTION.**—The erection or creation of anything.<sup>3</sup> The

Me. 212; *Sherburne v. Sherburne*, 6 Me. 210.

1. *Davis v. Dawes*, 4 Watts & S. (Pa.) 401; *Lewis v. Turner*, 40 Ga. 416; *Mayers v. Bryne*, 19 Ark. 308.

**Authorities on Constitutional Law.**—Story on the Constitution; Cooley's Constitutional Limitations; Cooley's Constitutional Law; Sedgwick, Statutory and Constitutional Law; Pomeroy's Constitutional Law; Desty's Federal Constitution; Black on Constitutional Prohibitions; Bump, Notes of Constitutional Decisions; Wade on Retroactive Law; Tiedman on Police Power.

2. On the question of the validity of a trust deed made by a married woman, wherein the certificate of privy examination, instead of following the words of the code that she "acknowledged the execution of the said deed to have been done by her freely, voluntarily, and understandingly, without compulsion or constraint from her said husband," substituted the word "restraint" for the word "constraint." The court, Cooper, Ch., after showing that while the omission of one of the words included in the form is fatal, yet the substitution of a word of similar meaning is not matter of substance, and that a prior act on the same subject actually employed the word "restraint," said: "The question is consequently narrowed down to this: Is the word 'restraint' the same word in substance as 'constraint,' the word prescribed by the form? . . . One of the meanings which both Sheridan and Johnson give to the verb 'constrain' is, to restrain. And all of our lexicographers give as one of the meanings of the noun 'restraint' an abridgment of liberty or hindrance of the will. It is in this sense that it was used in the form of certificate of 1833, and in that view is perhaps more appropriate than 'constraint,' which, except we give it the sense of 'restraint,' is identical in meaning with the word 'compulsion,' with which it is connected. The meaning of the two words, at one time identical, has been so differentiated by usage of the best writers as now to convey, when correctly used, distinct ideas. But as elements of the vulgar tongue they are still so nearly alike as to be applied

without discrimination to the same purpose. To say that an act is done without 'constraint,' or without 'restraint,' would convey the same meaning, namely, without 'any abridgment of liberty or hindrance of the will,' which is one of the recognized definitions of restraint. I am of opinion, therefore, that, while the words are different, the sense is one, and that the certificate is valid." *Edmonson v. Harris*, 2 Tenn. Ch. 427.

3. Where a jury had allowed plaintiffs the sum of \$500 for a "right of way" taken by a railroad company over their lands, on an instruction of the court that, "if the strip appropriated by the railroad company is timber land, the jury will consider the fact in estimating the damages, and that the railroad take with the appropriation of the land the right to destroy or appropriate the entire timber on the strip, if the company should deem it necessary or convenient so to do, this instruction was held error, and likely to mislead the jury; for, said Wright, J., "If the instruction in this case had used only the language that the company had the right to appropriate the timber on the strip if deemed necessary or convenient, it would have been little if any objectionable when or if taken in connection with the further thought, that such appropriation was to be for the purposes named in the statute. But even when thus considered it is liable to the construction that such appropriation might be for any purpose deemed necessary or convenient by the company. And this certainly is not the meaning of the law. The company has no right to determine the necessity for the use except as connected with the two objects named in the act. But if we look at the instruction a little more closely, it will be found to be still more objectionable. Under it the jury could give damages, in view of the fact that the company had the right to destroy the entire timber on the strip if deemed necessary or convenient. This language, it seems to us, loses sight of those rights which are surrendered on the one hand by the proprietor of the land, and acquired on the other by the company. By this appropriation the public, or in this instance the com-

act of putting a meaning on, or of explaining in a certain way.<sup>1</sup>

**CONSTRUCTIVE.** (See also FRAUD; TRUSTS.)—(1) Inferred; not directly expressed.<sup>2</sup>

pany, acquires only the right of way. The property in the soil and the timber growing thereon remain unchanged, except that the company may in some instances, if necessary, for the purposes named in the statute, appropriate the timber found thereon. The right of property in the timber is, however, not necessarily changed by the appropriation, any more than that in the soil. And there is certainly no warrant anywhere for the conclusion that such appropriation gives the right to destroy the timber. Unless necessary for the purpose of 'construction' or repairs, the proprietor may remove the timber and use it as his own; it being understood by the word 'construction' as here used, more is meant than the mere making of the road-bed. The 'construction' of the road implies its preparation and readiness for use; and not only so, but its use in a convenient and safe manner. Hence, though such timber might not be necessary for the 'construction' of the track, it might be necessary to remove it for the safe running of the locomotive and cars. The right to thus remove does not, however, carry with it the right to destroy, nor yet to appropriate it to the use of the company for the purpose of firewood or the like." *Preston v. Dubuque & Pacific R. Co.*, 11 Ia. 15.

1. In holding that a statute requiring notice of an appeal to be given "two weeks prior to" the term to which the appeal is addressed is mandatory and not directory, the court, Beasley, C. J., said: "Upon the argument before the court, an effort was made, on two grounds, to avoid the effect of this clear, statutory expression. The first position taken was, that the legislative direction with respect to the time for which notice of the appeal is to be given is not mandatory, but merely directory. There have been a number of decisions which have, under special circumstances, held that neither the exact time nor the exact mode prescribed by statutes for the doing of acts directed to be done is necessarily essential to the validity of the transaction. Upon looking into the cases referred to, and on examination of others standing in the same line, I find they all rest upon the common principle that the legislative will is to be ascertained not

from the meaning of the text of the statute alone, but from such words interpreted in view of the general object of the particular act. The adjudications are the results, not of acts of interpretation, which is the mere finding of the true sense of the special form of words used, but of acts of 'construction,' which Dr. Lieber, in his *Hermeneutics*, has properly defined as 'the drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclusions which are in the spirit, though not within the letter of the text.'" *Proprietors of Morris Aqueduct v. Jones*, 7 Vroom (N. J.), 206.

2. **Constructive Fraud Distinguished from Actual.** See ACTUAL, vol. i. p. 184, (g).

**Constructive Delivery.** See ACTUAL DELIVERY.

"Constructive delivery" is a general term comprehending all those acts which, although not truly conferring a real possession of the thing sold on the vendee, have been held, *constructioe juris*, equivalent to acts of real delivery. In this sense constructive delivery includes symbolical delivery and all those *traditiones fictæ* which have been admitted into the law as sufficient to vest the absolute property in the vendee, and bar the rights of lien and stoppage *in transitu*, such as marking and setting apart the goods as belonging to the vendee, charging him with warehouse rent, etc. *Bolin v. Huffnagle*, 1 Rawle (Pa.), 1.

**Constructive Possession Distinguished from Actual.** See ACTUAL POSSESSION.

**Constructive Notice.** See ACTUAL NOTICE.

Lord Chief Baron Eyre has defined "constructive notice" to be "in its nature no more than evidence of notice, the presumption of which is so violent that the court will not allow even of its being contradicted." Quoted and approved in *Nelson v. Allen*, 1 Verg. (Tenn.) 360; *Jordan v. Pollock*, 14 Ga. 145; *Conroy v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *French v. Loyal Co.*, 5 Leigh (Va.), 627; *Garrard v. Pittsburgh & Connellsville R. Co.*, 29 Pa. St. 154; *First Nat. Bank of Allegheny v. Farmers' Dep. Nat. Bank*, 5 Cent. Rep. 505.

"Constructive notice" is a legal inference from established facts; and when the facts are not controverted, or the

(2) One of the divisions of trusts.<sup>1</sup>

### CONSULS AND AMBASSADORS.

*Definition*, 764.

*Consul*, 764.

*Ambassador*, 764.

*Ambassadors—Division*, 765.

*Extraordinary*, 765.

*Ordinary*, 765.

*Ambassadors—Ministers—Distinguished*, 765.

*United States Law Concerning*, 766.

*Provisions of the United States Constitution*, 766.

*United States Statutes*, 766.

*Consular Officers*, 766.

*Diplomatic Officers*, 767.

*Duties of Consular Officers*, 767.

*Diplomatic and Consular Officers—Provisions*, 767.

*Consular Courts*, 768.

*Ambassadors—Immunities and Privileges*, 772.

*Consuls—Privileges*, 774.

1. **Definition.**—(a) *Consul*.—A consul is a commercial agent of a country, residing in a foreign seaport, whose duty it is to promote commercial intercourse of the state, and especially of the individual citizens. Consuls may be divided into consuls-general, consuls, or vice-consuls, whose functions are nearly the same.<sup>2</sup> A consul is a person commissioned to reside in a foreign country, as an agent of a government to protect the rights, commerce, merchants, and seamen of the state he represents, and to aid in any commercial and sometimes in diplomatic transactions with such foreign nation.<sup>3</sup> A consul is an officer appointed to reside in foreign seaports, to protect and extend the commerce carried on between the subjects of the country which appointed him, and those of the country or place in which he is to reside.<sup>4</sup> Consuls are commercial agents appointed by the sovereign to reside in the seaports of foreign countries, with a commission to watch over the commercial rights and privileges of the nation deputing them.<sup>5</sup> A consul is a commercial agent appointed by a government to reside in a seaport of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him.<sup>6</sup>

(b) *Ambassador*.—Ambassadors are functionaries by whom intercourse between sovereignties is conducted.<sup>7</sup> An ambassador is a minister of the highest rank employed by a nation to represent it, and to manage its interests at the court or seat of government of some other nationality.<sup>8</sup> Ambassadors are diplomatic ministers

alleged defect or infirmity appears on the face of the instrument and is matter of ocular inspection, the question is one for the court. Whether under a conceded state of facts the law will impute notice to the purchaser is not a question for the jury. *Birdsall v. Russell*, 29 N. Y. 220.

**Constructive Possession Distinguished from Actual.** See ACTUAL POSSESSION.

**Constructive Total Loss.** See ACTUAL.

1. A "constructive trust" is one that

arises when a person, clothed with a fiduciary character, by fraud or otherwise gains some advantage to himself. Courts construe this to be an advantage for the *cestui que trust* or a "constructive trust." *Burks v. Burks*, 7 Baxt. (Tenn.) 353.

2. Woolsey's Int. Law, sec. 95.

3. Webster's Dictionary.

4. Wharton's L. Dict.

5. 1 Kent, 42.

6. Bouvier's L. Dict.

7. Woolsey's Int. L.

8. Webster's Dict.

sent by one sovereign power to another, with authority by letters of credence to treat on affairs of State.<sup>1</sup> An ambassador is a public minister sent abroad by some sovereign state or prince, with legal commission and authority to transact business on behalf of his country with the government to which he is sent.<sup>2</sup>

**2. Ambassadors.—Definition.**—(1) An ambassador extraordinary is one employed on political or extraordinary occasion, or residing at a foreign court for an indeterminate period.

(2) An ordinary ambassador is one that has a permanent mission.<sup>3</sup> Ambassadors are either ordinary, who reside in the place whither they are sent, for the protection of commerce, which is their greatest care, or extraordinary. The latter is employed upon some special matter, as condolence, congratulations, and the like.<sup>4</sup>

**3. Ambassador—Minister Plenipotentiary—Distinguished.**—According to European authority, a minister plenipotentiary is not of equal rank with an ambassador. The Congress of Vienna of 1815 and of Aix-la-Chapelle in 1818 make this division: 1. Ambassadors and papal legates, or nuncios. 2. Envoys, ministers, and other accredited agents to the sovereigns. 3. Ministers resident accredited to sovereigns. 4. *Chargés d'affaires* accredited to the department of foreign relations. The distinction of ambassadors, ministers plenipotentiary, envoys extraordinary, and resident ministers has reference to diplomatic precedence and etiquette, and not to their essential powers and privileges.<sup>5</sup>

1. Wharton's L. Dict.

2. Bouvier's L. Dict.

3. Vattel's *Droit des Gens*, liv. 1, 4, c. 6, secs. 70-79.

4. Wharton's L. Dict.

5. Marten's *Précis du Droit des Gens, Modernes de l'Europe fondé sur les Traités et l'Usage*, 201-207.

The United States government send ministers plenipotentiary to the courts of the great powers, and *chargés d'affaires* to the inferior nationalities. Sparks's *Diplomatic Correspondence*, viii. 108.

The Congress of Vienna of 1815 settled the question of precedence among the diplomatic corps. The diplomatic representatives should take rank according to the date of the official notice of their arrival. This agreement was signed by eight European powers. Wheaton's *Elements of Int. Law*, 265; *Recueil des Pièces Officielles*, viii. No. 17.

*Note.*—Ministers plenipotentiary from the United States are ranked lower than ambassadors, even from an inferior nation. See 1 Whart. Dig. Int. Law, tit. Diplomatic Officers.

In the United States it would seem that the distinction recognized in Europe

between an ambassador and a minister is not accepted. A foreign minister is usually called an ambassador. Brightly's Dig. Laws U. S.

And a minister is defined as a representative of a sovereign or government at a foreign court; a delegate; an ambassador. Webster's Dict.

One European publicist says that *chargés d'affaires* and ministers resident are diplomatic representatives of the third class. Pinheiro-Ferreira's *Cours de Droit Public*. But this Portuguese publicist meant, undoubtedly, simply ministers, and not ministers plenipotentiary, who, it would seem by implication, would rank as diplomatic agents of the second class.

The consular office appears to have arisen about the middle of the twelfth century in Italy, and was generally established all over Europe in the sixteenth century. Formerly in Great Britain the crown appointed all consuls upon the indorsement of great commercial houses. Now they are appointed directly by the government without any such indorsement. Wharton's Law Dict.

In the United States the President,

**4. United States Law Concerning.**—(a) *Provisions of the United States Constitution.*—The judicial power of the United States shall extend to all cases affecting ambassadors, and to all cases affecting ministers and consuls. "In all cases affecting ambassadors, other public ministers, and consuls, . . . the United States supreme court shall have original jurisdiction."<sup>1</sup>

(b) *United States Statutes.*—The diplomatic officers, including consular, are distinguished by the United States statutes. Consul-general, consul, and commercial agent are full, principal, and permanent consular officers, and to be distinguished from subordinate and substitutes.

Deputy consul and consular agent denote consular officers subordinate to their principals, "exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively, the former [deputy consuls] at the same ports or places, and the latter at ports or places different from those at which such principals are located respectively."

Vice-consuls and vice-commercial agents are consular officers who are substituted temporarily to fill the places of consuls-general, consuls, or commercial agents, when temporarily absent or relieved from duty.

(1) *Consular Officers* are consuls-general, consuls, commercial agents, deputy consuls, vice-consuls, vice-commercial agents, and consular agents, and none others.

(2) *Diplomatic Officers* are ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, agents, and secretaries of legation, and none others.

No person in the diplomatic service of the United States shall wear any uniform or official costume not authorized by Congress.<sup>2</sup>

Every consul-general, consul, and commercial agent must give a bond, with sureties who are permanent residents of the United States, to be approved by the secretary of state, who shall deposit

"by and with the advice and consent of the Senate," "shall appoint ambassadors, other public ministers, and consuls. . . ." U. S. Const. art. 2, sec. 2, pt. 2.

Originally a consul had large judicial and commercial powers. He exercised entire municipal authority over his countrymen in the country where he was sent. The great commercial changes and the shifting of circumstances, together with the prevalence of civil order in the several Christian nations, have greatly modified the consular office and curtailed its powers. Generally, in these times, the judicial powers which are vested in consuls accredited to any na-

tion are given by express provisions of treaties between the nations concerned. Warden's Origin and Nature of Consular Establishments.

Consuls were known in ancient Athens, and were located in commercial ports in which the Athenians traded, to protect their merchants in mercantile transactions. 3 St. John's Hist. of the Manners and Customs of Ancient Greece, 282.

The introduction of the practice of resident ministers adopted by nations is credited to Ferdinand the Catholic. 1 Prescott's Hist. Ferdinand and Isabella, 352.

1. Art. iii. sec. 2.

2. U. S. Rev. Stat. (1874), t. 18, c. 1.

them with the secretary of the treasury. These bonds are in amount from one thousand to ten thousand dollars. Every vice-consul also is required to give bond. Certain consuls are also prohibited from transacting business as a merchant or factor, and the like. It is also provided that all consular officers whose respective salaries exceed one thousand dollars per annum shall be prohibited from transacting business on their own account.

The president has general authority to appoint consular clerks and the like.<sup>1</sup>

**5. Duties of Consular Officers.**<sup>2</sup>—(1) Every consular officer shall keep a detailed list of all the seamen and marines shipped and discharged by him.

(2) He shall keep a list of the vessels arriving and departing, their registered tonnage, and the number of their seamen and mariners, and those protected, and whether United States citizens or not, and shall make returns to the secretary of the treasury.

(3) To take possession of the personal estate left by any citizen of the United States, other than any seamen belonging to any vessel, who shall die within the jurisdiction of their consulate, leaving no legal representative, partner in trade, or trustee appointed to take care of the deceased's effects.

(4) To take an inventory of the same, assisted by two merchants of the United States whenever practicable.

(5) To collect the debts due the estate in the country where the party died, and to pay all debts owing from the estate.

(6) When necessary, sell perishable property at once, and the rest at the expiration of a year, and transmit the balance after the settlement of all debts to the treasury of the United States, unless a legal representative appear to claim the balance.

Consular officers are forbidden to exercise any diplomatic functions, or to hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government or country to which he is appointed, when there is a diplomatic officer appointed and acting. In the absence of the diplomatic officer, the consul can only act by express authority from the president.<sup>3</sup>

**6. Diplomatic and Consular Officers—Provisions.**—These officers must not be absent from their post of duty for a longer period than ten days at any one time, without permission previously obtained from the president.

The compensation allowed these officers shall be in full for all the services rendered and personal expense incurred. All fees collected by diplomatic and consular officers for and in behalf of the United States shall be collected in coin of the United States, or at its representative value in exchange.

Every secretary of legation and consular officer can take the

1. U. S. Rev. Stat. (1874), t. 18, c. 2.

3. U. S. Rev. Stat. (1874), t. 18,

2. U. S. Rev. Stat. (1874), t. 18, c. 1. c. 2.



oath of any person whenever he deems it necessary, or perform any notarial act which any notary public is required or authorized by law to do within the United States. Every such oath, affirmation, affidavit, deposition, and notarial act administered, when certified under his hand and seal of office, shall be valid, and of like force and effect within the United States, to all intents and purposes, as if administered by any competent officer within the United States.

These officers are forbidden to correspond with any newspaper or private person regarding the affairs of the government where they are located.<sup>1</sup>

Modern consuls generally legalize by their seal, for use within their own country, acts of judicial or other functionaries; they may authenticate marriages, births, and deaths among their countrymen. They receive protests of masters of vessels, grant passports, and act as depositaries of ship papers. They may reclaim deserters from vessels, provide for destitute sailors, and discharge them and send them home when they have been cruelly treated. They act in behalf of the owners of stranded vessels, and administer on personal property left within their consulates, where no legal representative is left, and where treaty stipulations permit.<sup>2</sup>

Consuls are supposed to watch the commercial interests of the state which they represent. To assist their countrymen with advice on all doubtful occasions. To see that the conditions of commercial treaties are properly observed. To see that those under their official protection are not subjected to any unnecessary or unjustifiable demands in conducting their business. To represent their grievances to the authorities at the place where they reside, or to the ambassador of the sovereign appointing them, or to the court on which the consulship depends, or to the government at home.<sup>3</sup>

**7. Consular Courts.**—Consuls have jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of other nations between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging to the nation represented by such consular officer, provided no treaty stipulation contravenes such action.

1. U. S. Rev. St. t. 18, c. 3.

2. Woolsey's Int. Law, § 96.

3. Wharton's L. Dict. t. Consul.

It is laid down that a British consul must make himself master of the language used by the court and magistracy of the country where he resides. He is required to acquaint himself with the treaties and laws of nations, and the specifications of duties on exported and imported goods. To protect his countrymen from insult, within his jurisdiction. To see that his countrymen do not injure the native citizens. To see that British seamen have justice accorded them.

The consul must attend all arbitrations where property is concerned between masters of British ships and the freighters, being inhabitants of the place where he resides. 1 Chitty Com. Law. 58.

Consuls from the United States are authorized to make certificates of certain facts in certain cases, which receive faith and credit in the courts of the United States. But these consulate certificates are not to be received in evidence unless they are given in the performance of a consular function. U. S. v. Hand, 2 Wash. C. C. 435.

By treaty between the United States government with China, Japan, Siam, Egypt, and Madagascar, the ministers and consuls of the United States, in those countries, shall have, in addition to other powers and duties, judicial powers. These officers are empowered to arraign and try all citizens of the United States charged with offences against law committed in such countries, respectively, and to sentence the offenders in the manner authorized. They can also execute the provisions of the treaties in regard to civil rights, whether of person or property. Their jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as necessary to execute such treaties, and so far as they are suitable to carry the same into effect, respectively adopted. But where the United States laws are not adapted, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries. And in case this does not answer the ends of justice, then such officers may decree such regulations as shall supply the defects. Officers consular at islands or in uncivilized countries have a limited civil jurisdiction. In some cases an appeal is allowed to the minister. Ministers are allowed jurisdiction over certain offences against foreign governments committed by citizens of the United States, provided no treaty stipulation prevents. In the countries named in the above paragraphs the United States ministers have appellate jurisdiction in civil and criminal cases. Punishments are inflicted by fines and imprisonment. The minister can also carry out the execution of criminals, and punish for contempts. Marshals of consular courts are appointed by the President. The regulations of these courts are established by the ministers, who make the regulations public, and transmit them to the United States secretary of state. In carrying out the laws as established under this act the word "minister" is the person invested with and exercising the principal diplomatic function. The word "consul" is the person invested by the United States with, and exercising the functions of, consul-general, vice-consul-general, consul, or vice-consul.<sup>1</sup>

1. U. S. Rev. Stat. tit. 47, sec. 4079 *et seq.*

Giving judicial powers to United States consuls is provided by treaty in China, Japan, Siam, Turkey, Persia, Tripoli, Tunis, Morocco, and Muscat, and in uncivilized countries. This consular jurisdiction of civil and criminal cases is to conform to the United States law when it applies, otherwise by the common law, including equity and admiralty. Where these laws will not apply, the defects are to be reached and the judgment enforced by suitable decrees. Many of these cases are appealable to the ministers. Lawrence's Wheaton, note 74; 12 U. S. Stat. at Large, 72.

It is not understood that consular or diplomatic officers have civil or criminal jurisdiction, *virtute officii*, not even with their *attachés*. Wheaton, Dana's note 128.

Generally all consular officers representing Christian nations are supposed to have administrative and judicial powers so far as their own countrymen are concerned. Attorney-General Cushing, 7 Op. Atty.-Gen. 342; 8 Op. Atty.-Gen. 380.

This same doctrine is held by Great Britain. The *Laconia*, 1 Brown & L. 117; *Barber v. Lamb*, 8 C. B. Rep. N. S. 95. In the case of the *Laconia*, 1 Brown & L. 117, it was held that the supreme

consular court at Constantinople has, by virtue of 6 & 7 Vic. c. 94. and orders in council of August, 1860, jurisdiction in cases of collision within Turkish waters, and can exercise such jurisdiction both *in rem* and *in personam*. 7 L. T. N. S. 164; 33 L. J. Adm. Cas. 11. A neutral residing in an enemy's country, as consul of a neutral state, and who also traded there as a merchant, is to be regarded as an enemy. *Sorensen v. Reg.*, 11 Moore P. C. C. 141.

The Ottoman government allows Great Britain to have jurisdiction between British subjects and subjects of other Christian states, which jurisdiction is exercised by consular courts. *Passayanni v. Russian Co.*, 2 Moore P. C. C. N. S. 161; 9 Jur. N. S. 1160. It was also decided in this case that there is no compulsory power in English consular courts over any person except English subjects; but a Russian or other foreigner may of his own accord submit to the jurisdiction of such court with the consent of his sovereign.

A defendant, relying on a judgment of a tribunal summoned by a foreign consular court as a bar to a party proceeding in England, is required to establish that said tribunal had jurisdiction by treaty, usage, or voluntary submission. *Barber v. Lamb*, 8 C. B. N. S. 95; 6 Jur. N. S. 981; 29 L. J. C. P. 234; 8 W. R. 461.

A foreign consular court at Constantinople, acting judicially, orders the giving of a bond in the nature of bottomry upon a cargo owned by a subject of a foreign state which recognized the consular court as its own; said cargo being upon a ship of said state lying in the port of Constantinople. The bond was sought to be impeached by action in a British colonial court, the owners alleging that the consular court had no jurisdiction. It was held that the presumption was that the consular court had jurisdiction, although outside of Turkey such presumption might not exist in the dominions of a European power. *Messina v. Petrocchino*, 4 L. R. P. C. 144; 20 W. R. 451.

By the rule adopted in the United States the consul of a decedent's country can intervene of right, apart from treaty, only by way of surveillance, and without jurisdiction. 11 U. S. Stat. at L. 52, 63; 8 Op. Atty.-Gen. 98.

Consular certificates are evidence only so far as made by statute. *Callett v. Ins. Co.*, 1 Paine C. C. 594; *Brown v. The Independence*, 2 Crabbe (U. S. Dist. C.), 54; *Levy v. Burley*, 2 Sumn. C. C. 355.

United States consuls having no judi-

cial power, cannot have jurisdiction of offences of seamen in foreign ports, nor exempt the master of the ship from his own responsibility. *The William Harris, Ware* (U. S. Dist. C.), 367. If, however, an American vessel seeks port of necessity for repairs, the American consul may, it would appear, according to usage, direct a survey to ascertain the damages, as part of his official duty. *Potter v. Ocean Ins. Co.*, 3 Sumn. C. C. 27. In an English case it was held that a United States consul was not, as consul, permitted by the English law to administer upon the personality of a domiciled citizen of the United States, dying in England. The crown must take charge of the personal estate in trust, for payments of debts, if any, and distribution, according to the owner's domicile. *Aspinwall v. The Queen's Proctor*, 2 Curteis, 241.

Foreign consuls and like officials have exclusive jurisdiction, in the United States, over controversies, difficulties, and troubles between officers and any of the crew, or between any of the crew, of vessels of their nationality, where treaty stipulations accord this power. 13 U. S. St. at L. c. 116.

A foreign consul, recognized by the United States government, may assert and defend, in the courts of the United States, the rights of property of the subjects of his country, and may bring suits for such purpose, without any special authority or instructions from the party in interest. *The Bello Corrunes*, 6 Wheat. (U. S.) 168.

As to consul's right to intercede in behalf of his countrymen. *Robson v. The Huntress*, 2 Wall. Jr. (U. S.) 59; *Elizabeth, Blatchf. Prize Cas.* (U. S. Dist. C.) 250; *Adolph*, 1 Curt. (U. S.) 87.

Seamen have often had resort to the admiralty courts to collect their wages. It has been held in these courts that when a sailor shipped for a voyage ending in a home port, his protest would be respected in the absence of special circumstances, such as a clear deviation, cruelty, or breaking up the voyage, although there might be a doubt as to the validity of the articles of agreement. *The Becherdass Ambaidass*, 1 Lowell (U. S. Dist. C.), 566; *The Maggie Hammond*, 9 Wall. (U. S.) 435.

In *Dainess v. Hall*, 91 U. S. 13, the supreme court held that judicial powers are not necessarily incident to the office of consul, notwithstanding the fact that such powers are usually conferred upon consuls of Christians in pagan and Mahometan countries, to settle

controversies between their own countrymen or subjects residing or commorant there, and also for the punishment of crimes. These judicial powers have their existence and power from treaty stipulations and positive laws of the nations concerned. The treaty between the United States and the Ottoman empire, of 1862, concedes to the United States the same privileges, in respect to consular courts, with regard to civil and criminal jurisdiction of said courts, which are enjoyed by other Christian nations; and the act of Congress of June 22, 1860, establishes the necessary arrangement for the exercise of such jurisdiction. But it was further held that such jurisdiction is, in terms, only such as is allowed by the laws of Turkey, or its usages in its intercourse with other Christian nations, and hence such laws or usages must be shown in order to know the precise extent of consular jurisdiction. Courts cannot ordinarily take judicial notice of foreign laws and usages, and the party claiming the benefits of such laws by way of justification must plead them so that the court can see that the case is within their provisions. In this case the consul-general of the United States, in Egypt caused certain goods to be attached. The plaintiff and the parties at whose suit the attachment was issued were citizens of the United States and not residents nor sojourners in the Turkish dominions. Hence an action to recover the value of the goods. As a defence the consul-general pleaded his official character, as giving him jurisdiction to entertain the attachment suit. This plea was defective in as much as it did not set forth the laws and usages upon which he relied. This case came from the supreme court of the District of Columbia.

In this case the United States supreme court quote from the instructions of the British Foreign Office to their consuls in the Levant in 1844, as cited by Mr. Phillimore, as follows:

"The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries come exclusively under the control of the local magistracy, depends originally on the extent to which that right has been conceded by the sultans of Turkey to the British crown; and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the queen, in the exercise of the power vested in her majesty by act of Parliament, may be pleased

to grant to any of her consular servants authority to exercise jurisdiction over British subjects." 2 Int. Law, p. 273, § 276.

The general doctrine in force in the Levant, of the extritoriality of foreign Christians, has given rise to the following system of municipal and legal administration:

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians, at length substituted in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts,—an arrangement introduced first by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other Christian nations." Consuls' Manual of Dec. 1862, §§ 169-171.

By a late act of Congress consular courts in China are given jurisdiction in cases of trafficking in opium by citizens of the United States. U. S. Law of 1887, § 3. p. 409.

For further law on the extent of consular jurisdiction, see Hall's Int. L. Appen. V.; Consular Convention between Austria-Hungary and the United States of July 11, 1870.

The jurisdiction given to United States ministers and consuls is limited to persons owing allegiance to the United States. 11 Op. Atty.-Gen. 474.

A similar jurisdiction is exercised over their subjects by France and Germany. 2 Fœlix. p. 294; Bar's Int. L. § 138.

The treaty between the United States and Belgium does not give jurisdiction on foreign consuls to take cognizance of offences committed against the local laws of this country. It makes no provision for a consular court, nor does it authorize the consul to act even as a committing magistrate. *In re Wildenhuis*, 28 Fed. Rep. 924.

A party was tried and convicted before a consular general court at Kanagawa, Japan, for aiding a United States paymaster to desert. The case was appealed to the United States minister, Hon. R. B. Hubbard, who decided he had no appellate jurisdiction. Japan Weekly Mail, Sept. 18, 1886.

8. *Ambassadors—Immunities and Privileges.*—It is a definite principle of law, that ambassadors are exempt from all local jurisdiction, civil and criminal.<sup>1</sup> Any writ or process, issued from any of the courts of the United States or of any particular State, for the arrest or imprisonment of any ambassador or other public minister, or any domestic servant thereof, or against his goods or chattels, is null and void. The parties suing out such writs are deemed and held violators of international law, and become liable to imprisonment not exceeding three years, and to a fine in the discretion of the court. But citizens of the United States who contract debts previous to having entered the diplomatic service, whose debts remain unpaid, cannot have any benefit from this act. No one is liable to punishment under this act for having prosecuted the servant of an ambassador or other public minister, unless the name of such servant is registered in the office of the secretary of state, and by him transmitted to the office of the district marshal, in which district the minister resides. Assaults on ambassadors and other public ministers are punished by imprisonment not exceeding three years, and a fine in the discretion of the court.<sup>2</sup> The common law of England recognizes the rights of ambassadors by annulling all legal process sued out against them which may infringe the immunities of a foreign minister or any of his train.<sup>3</sup> All legal processes for the arrest of any ambassador or any of his domestics, or for the seizure of his goods or chattels, are utterly void. All such prosecutors shall be deemed violators of the law of nations, and disturbers of public repose, and are subject to such penalties and corporal punishment as the lord chancellor and the chief justices, or any two of them, shall think fit.<sup>4</sup>

According to the rules of interpretation, a statute fixing the salary of an officer at a named sum, there being no limitation as to time, should not be deemed abrogated or suspended by subsequent acts, which merely appropriate a less amount for the services of that officer for particular fiscal years, and which contain no words which expressly, or by implication, modified or repealed the previous law. *United States v. Lantson*, 118 U. S. 389.

1. 1 Kent, 15.

2. 1 U. S. Stat. at L. 117; Brightly's Digest, 40; U. S. Rev. (1878) sec. 4062 *et seq.*

3. 2 Bl. Com. b. iv. 70.

4. 7 Anne, c. 12.

The inviolability of ambassadors was a great international question in the fifteenth and the sixteenth century. Lord Coke held to the doctrine that if an ambassador committed any crime which was not merely *malum prohibitum*, he thereby forfeited his privileges and dignity as an ambassador, and could be punished as any private alien, and that he was bound to

answer civilly to his contracts that were good, *jure gentium*. 4 Inst. 153.

During the reign of Queen Anne a Russian ambassador was arrested. He gave bail and then complained to the queen. The prosecutors were arrested and imprisoned. But how far this was criminal in the prosecutors was never determined. 1 Bl. Com. b. i. 254.

In 1653, in England, Sa being a brother of the Portuguese ambassador, and one of his train, fell into a quarrel with a certain party and wounded him, who was saved from death by persons interfering. The next night Sa with fifty followers came to the same place and killed one person and wounded many others. The Portuguese ambassador was compelled to deliver up the delinquents, and Cromwell resolved that Sa should be tried by the law of the land. Sa was convicted, sentenced, and hung. It seems that if he had been the ambassador his position would have protected him. 1 Mahon's Hist. of Eng. c. 8.

In 1717 Count Gyllenberg, the Swedish minister, was arrested in England, and the court then held that a foreign minister

who conspires against a government at which he is accredited has clearly violated the laws of nations. Hence he is no longer entitled to the protection of the laws of nations. Woolsey's Int. L. sec. 92, *c*.

But the nations do not now arrest ambassadors and make them answer. The most that can be done under the modern doctrine of nations is to seize the offending minister and send him and his papers out of the state; that is, when the minister has committed an offence that endangers the safety of the state where he resides, and especially when the danger to the state is imminent. Halleck's Int. L. 211; Wheaton's Int. L. pt. 3, c. 1, sec. 15.

If ambassadors should be so regardless of their duty and of the object of their privileges as to insult the government where they reside, or openly attack the laws, they may be suppressed by refusal to treat with them, and an application can be made to their sovereign for their recall; or if the occasion is urgent, they may be dismissed and be required to depart from the country within a reasonable time. Grotius, b. 2, c. 18, secs. 1-6.

Generally, now, it is the opinion and practice of civilized nations, that if ambassadors commit grave crimes, whether against the state or moral order, they must be sent home to their sovereign for judgment, and that only self-defence will allow the killing of such an official. Woolsey's Int. L. 92, *a*.

The safety of the State is considered superior to all other considerations, and if the machinations of an ambassador endanger the State he may be remanded home to his sovereign, for he cannot be made amenable to the civil or criminal jurisdiction of the country where he resides. This is the settled rule of public law ever since the reign of Queen Elizabeth, when an attempt was made to subject the Scotch and the Spanish ambassadors to criminal and civil jurisdiction. Ward's Hist. of the Laws of Nations, ii. 486; Hall's Int. L. pt. 2, c. 9; Grotius, b. 2, c. 18, sec. 4; Bynkershoek's De Foro Legatorum, c. 8, 17, 18; Vattel, b. 4, c. 7, secs. 92-103; Schooner Exchange v. McFaddon, 7 Cranch (U. S.), 116.

It is a contempt of the government for a foreign minister, while a resident in the United States, to give his ideas to the people through the newspapers. His intercourse and correspondence must be with the executive department of the government exclusively. 1 Op. Atty.-Gen. 43.

The secretary of legation is also exempt from any civil or criminal prosecution in the courts of the nation, when

his superior is an ambassador representing some other sovereign. *Ex parte* Cabrera, 1 Wash. C. C. 232.

If an ambassador or any of his retinue assaults any party, the party assaulted has a right to defend himself, but he must use only force enough for self-defence. *United States v. Liddle*, 2 Wash. C. C. 205. The public ministers representing other nations may bring suits as plaintiffs in the courts of the United States, and in the country where they are accredited. In the United States the Federal courts have jurisdiction of such suits. U. S. Const. art. 3, sec. 2.

The *attachés* of an ambassador are not exempt from criminal or civil prosecution unless their names are registered with the secretary of state. U. S. v. Lafontaine, 4 Cranch C. C. 173; U. S. v. Jeffers, 4 Cranch C. C. 704.

An ambassador's household and all *attachés* of the legation are exempt from prosecution, civil and criminal. Bar's Int. L. 492, note (u); U. S. v. Benner, 1 Bald. C. C. 240; *Ex parte* Cabrera, 1 Wash. C. C. 232.

This exemption does not cease even when the ambassador has his passport. *Dupont v. Pichon*, 4 Dall. (Pa.) 321. So strict is the law of nations in protecting the rights of ambassadors, that suit cannot be brought against them when passing through a country on their way to their destination as minister in another country. *Holbrook v. Henderson*, 4 Sandf. (N. Y.) 619. All the property of an ambassador identified with his person, is exempt from seizure and protected. U. S. v. Hand, 2 Wash. C. C. 435. Even if a party assaults an ambassador, ignorant of his official *status*, he is guilty, ignorance being no defence. U. S. v. Ortega, 4 Wash. C. C. 531; U. S. v. Liddle, 2 Wash. C. C. 205.

If an ambassador has liabilities arising out of business engagements at the place of his residence as minister, he is exempt from suit. *Magdalena Steam Co. v. Martin*, 2 El. & El. 94; *Hallock's Int. L. c. 9, secs. 14, 19 et seq.* But the law has otherwise been interpreted. It is held that if the ambassador voluntarily attorns to the jurisdiction, then in that case he is responsible, and suit can be brought against him and his goods. *Taylor v. Best*, 14 C. B. (Eng.) 487. But this is not the rule in the United States. By act of Congress of April 30, 1790, sec. 27, a foreign minister and all *attachés* of the legation cannot waive their privilege of protection from civil and criminal process, because these privileges

**9. Consuls—Privileges.**—It is settled by the law of nations that a consul has no more immunities or privileges than any other person who enters a country under a safe-conduct.<sup>1</sup> In civil and criminal prosecutions consuls are equally subject to the laws of the country where they reside as other aliens.<sup>2</sup> Consuls enjoy no inviolability of person nor any immunity from jurisdiction unless

belong to their sovereignty who sends them. *U. S. v. Benner*, 1 *Baldw. C. C.* 234; *Valarino v. Thompson*, 7 *N. Y.* 576; *Wheaton*, *Dana's note*. 129; *Hall's Int. L.* pt. 2, c. 9; *Halleck's Int. L.* c. 9, sec. 16 *et seq.*

It is a principle of international law that an ambassador, while residing within a foreign state, is considered as a subject of his own country, retaining his original domicile. The government he represents has exclusive cognizance of his conduct and control of his person. *Grotius*, b. 2, c. 18, secs. 1-6; *Wicquefort's De l'Ambassadeur*, liv. 1, sec. 27; *Vattel*, b. 4, c. 7, secs. 81-135.

If an ambassador enters into business, his property in that line of trade is liable to seizure as in the case of any other alien. *Bynkershoek's De Foro Legatorum*, c. 8; *Vattel*, b. 4, c. 8.

In the case of *Holbrook v. Henderson*, 4 *Sand. (N. Y.)* 619, it was held that an ambassador was protected in going through a country to his destination. The minister was from the republic of Texas, accredited to France. In New York he was arrested for debt on his return to Texas, and the court discharged him. It was held that going through a country in time of peace did not require a passport for the protection of a person. Passports, though named in our law, are unknown in practice. The protection is implied by natural and municipal law, and it is the duty of nations to enforce international law as part of the law of the land. The court further held that the doctrine of international law, as laid down by *Grotius*, is exploded. *Grotius* says, b. 2, c. 18, sec. 5, that the obligation to protect ambassadors extends only to the power to whom the embassy is sent, and does not extend to the power through whose territory the ambassador presumes to pass without passport. The court says this doctrine is harsh, narrow, and not now the rule.

The privileges of an ambassador are not considered to extend to debtors as to debts incurred prior to their entering the minister's service. Nor do these immunities extend to persons who were under previous obligations, as sailors, soldiers, apprentices, minors, a wife, and the like. Nor do these immunities extend to

a laborer engaged to work in the garden attached to a minister's residence. *U. S. v. Hand*, 2 *Wash. C. C.* 435; 1 *Op. Atty.-Gen.* 89-91; *Wheaton's Elements Int. L.* (3d Ed.) 264-387; 2 *Ward's Hist.* 552; *Vattel*, b. 4, c. 8, sec. 113.

A nation may lawfully refuse to receive an ambassador, and such refusal is not a just cause for war. This act would undoubtedly excite unfriendly feelings, unless accompanied with conciliatory explanations. 1 *Kent*, 40; *Wheaton*, *Dana's note*, 137.

*Note.*—Austria refused to receive an ambassador from the United States in 1886, giving no cause. See *Dip. Correspondence*.

How far a nation is bound by the ambassador's actions is a question of great importance. A general letter of credence is given the minister, but confers no power to bind his sovereign conclusively. To bind his government he must have a distinct and special power to bind his sovereign definitely, without the necessity of ratification by his government. 1 *Kent*, 41.

Any engagement entered into by the ambassador has no binding effect until ratified by his principal. *Vattel*, b. 4, c. 6, sec. 77. The international doctrine now held is that a treaty is not binding, although signed by the minister plenipotentiary, until ratified by his sovereign. *The Eliza Ann*, 1 *Dodson (Adm. Eng.)*, 244; *Vattel*, b. 2, c. 12, sec. 156; *Martens*, b. 2, c. 1, sec. 3. But when a treaty has been concluded under a full power by the minister plenipotentiary, it cannot be rejected in honor, without sufficient reasons, such as violation of instructions by the ambassador, mutual error, or a moral or physical impossibility. *Wheaton's Elements* (3d Ed.), 303.

1. 1 *Kent*, 45.

2. 1 *Op. Atty.-Gen.* 45, 302; *Wicquefort's De l'Ambassadeur*, liv. 1, sec. 5; *Bynkershoek's De Foro Legatorum*, c. 10; *Martens's Droit des Gens*, liv. 4, c. 3, sec. 148; *Vineash v. Becker*, 3 *Maule & Selw. (Eng.)* 284; *U. S. v. Ravara*, 2 *Dall. (Pa.)* 297; *Clarke v. Cretico*, 1 *Taunt. (Eng.)* 106; *Com. v. Kosloff*, 5 *Serg. & Rawle (Pa.)*, 546; *State v. De La Foret*, 2 *Nott & McCord (S. C.)* 217.

given them by treaty.<sup>1</sup> They have nevertheless that inviolability of person which renders it possible for them to perform their consular duties.<sup>2</sup> A sovereign in receiving a consul tacitly engages to allow him all the liberty and safety necessary in the proper discharge of his functions.<sup>3</sup>

1. Woolsey's Int. L. sec. 96.

2. Heffner, sec. 244.

3. Vattel, b. 2, c. 2, sec. 34.

Vattel's doctrine is hardly that adopted at present. He says a consul's functions require that he should be independent of the ordinary criminal jurisdiction of the country, and that he should not be molested unless he violates the laws of nations by some great crime. Vattel, b. 2, c. 2, sec. 34. This doctrine of Vattel's is confirmed by De Steck, basing his conclusions on the commercial treaties in Europe since 1664. *Essai Sur les Consuls*, sec. 7, p. 62.

While the United States government does not fully indorse Vattel's and De Steck's doctrine, yet it is a provision in the United States constitution that the supreme court of the United States shall have original jurisdiction in all cases affecting consuls and ambassadors. This Federal jurisdiction is to be exclusive—not including the State courts. *Hall v. Young*, 3 Pick. (Mass.) 80; *Com. v. Kosloff*, 5 Serg. & R. (Pa.) 546; *Davis v. Packard*, 7 Pet. (U. S.) 276; *Sartori v. Hamilton*, 1 Greene (N. J.), 107; *U. S. v. Ravara*, 2 Dall. (Pa.) 297.

The privilege of a consul to exemption from liability to prosecution in State courts is not personal which can be waived. If he does not plead such exemption, and judgment is rendered against him, this is no waiver. Nothing can waive this privilege. *Miller v. Sells*, 66 Cal. 341; *Durand v. Halbach*, 1 Miles (Pa.), 46; *Valarino v. Thompson*, 7 N. Y. 576; *Griffin v. Dominguez*, 2 Duer (N. Y.), 656. This rule is not changed though there be other defendants. *Naylor v. Hoffman*, 22 How. Pr. (N. Y.) 510. But if a consul brings suit in a State court it has jurisdiction. *Sagory v. Wissman*, 2 Benedict (U. S. Dist. C.), 240.

The Federal courts have jurisdiction of suits brought against consuls. *Graham v. Stucken*, 4 Blatchf. C. C. 50; *Bixby v. Janssen*, 6 Blatchf. C. C. 315; *Gittings v. Crawford*, Taney C. C. 1; *St. Luke's Hospital v. Barklay*, 3 Blatchf. C. C. 259.

When a foreign consul files a bill in equity in a State court it would seem that the court has jurisdiction of a cross-bill. *Sagory v. Wissman*, 2 Benedict (U. S. Dist. C.), 240.

Foreign consuls cannot in the United States exercise admiralty jurisdiction except by force of treaty. *Glass v. Betsey*, 3 Dall. (Pa.) 6.

A consul was sued in the United States district court by one of his own countrymen, and the court took jurisdiction. *Lorway v. Lousada*, 1 Lowell (U. S. Dist. C.), 77; *U. S. v. Lafontaine*, 4 Cranch C. C. 173; *Wheaton's Int. Law*, pt. 3, ch. 1.

Whenever the president recognizes a representative from a foreign sovereign, then the courts are bound to take notice of the official capacity of the agent. *U. S. v. Ortega*, 4 Wash. C. C. 531. See note to same case in 11 Wheat. (U. S.) 468, for a general discussion of this subject.

At many places American consuls are forbidden to traffic or carry on business. 11 U. S. Stat. at L. c. 127, sec. 5.

This is also the English law. *Abdy's Kent*, 142, note 2.

But the American consuls are generally permitted to trade. *Coppell v. Hall*, 7 Wall. (U. S.) 542; *The Pioneer*, Blatchford Pri. (U. S. Dist. C.) 666.

The same liberty is given to British consuls as a general thing. *The Baltica*, 11 Moore P. C. 141; *The Aina*, 1 Spinks (Adm.), 313.

But when a consul enters into trade his official character gives no protection to that of merchant when both are united in one and the same person. *The Indian Chief*, 3 Rob. Chr. (Adm.) 27; *Arnold & Ramsay v. U. Ins. Co.*, 1 Johns. Cas. (N. Y.) 363; 1 Chitty's Com. L. 57.

Usually in commercial treaties between the United States and other countries it is generally stipulated for the privilege of their consuls' trading. And the consuls are subject to the same laws and usages as other persons of their own nation. See Treaty between United States and Hanover, May 20, 1840, art. 6.

American consuls abroad are not allowed a salary, but are paid by fees, except the one in London, who has a salary. 1 Kent, 44, note a.

This law is greatly modified now, and many consuls, vice-consuls, and commercial agents draw salaries. For instance, the consuls-general at Havana, London, Paris, and Rio de Janeiro get six thousand dollars each per annum. See U. S. Law of 1886 and 1887, p. 481, schedule B.



**CONTAGIOUS DISORDERS.** See HEALTH; QUARANTINE, etc.

**CONTEMPLATION.**—The act of purposing, designing, or looking forward to anything.<sup>1</sup>

It is not a cause for ill-will between nations if consuls are refused recognition. An English consul was refused by Russia because it was alleged that he was hostile to the Russian government. Turkey refused a consul sent by the United States to Beirut, because he was a clergyman, and might be too much of a missionary. Austria rejected a consul from the United States because of his political opinions, he having previously been an Austrian subject. Schuyler's Am. Dip. 96.

1. **Contemplation of Insolvency.**—In an action for damages for the unlawful conversion by the defendant of certain personal property claimed by the plaintiffs, which the plaintiffs had purchased from a plate-glass company, but which the defendants levied on while still in the possession of the company and sold by the sheriff, the defendants claimed that any sale or transfer made by the company was void (2 R. S. [5th Ed.] 600, § 4), as at the time of the sale the company was in "contemplation of insolvency"—in fact was insolvent. But the court held that mere knowledge of the imminency of insolvency ought not to prejudice an honest customer where the insolvency has not actually occurred, or the affairs of the company remain in the hands of its officers in the usual course of business, without the interference of a court; Robertson, J., saying, "'Contemplation of insolvency' must also mean something more than expectation of its occurrence: it must include provision against its results so far as the transferee is concerned, and that can only be applicable where he is already a creditor, and the object is to take his debt out of the equal ratable distribution of the assets of the company when insolvent." Heroy v. Kerr, 21 How. Pr. Rep. (N. Y.) 409.

**Contemplation of Bankruptcy.**—So where A and B, being partners in trade and apprehending embarrassment in their business, conveyed all their stock and real estate and certain notes to certain of their creditors to secure them against certain debts and liabilities, as sureties and indorsers on the notes on A and B, and afterward suits were commenced upon certain of the debts so secured, on which judgment was rendered and execution was levied, but before judgment was rendered A and B became bankrupts under the act; and the personal chattels so assigned were previous to the bankruptcy sold, and the

proceeds applied to the payment of the said debts,—it was held that the assignment was an act in "contemplation of bankruptcy" within the United States Bankrupt Act of 1841, ch. 9, and in preference of certain creditors, and was therefore void; the court, Story, J., saying: "These conveyances are in no just sense ordinary dealings and transactions in the common course of business. They were notoriously made with the intent to give a preference to certain creditors. They were voluntarily made, . . . without any consideration. . . . We must treat all these conveyances, therefore, as nearly contemporaneous, and known to the defendants to contain a transfer of all the property of the bankrupts with some trifling exceptions, and to be intended to give certain creditors a preference in contemplation of a breaking up of their business, and their immediate insolvency. What is this but a case of conveyances made giving a preference in 'contemplation of bankruptcy' in the sense of the second section of the act? The defendants must be presumed to know the law, and cannot set up their ignorance as a justification. They must be presumed to know the natural, nay the necessary, results of these conveyances to be, that they were acts of bankruptcy within the meaning of the first section of the Bankrupt Act, for which a proceeding might be had by the creditors of the bankrupt *in invitum*. The very facts put them upon inquiry, and diligent inquiry, to know whether the bankrupts must not thereby contemplate a state of immediate insolvency, and a direct preference of a few over the other creditors, which would be unlawful. Nay, the facts were so awakening and striking that no persons not choosing voluntarily to shut their eyes could doubt that the bankrupts were ruined in business, and unable to proceed farther; and that if they did not intend to seek as volunteers the benefit of the Bankrupt Act, their creditors had a right to proceed against them *in invitum* for the unlawful preference. 'Contemplation of bankruptcy' in the sense of the Bankrupt Act is not limited or confined to those cases only where the bankrupts contemplate and intend to be volunteers in bankruptcy, nor even where they contemplate future proceedings by their creditors against themselves *in invitum* under the act; but it extends also to cases where the bankrupts contemplate a complete and total stoppage of their business

**CONTEMPLATION OF BANKRUPTCY.** See **BANKRUPTCY**, Vol. II. p. 67.

**CONTEMPT.** (See also **ATTACHMENT**.)

*Definition*, 777.

*Contempt of Legislature*, 777.

*In the United States*, 777.

*In England*, 778.

*Inferior Legislatures*, 779.

*Contempt of Court—Instances of Contempts Committed by*, 780.

*Those Acting in Some Special Capacity*, 780. [780.]

*Inferior Judges or Magistrates*,

*Sheriffs, Bailiffs, Clerks and other*

*Officers of the Court*, 780.

*Attorneys, Solicitors, and Counsellors at Law*, 782.

*Jurymen*, 782.

*Witnesses*, 783.

*Parties*, 784.

*Any Person*, 785. [788.]

*Instances of What are Not Contempts*,

*Proceedings in Contempt*, 790.

*The Penalty for Contempt*, 795.

*Purging*, 797.

*Power of the Courts*, 799.

*Inferior Courts*, 800.

*Miscellaneous*, 802.

1. **Definition.**—Contempt is disorderly, contemptuous, or insolent language or behavior in the presence of a legislative or judicial body, tending to disturb its proceedings or impair the respect due to its authority,<sup>1</sup> or a disobedience to the rules or orders of such a body, which interferes with the due administration of law.<sup>2</sup>

2. **Contempt of Legislature.**—In a constitutional government, where the legislature has such powers only as are conferred by the constitution, either expressly or by necessary implication, the power to punish for contempt is limited to cases expressly provided for by the constitution, or to cases where the power is necessarily implied from these constitutional functions, and to the proper performance of which it is essential.<sup>3</sup>

and trade, and mean, under such circumstances, to provide for preferences to particular creditors injurious to the interests of their other general creditors, whether any proceedings are or shall be *in futuro* instituted by or against them under the Bankrupt Act or not. In short, 'contemplation of bankruptcy' means a contemplation of becoming a broken up and ruined trader, according to the original signification of the term; a person whose table or counter of business is broken up *bankus ruptus*." *Everett v. Stone*, 3 Story (U. S.), 446.

The words in "contemplation of bankruptcy," as used in the bankrupt law, mean a contemplation of a state of bankruptcy merely, and not an intention to take the benefit of the bankrupt law. And this means more than an inability to pay debts promptly: it contemplates a thorough breaking up of business. *McClean v. Lafayette*, 3 McLean C. C. (U. S.) 587.

1. *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *Burdett v. Abbott*, 14 East, 1; *Crosby's Case*, 3 Wils. 188; *Munay's Case*, 1 Wils. 299; *Williamson's Case*, 26 Pa. St. 9; 2 Story's Comm. 305, 317.

2. *Wharton's Criminal Law* (7th Ed.), § 3426.

3. *Burnham v. Morrissey*, 14 Gray

(Mass.), 226, *Kilbourn v. Thompson*, 103 U. S. 168, 106 U. S. 220; *In re Stanford* and the *Pacific R. Commission* decided, Aug. 29, 1887, in U. S. Circuit Ct. at San Francisco, not yet reported.

Mr. Justice Field, reviewing and approving the case of *Kilbourn v. Thompson* (113 U. S. 168), says:

"This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a Congressional committee. The courts are open to the United States as they are to the private citizen, and both can there secure by regular proceedings ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws."

Sawyer, Judge, says, quoting from opinion of the Chief Justice in the *Sinking Fund Cases*, 99 U. S. 718: "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes."

In the matter of the application of the *Pacific Railway Commission* for an order upon a witness before it to answer certain interrogatories propounded to him,

(a) *In the United States.*—The power is conferred on the Senate and the House of Representatives, and upon the corresponding legislative bodies of the respective States, to punish its own members for disorderly conduct, or for failure to attend its sessions. Neither house has any general power to punish for contempt;<sup>1</sup> and the legality of the action of either house may be examined and determined by the supreme court.<sup>2</sup>

1. *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *Ex parte Kearney*, 7 Wheat. (U. S.) 38; *Ex parte Nugent*, 1 Am. L. J. 107; *Brown v. Brown*, 4 Ind. 627; *Whittem v. State*, 36 Ind. 196; *Ex parte Smith*, 28 Ind. 47; *Kernsdl v. Cason*, 25 Ind. 362; *Burnham v. Morrissey*, 14 Gray (Mass.), 226; *State v. Matthews*, 37 N. H. 450; *People v. Keeler*, 99 N. Y. 463; s. c., 32 Hun (N. Y.) 563; *Kilbourn v. Thompson*, 103 U. S. 168; Const. of the U. S. art. i. sec. v. § 2; Const. of Penna. art. ii. sec. ii.

2. The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry, when the judgment is relied on in any other proceeding. *Williamson v. Berry*, 8 How. (U. S.) 495; *Thompson v. Whitman*, 18 Wall. (U. S.) 457.

“The House of Representatives is not the final judge of its own power and privileges, in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. The house is not the legislature, but only a part of it, and is therefore subject in its action to the law in common with all other bodies, officers and tribunals within the commonwealth.” *Burnham v. Morrissey*, 14 Gray (Mass.), 226.

The most thoroughly considered case on the subject in the United States is perhaps *Kilbourn v. Thompson*, 103 U. S. 168, the substance of which is as follows:

K., for refusing to answer certain questions put to him as a witness by the House of Representatives of the Congress of the United States, concerning the business of a real-estate partnership of which he was a member, and to produce certain books and papers in relation thereto, was, by an order of the house, imprisoned for forty-five days in the common jail of the District of Columbia. He brought suit to recover damages therefor against the sergeant at-arms, who executed the order, and the members of the committee who caused him to be brought before the house, where he was adjudged

to be in contempt of its authority. *Held*, that although the house can punish its own members for disorderly conduct, or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, where the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness, there is not found in the constitution of the United States any general power vested in either house to punish for contempt.

An examination of the history of the English Parliament and the decisions of the English courts show that the power of the House of Commons, under the laws and customs of Parliament to punish for contempt, rests upon principles peculiar to it, and not upon any general rule applicable to all legislative bodies.

The Parliament of England, before its separation into two bodies, since known as the House of Lords and the House of Commons, was a high court of judicature, the highest in the realm, possessed of the general power incident to such a court of punishing for contempt. On its separation the power remained with each body, because each was considered to be a court of judicature and exercised the functions of such a court.

Neither house of Congress was constituted a part of any court of general jurisdiction, nor has it any history to which the exercise of such power can be traced. Its power must be sought alone in some express grant in the constitution, or be found necessary to carry into effect such powers as are there granted.

The court, without affirming that such a power can arise in any case other than those already specified, decides that it can exist in no case where the house, attempting to exercise it, invokes its aid in a matter to which its authority does not extend, such as an inquiry into the private affairs of the citizen.

The constitution divides the powers of the government which it establishes into three departments,—the executive, the legislative, and the judicial,—and unlim-

(b) *In England.*—The power of the two Houses of Parliament under the laws and customs of Parliament to punish for contempt rests upon principles peculiar to it, and not upon any general rule applicable to all legislative bodies; having been before its separation into two bodies, since known as the House of Lords and the House of Commons, the highest court of judicature in the realm, possessed of the general power incident to such a court to punish for contempt. Upon its separation, each house was considered to be a court of judicature, and exercised the functions of such a court.<sup>1</sup> The question of the jurisdiction of the house is always

ited power is conferred on no department or officer of the government. It is essential to the successful working of the system that the lines which separate those departments shall be clearly defined and closely followed, and that neither of them shall be permitted to encroach upon the powers exclusively confined to the others. That instrument has marked out, in its three primary articles, the allotment of power to those departments, and no judicial power, except that above mentioned, is conferred on Congress, or either branch of it. On the contrary, it declares that the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the Congress may from time to time ordain and establish.

The resolution of the house under which K. was summoned and examined as a witness, directed its committee to examine into the history and character of what was called "the real-estate pool" of the District of Columbia, and the preamble recites as the grounds of the investigation, that Jay Cooke & Co., who were debtors of the United States and whose affairs were then in litigation before a bankruptcy court, had an interest in the pool or were creditors of it. The subject-matter of the investigation was judicial, and not legislative. It was then pending before the proper court, and there existed no power in congress, or in either house thereof, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and consequently no authority to compel a witness to testify on the subject.

It follows that the order of the house declaring K. guilty of a contempt of its authority, and ordering his imprisonment by the sergeant-at-arms, is void, and affords the latter no protection in an action by K. against him for false imprisonment. The provision of the constitution that for any speech or debate in

either house the members shall not be questioned in any other place exempts them from liability elsewhere for any vote, or report to or action in their respective houses, as well as for oral debate. Therefore the plea of the members of the committee that they took no part in the actual arrest and imprisonment of K., and did nothing in relation thereto beyond the protection of their constitutional privilege, is, so far as they are concerned, a good defence to the action.

A similar ruling is to be found in the opinion of Justice Field, of the United States supreme court, delivered in the United States circuit court, at San Francisco. Aug. 29, 1887, in the case of Stanford and the Pacific R. Commission, not yet reported.

1. *Brass Crosby's Case*, 3 Wils. 188; *Burdett v. Abbott*, 14 East, 1; *Sheriff of Middlesex*, 11 A. & E. 273; *Lord Coke*, 4 Inst. 23, 47; *Stockdale v. Hansard*, 9 Ad. & E. 1; *Rielly v. Carson et al.*, 11 Moo. P. C. 63; *Fenton v. Hampton*, 11 Moo. P. C. 347; *Doyle v. Falconer*, L. R. 1 P. C. 328; *Stewart v. Blain*, 1 McAr. (D. C.) 453; *Rex v. Flower*, 27 How. St. Tri. 986.

A warrant of arrest under the hand and seal of the Speaker, attested by the clerk and directed to the sergeant-at-arms, is legal, although it does not show on its face on what evidence it was founded, nor set forth specially in what the alleged contempt consisted. *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *Howard v. Sir Wm. Grosset*, 10 Q. B. 359; U. S. Rev. St. §§ 101, 103.

The duration of imprisonment for contempt to a legislative body terminates upon the close of the existing session. *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *Burnham v. Morrissey*, 14 Gray (Mass.), 226; *Stockdale v. Hansard*, *May's Treatise on Privileges of Parliament*, p. 75; *Rex v. Crosby*, 3 Wils. 188; *Burdett v. Abbott*, 14 East. 1. See *in re Sanborn*, *Monthly Law Reporter* (Boston), May, 1860.

open to the inquiry of the courts, in a case where that question is properly presented.<sup>1</sup>

(c) *Inferior Legislatures.*—The power of committal for contempt under any circumstances does not belong to inferior legislatures, such as town councils or town meetings. The remedy for disturbance in such case is binding over to keep the peace, or indictment for disturbing a meeting.<sup>2</sup>

3. *Contempt of Court.*<sup>3</sup>—Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, or for disturbing them in their proceedings.<sup>4</sup>

Contempts may be committed—

(I.) BY THOSE ACTING IN SOME SPECIAL CAPACITY.<sup>5</sup>—(a) *In*

And it seems that the power cannot be exerted beyond imprisonment, and it is often regulated by statute. 1 N. Y. Rev. St. 154, § 13. Nugent, *Ex parte*, 1 Am. L. J. 107. The powers and privileges of Parliament were very elaborately and ably discussed in Howard v. Grosset, 10 Ad. & E. N. S. 359, 411.

1. Sheriff of Middlesex, 11 Ad. & E. 273.

2. 3 Wharton's Criminal Law (7th Ed.), § 3445.

3. *Definition.*—Contempt of court is a disobedience to the court, or an opposing or despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what is commanded or required by the process, order, or decree of the court; sometimes it arises by one or more, their opposing or disturbing the execution or service of the process of the court, or using force to the person that serves it. Sometimes by using words importing scorn, reproach, or diminution of the authority to the court, its process, orders, officers, or ministers, upon executing or serving such process or orders. It is also a contempt to abuse the process of the court by wilfully doing any wrong in executing it, or making use of it as a handle to do wrong or to do anything under color or pretence of authority of the court, without such process or authority. Viner's Abr. vol. v. p. 442; 4 Blk. Com. 283; 4 B. & A. 329, 331; 3 Wheeler Am. C. L. 320; *Ex parte* Cohen, 5 Cal. 494; 3 Wheeler Cr. Cas. (N. Y.) 1; Lyon v. Lyon, 21 Conn. 185, 198; 3 Scam. (Ill.) 395; *In re* Yeates, 4 Johns. (N. Y.) 317, 325; 4 Paige (N. Y.), 405; 5 Paige (N. Y.), 54, 56, 311, 313, 489; 11 Price, 68; Trimble v. Barnard, 15 W. N. C. (Pa.) 127.

A contempt of court is a specific criminal offence, and the imposition of a fine for

such contempt is a judgment in a criminal case. Fischer v. Hayes, 6 Fed. Rep. 63.

4. The power to proceed in contempt is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid. The doctrine in these broad terms is generally asserted, and is believed to be sound; the narrower doctrine, about which there is no dispute, is, that this power is inherent in all courts of record. 2 Bishop Cr. Law (7th Ed.), § 247; Passmore Williamson's Case, 26 Pa. St. 9; Mariner v. Dyer, 2 Greenl. (Me.) 165; State v. White, T. U. P. Charlt. (Ga.) 123; Yates v. Lansing, 9 Johns. (N. Y.) 395; 6 Johns. (N. Y.) 337; 4 Johns. (N. Y.) 317; State v. Tipton, 1 Blackf. (Ind.) 166; Clark v. People, 1 Breese (Ill.), 266; U. S. v. Hudson, 7 Cranch (U. S.), 32, 34; Rex v. Cotten, W. Kel. 133; People v. Turner, 1 Cal. 152; *Exp.* Adams, 25 Miss. 883; Morrison v. McDonald, 21 Me. 550; State v. Woodfin, 5 Ired. (N. C.) 199; Gate v. McDaniel, 3 Port. (Ala.) 356; Stuart v. People, 3 Scam. (Ill.) 395; Gorman v. Luckett, 6 B. Mon. (Ky.) 638; State v. Mathews, 37 N. H. 450; Watson v. Williams, 36 Miss. 331; *Ex parte* Smith, 28 Ind. 47; *In re* Moore, 63 N. C. 397; *Ex parte* Robinson, 19 Wall. (U. S.) 505; Church v. Muscatine, 2 Iowa, 69; People v. Wilson, 64 Ill. 195; State v. Morrill, 16 Ark. 384; *Ex parte* Wright, 65 Ind. 508; 22 Me. 550; 5 Ired. (N. C.) 199; State v. Morrill, 16 Ark. 384; 25 Ala. 81; 25 Miss. 383; 37 N. H. 450.

5. As regards those in official position, it may be laid down that all corrupt conduct, oppression, or injustice in execution of office by color thereof, gross or wilful neglect of duty, and generally all misbehavior in office, constitute a contempt of court. 2 Hawk. P. C. 207, 12, 17; 4 Blk. 28, etc.

*ferior Judges or Magistrates*, by acting unjustly, oppressively, or irregularly in administering those portions of justice which are intrusted to their distribution; or by disobeying the writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to, or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like; any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority whose duty it is to keep them within the bounds of justice.<sup>1</sup>

(b) *Sheriffs, Bailiffs, Clerks, and other Officers of the Court*, by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty.<sup>2</sup>

1. The power of courts over this offence may be exerted to punish the perversion, maladministration, or denial of justice by inferior judges or magistrates, "since the superior courts have a general superintendence over all inferior jurisdictions." 2 Hawk. 217.

Refusing to seal a bill of exceptions without sufficient cause is a contempt on the part of the court of common pleas, and the supreme court (of *New York*) will award a *mandamus* to compel the court of common pleas to sign it. In this case the bill of exceptions was untrue, which was held sufficient cause for the refusal. *People v. Judges of Westchester*, 2 Johns. Cas. (N. Y.) 118; *People v. Judges of Washington Co.*, 2 Caines (N. Y.), 97. See also *Conrow v. Schloss*, 55 Pa. St. 28.

Disobedience of a peremptory *mandamus* from the supreme court of *Georgia* held a contempt in *Exp. Carnochan, Charlton*, 315. See *State v. Hunt, Cox* (N. J.), 287; *Patchin v. Mayor*, 13 Wend. (N. Y.) 664; *State v. Smith*, 9 Iowa. 334.

Misconduct of inferior judges or magistrates, such as usurping jurisdiction, disobeying writs, disregarding adjudications of superior courts, and refusing to proceed on causes. *Swift v. State*, 63 Ind. 81; *People v. Judges*, 2 Caines (N. Y.), 97; *Brinkley v. Brinkley*, 47 N. Y. 40; *Paley on Convictions* (1866), 329.

2. *Sheriffs*.—Contempt of sheriff in not paying over money, or neglecting to collect it on execution. *Ex parte Thurmond*, 1 Bailey (S. Car.), 605.

Serving a writ improperly, or refusing to serve it at all, or making a false return. *State v. Tipton*, 1 Blackf. (Ind.) 316; *Summers ex parte*, 5 Ired. (N. C.) 146; *Pitman v. Clarke*, 1 McMullen (S. Car.), 316; *People v. Marsh*, 2 Cow. (N. Y.), 493; *State v. Williams*, 2 Speers (S. Car.), 26.

For (sheriff) not returning a writ, a rule for an attachment was granted, though twelve years had elapsed since the issue of the writ. *Brockway v. Wilber*, 5 Johns. (N. Y.) 356.

To pocket a *venire* is a contempt. *Kepple v. Williams*, 1 Dall. (U. S.) 29.

To pertinaciously refuse or culpably neglect to collect a debt in gold or silver. *Rice v. McClintock, Dudley* (S. Car.), 354. To make a levy after the appointment of a receiver. *Com. v. Young*, 33 Leg. Int. (Pa.) 160; *Russel v. E. A. Railroad Co.*, 1 Eng. L. & E. 101. Carelessly allowing a prisoner to escape. *Craig v. Malbie*, 1 Ga. 544.

It is a contempt on the part of a sheriff to seize goods in the hands of a receiver with notice of his appointment, unless the writ be issued by special leave of the court, even though the title of the plaintiff be paramount to that of the receiver. *Com. v. Young*, 11 Phila. (Pa.) 606.

*Clerks and other Officers*.—Gross neglect on the part of a prothonotary of a court may constitute official misconduct under the Pennsylvania act of April 3, 1809, relative to contempt. *Com. v. Snowden & Brews*. (Pa.) 218.

Embezzlement or misappropriation of funds, or failure to pay them over when so ordered, is a contempt on the part of a receiver appointed by the court. *Cartwright's Case*, 114 Mass. 230; *Pitman's Case*, 1 Curtis C. C. 186.

For clerk of a court to fraudulently withhold money belonging to an estate. *State v. Tipton*, 1 Blackf. (Ind.) 166; *Connor v. Archer*, 1 Speers (S. Car.), 89.

Improper conduct or disobedience to the court of clerks, masters, or referees. *Willand ex parte*, 11 C. B. 544; *Smith ex parte*, 28 Ind. 47; *Newbury in re*, 4 A. & E. 100; *People v. Nevins*, 1 Hill (N. Y.), 154.

(c) *Attorneys, Solicitors, and Counsellors at Law*, who are also officers of the respective courts, by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice.<sup>1</sup>

(d) *Jurymen*, in collateral matters relating to the discharge of their office; such as making default when summoned, refusing to be sworn or to give any verdict, eating or drinking without the

County commissioners are officers within the meaning of the act. *Hummel's Case*, 9 Watts (Pa.), 416. See *Freeman v. Hays*, 2 Clark (Pa.), 253; *Austin's Case*, 5 Rawle (Pa.), 191; *McLaughlin's Case*, 5 W. & S. (Pa.) 272.

Where an officer of the court so conducts himself during the trial of a cause as to inflict if not stopped irreparable injury, attachment for contempt is the proper remedy because the only remedy. *R. v. Clement*, 4 B. & Ald. 218.

The deputy-marshal is an officer of the district court, amenable to its jurisdiction for malfeasance in office; and this jurisdiction may be exercised by summary order or attachment for contempt. 2 Brock. Marsh. C. C. 1; 3 McLean, 365; *The Laurens, Abb. Adm.* (N. Y.) 508.

Disobedience of an inferior officer of the court. *Swift v. State*, 63 Md. 91.

1. Malpractice of attorneys, as in withholding papers or money from clients. *Pitman's Case*, 1 Curtis C. C. 186; *The Laurens*, 1 Abbot U. S. 302. Publications by attorneys derogatory to court. *Biggs ex parte*, 64 N. Car. 202; *Moore ex parte*, 64 N. Car. 398.

When the attorney undertakes to procure the bail himself, he assumes, in addition to his ordinary duty, the responsibility of knowing whom he presents to the court. *In re Lucas Hirst*, 1 W. N. C. (Pa.) 18; *In re Jared Ingersoll*, 1 W. N. C. (Pa.) 18; *In re O'Grady & Deringer*, 4 W. N. C. Pa. 199, 200.

While an attorney was arguing a motion in a State court for the appointment of a receiver of an insolvent corporation, proceedings against which had already been taken in the bankrupt court, of which fact the attorney had knowledge, he was served with an injunction from the bankrupt court. He informed the justice of the fact, ceased his argument, and handed up his papers, one of which was a draft order for the appointment of a receiver. *Held*, he had deliberately disregarded the order of the bankrupt court, and was guilty of contempt. *S. Side R. Co., 7 Ben.* (N. Y.) 391; 10 Bnkr. Reg. 274.

Disrespectful language to the court by an attorney; how punishable. *Ex parte Selden*, 6 Pittsb Leg. Int. (Pa.) 18. An attorney cannot be punished by suspen-

sion for disobeying the exigency of a writ of subpoena. *Commonwealth v. Newton*, 1 Gr. (Pa.) 453; *In re Davies' Case*, 93 Pa. St. 126, 121; *Dickens' Case*, 67 Pa. St. 169; *Gates' Case*, 17 W. N. C. (Pa.) 142; *In re Serfass*, 19 W. N. C. (Pa.) 476.

An attorney writing and publishing strictures on the opinion of the court, in order to prejudice a cause. *Matter of Darby*, 3 Wheel. C. C. 1; *Reg. v. Wilkinson*, 41 Up. Can. Q. B. 42; *Higginson's Case*, 2 Atk. 469. Solicitors and officers of courts by gross fraud and corruption, doing injustice to clients. *Ex parte Pater*, 5 Best & Smith, 299. Entering a dismissal of action in disrespectful language. *Ex parte Smith*, 28 Ind. 47; *Lockwood v. State*, 1 Ind. 161. For unprofessional and disrespectful language before the court. *Redman v. State*, 28 Ind. 205; *Brown v. Brown*, 4 Ind. 627; *Withers v. State*, 36 Ala. 252. Filing an indecent petition for divorce. *Brown v. Brown*, 4 Ind. 627. Instituting a fictitious suit. *Smith v. Junction R. Co.*, 29 Ind. 546; *Smith v. Brown*, 3 Tex. 360; *Lord v. Veazie*, 8 How. (U. S.) 254. Suing out an attachment for a witness who has not been served with process. *Butler v. People*, 2 Col. 295. Failing to pay or replevy a judgment in a bastardy proceeding. *Reynolds v. Lamont*, 45 Ind. 308. Making use of a false instrument in order to prevent the course of justice. *Rex v. Mawbey*, 6 Term R. 619. Appearing and confessing judgment without authority. *Denton v. Noyes*, 6 Johns. (N. Y.) 296. For an attorney to refuse to defend a poor person on appointment by the court without a fee, or to advise a client of the legal consequences of a forfeiture of a recognizance, is not a contempt. *Blythe v. State*, 4 Ind. 525; *Ingle v. State*, 8 Blackf. (Ind.) 574. Attorneys are officers of the court, and can only be deprived of their offices by judgment of the court after opportunity to be heard has been afforded. *Ex parte Garland*, 4 Wall. (U. S.) 378; *Ex parte Heyfron*, 7 How. (Miss.) 127; *Fletcher v. Dangerfield*, 20 Cal. 427.

**Privilege.**—Solicitors attending at police court. *Freston in re*, 11 Q. B. D. 545; *Bateman v. Phillips*, 4 Taunt. 137.

leave of the court, and especially at the cost of either party, and other misbehaviors or irregularities of a similar kind; but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict.<sup>1</sup>

(e) *Witnesses*, by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn.<sup>2</sup>

1. For a juror to corruptly confer with a party to a cause on trial, about the cause and the verdict to be rendered, is a contempt under Rev. St. 725. *Re May*, 1 Fed. Rep. 737.

During the progress of the trial of an indictment for an assault, a juror viewed the locality where it was committed. *Held*, not a contempt. *People v. Oyer & Terminer Ct.*, 101 N. Y. 245; s. c., 54 Am. Rep. 691.

One exempt from jury service by reason of his membership in a military company is not guilty of contempt if, having been summoned, he does not attend to make excuses (Lewis, P. J., dissenting). *Miller v. Com.*, 80 Va. 33. If a juror, charged with a cause, leaves his associates and mingles with the community, or hold communication with persons outside, he commits a contempt of court. *State v. Helvenston*, R. M. Charl. (Ga.) 48. See 2 Hawk P. C. (Curw. Ed.) p. 212. Holding a communication after retiring, with persons other than officers of the court. *State v. Helvenston*, R. M. Charlton (Ga.), 48. Conversing with a bystander during the trial of a cause; leaving the court without consent of the court. *Barlow v. State*, 2 Blackf. (Ind.) 114; *Exp. Hill*, 3 Cow. (N. Y.) 355. And so for a juror voluntarily to express an opinion as to the guilt of a prisoner for the purpose of disqualifying himself. *U. S. v. Devaughan*, 3 Cr. C. C. 84.

2. The refusal of a witness to answer proper questions before a grand jury is punishable as a contempt under the statutes as committed in a proceeding upon an indictment. *People v. Kelley*, 1 A. L. Reg. N. S. 534, or 24 N. Y. 74; *Lockwood v. State*, 1 Ind. 64.

For a witness not to attend when subpoenaed, or when under recognizance to attend. *Yates v. Lansing*, 9 Johns. (N. Y.) 395; *Yates v. People*, 6 Johns. (N. Y.) 337; *R. v. Harland*, 8 Dowd. P. C. 328.

For a witness, when ordered to leave the court during the examination of other witnesses, to remain in. *Whittem v. State*, 36 Ind. 196.

For a witness when attending to refuse to be sworn. *Roelker ex parte*, 1 Sprague

(U. S.), 276; *Burr's Trial*, 354; *Judson ex parte*, 3 Blatchf. C. C. 89, 148; *Peck ex parte*, 3 Blatchf. C. C. 113; *Walker ex parte*, 25 Ala. 81; *Langdon ex parte*, 25 Vt. 680. When sworn, to refuse to answer. *U. S. v. Coolidge*, 2 Gall. C. C. 364. Insolent demeanor of witness before a grand jury, and refusal to answer their questions. *U. S. v. Caton*, 1 Cranch C. C. 150; Ala. Code, § 4136; *Newsom v. State*, 78 Ala. 407.

In *Pennsylvania* it is provided by statute (act Feb. 24, 1870, Pamph. L. 34) that persons summoned as witnesses in certain criminal cases, and who abscond, shall be guilty of a misdemeanor, punishable by fine and imprisonment. "This is intended to apply to cases where the party in contempt could not be reached by attachment" *Com. v. Phillips*, 3 Pittsburg (Pa.) 426.

A Jew who refuses to be sworn as a witness on Saturday. *Stansbury v. Marks*, 2 Dall. (Pa.) 213. A person not a Quaker, who had conscientious scruples against taking an oath, on account of a vow that he never would do so, and therefore refused to be sworn, was committed for contempt, the liberty of affirming being restricted to Quakers, under the laws of Massachusetts. *U. S. v. Coolidge*, 2 Gall. C. C. 364. See also *Wilson Bryan's Case*, 1 Cranch C. C. 151.

The refusal of a witness to appear before an examiner is punishable as a contempt. *Bowen v. Thornton*, 9 W. N. C. (Pa.) 575. But not where there has been a substantial answer to the question, or it is not within the range of the examiner's duties. *Loughlin v. Maybin*, 39 Leg. Int. (Pa.) 256.

A witness not appearing in response to subpoena of a magistrate or notary not guilty of contempt. *Trimble v. Barnard*, 15 W. N. C. (Pa.) 127.

A witness committed for contempt, for disorderly behavior in court, is privileged while returning at the expiration of his imprisonment. *R. v. Wigley*, 7 Car. & P. 4.

Refusal to obey a subpoena issued by a Federal court is an offence against the Federal government within the meaning



(f) *Parties* to any suit or proceedings before the court, as by misbehavior, interfering with the course of justice,<sup>1</sup> disobedience to any rule or order made in the progress of a cause; non-payment of costs awarded by the court upon a motion,<sup>2</sup> or non-observance

of section 1014 of the Revised Statutes of the United States. *In re Ellerbe*, 13 Fed. Rep. 530.

1. For a party, when books are submitted to his inspection by order of court, to break open parts sealed up, not relating to the subject of litigation, is a contempt. *Dias v. Merle*, 2 Paige (N. Y.), 494.

Threatening letter addressed and sent pending the suit to the defendant by the plaintiff, is a contempt of court. *Smith v. Lakeman*, 26 L. J. Ch. 305.

One who deceives the court by pretending to be sick, and thereby procures the postponement of a civil case, is guilty of criminal contempt, but he should not be proceeded against and adjudged guilty during his absence. *Welsh v. Barber*, 52 Conn. 147; s. c., 52 Am. Rep. 567.

Bringing an action in the name of another without his consent. *Scott v. John*, 15 Ala. 566; *Butterworth v. Stagg*, 2 Johns. Cas. (N. Y.) 291. Or bringing an action in the name of a fictitious person, for the purpose of indirectly affecting a pending controversy, is a contempt. *Smith v. Junction R. Co.*, 29 Ind. 546. See also *Coxe v. Phillips*, Rep. temp. Hardw. 237; *Brewster v. Kitchin*, Comb. 425.

Defendant participating in a rescue and escaping from the custody of the sheriff. *State v. Bergen*, 1 Dutch. (N. J.) 209.

Violence in matters relating to the procedure of the court. *Adams v. Hughes*, 1 B. & B. 24; *Watson ex parte*, 1 D. N. S. 805.

A co-respondent in a suit for divorce, immediately after the service of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward for information which would lead to the discovery and conviction of the authors of them. *Held*, that these advertisements constituted a contempt of court. *Brodribb v. Brodribb & Wall.*, 11 P. D. 66, 55 L. J. P. 47, 34 W. R. 580; 50 J. P. 407.

2. An order was passed directing defendant to pay the money into court, or show cause for not doing so. The defendant refused to obey the order on the ground that the complainant was not entitled to the money, and that he had paid it away to the persons who were entitled. Thereupon a peremptory order

was passed, requiring him to bring the money into court, but in indulgence to him, a proviso was annexed that a bond with security should be deemed a compliance with the order; this order was also disobeyed by defendant, and his answer was put in assigning the same reason as before for refusing to comply. *Held*, that the defendant was guilty of contempt in parting with the fund, whilst the question as to its disposition was pending before the court. The question who was entitled to the fund, was a question to be determined by the court upon a hearing of the cause. The only question upon passing the order for paying the money into court was the best method of securing the trust fund to await the decision of that question. The defendant could not be allowed to decide the question of title for himself, and set up his opinion as an excuse for disobeying the order to pay. *Wartman v. Wartman*, Taney C. C. 362.

A rule for contempt for failure to pay money into court will be discharged when it is made apparent that there is an absolute inability to make the payment, but this must clearly appear. *Smith v. Smith*, 92 N. Car. 304.

It is not a contempt which the city court of New York has power to punish for defendant to put in a verified answer, known to be false, in order to obtain delay to put property out of the way, and thus defeat the collection of plaintiff's judgment. *Moffat v. Herman*, 17 Abb. N. Cas. (N. Y.) 107, reversing s. c., 17 Abb. (N. Y.) 62; *Redman v. State*, 28 Md. 205; *Brown v. Brown*, 4 Ind. 627; *State v. Garland*, 25 La. Ann. 532.

To disobey rules or orders, obedience to which is essential to the progress of the case. *Price v. Hutchinson*, L. R. 9 Eq. 534; *State v. Sparks*, 27 Tex. 627.

Disobedience to an order of court for summary payment, which payment cannot be otherwise enforced. *People v. Compton*, 1 Duer (N. Y.), 512; *Woodworth v. Rogers*, 3 Wood. & M. C. C. 135; *Peter v. Muller*, 1 Bond C. C. 601; *Mead v. Nbriss*, 21 Wis. 310.

Disobedience to an order for specific conveyance. *Remley v. Dewart*, 41 Ga. 466; *Ford v. Ford*, 10 Abb. Pa. N. S. (N. Y.) 74; 41 How. Pr. (N. Y.) 169.

Where the defendant in a *habeas corpus* makes an evasive or false return thereto,

of awards duly made by arbitrators or umpires after having entered into a rule for submitting to such determination.<sup>1</sup>

II. BY ANY PERSON.—As in the face of the court by rude and contumelious behavior, by obstinacy, perverseness or prevarication, by breach of the peace, or any wilful disturbance whatever;<sup>2</sup> or in the absence of the party, as by disobeying or treating with disrespect the writs, rules, or process of the courts;<sup>3</sup> by interfering

he may be committed for contempt in order to compel obedience to the writ. *U. S. ex rel. Wheeler v. Williamson*, 3. A. L. Reg. O. S. 729.

*Certiorari* is in the nature of a *superseas*, and an attachment will lie against one who, with notice of its issue, proceeds in the matter which has been removed for review. *State v. Lambert*, 46 N. J. L. 59.

A judgment debtor may be committed for contempt for wilfully disobeying an order in proceedings in aid of execution in requiring him to apply property in his possession, not exempt, to the satisfaction of the judgment. *State v. Burrows*, 33 Kan. 10.

Under the practice in the courts of equity of the United States, no order is necessary fixing the time within which the main decree rendered in the cause must be performed, before a party can be in contempt for non-performance. *Souter v. La Crosse R., Woolw. C. C.* 80, 83.

Injunction against trustees by name; breach by new trustees. *Avory v. Andrews*, 51 L. J. Ch. 414.

A disobedience to an injunction is none the less a contempt of court because the act is done in good faith and not prohibited by the order, or under advice to that effect. *Atlantic Giant Powder Co. v. Mfg. Co.*, 9 Fed. Rep. 316; *Wells, Fargo & Co. v. O. R. & N. Co.*, 19 Fed. Rep. 20.

1. When one disobeys an order to perform the awards of referees. *McClure v. Guleck*, 2 Harrison (Ind.), 340; *Shriver v. State*, 9 Gill & J. (Md.) 1; *Yeates v. Russell*, 17 Johns. (N. Y.) 461; *Rex v. Meyers*, 1 T. R. 265; *Mendell v. Tyrell*, 9 M. & W. 217; *McArthur v. Campbell*, 4 Nev. & M. 208.

2. Insulting language to a judge relative to his conduct in a suit pending before him, even though out of court, is a contempt punishable by fine and imprisonment. *Commonwealth v. Dandridge*, 2 Va. Cas. 408. "Every insult offered to a judge in the exercise of the duties of his office is a contempt." *Charlton's Case*, 2 Myl. & Cr. 316.

It is a contempt to strike an attorney in the court-room, although the cause of the assault have no relation to the proceeding in which the attorney is engaged. *U. S. v. Patterson*, 26 Fed. Rep. 509; *Rex v. Davidson*, 4 B. & A. 329.

Contempt by disrespectful language spoken in court is not excused by the fact that the judge was ill-tempered and discourteous. *Holman v. State*, 105 Ind. 513.

To call another a liar in the presence of the court and in the hearing of its officers is a contempt. Violent language and an assault made, in a hall adjoining the court-room and within the hearing of the court, it then being in session, is a contempt which the court may punish, within the meaning of the act of March 2, 1831. *U. S. v. Emerson*, 4 Cranch C. C. 188; *People v. Boscowitch*, 20 Cal. 436.

For an acquitted prisoner to swear vengeance on the prosecuting witnesses within the precincts of the court, is a contempt. *U. S. v. Emerson*, 4 Cranch (U. S.), 188. It seems that it is a contempt for a man to seize his own property by force in open court. *Com. v. Wilson*, 1 Phila. (Pa.) 83.

3. Wilfully disobeying an order of court in proceedings in aid of execution requiring property to be applied to satisfaction of the judgment. *State v. Burrows*, 33 Kan. 10.

Refusing to obey an order directing defendant to pay money into court or show cause for not doing so. *Wartman v. Wartman*, Taney C. C. 362.

Where, as in *New York*, the statute makes it a criminal contempt wilfully to disobey "a process or order lawfully issued or made" by a court of record, disobedience in obeying a subpoena issued by the district attorney in a criminal case is not within the statute. *Sherwin v. People*, 100 N. Y. 351.

Where a corporation, its officers, agents, and employes, having been enjoined from maintaining a certain dam by notice served on it, caused it to be removed, and shortly thereafter the president resigned his position, transferred

with, or perverting such writ or process to the purposes of private malice, extortion, or injustice;<sup>1</sup> by speaking or writing contemptuously of the court or judges acting in their judicial capacity, by printing false accounts (or even true ones without proper permission) of causes then depending in judgment;<sup>2</sup> and by anything, in

his stock, entered into an agreement for the purchase of the land, including the locality from which the dam had been removed, and reconstructed the dam, *held*, that he was properly punishable for contempt. *Morton v. Tulare County Superior Ct.*, 65 Cal. 496.

Disobedience to an order of court for summary payment, which payment cannot be otherwise enforced. *People v. Compton*, 1 Duer (N. Y.), 512; *Woodworth v. Rogers*, 3 Wood. & M. (U. S.) 135; *Potter v. Muller*, 1 Bond (U. S.), 601; *Mead v. Norris*, 21 Wis. 310. Doing what one has been enjoined from doing. *Davis v. Mayor*, 1 Duer (N. Y.), 457; *People v. Compton*, 1 Duer (N. Y.), 512. Disobedience to an order of court for specific conveyance. *Remley v. De-wall*, 41 Ga. 466; *Ford v. Ford*, 10 Abb. Pr. U. S. (N. Y.) 74. Publication of proceedings ordered not to be published. *Wellesley. In re*, 2 Rus. & M. 639.

How Michigan statute makes a personal demand for alimony a prerequisite to a commitment for contempt in not paying it. *Edison v. Edison*, 56 Mich. 185.

Under its power over trusts, a court of equity may direct the manner of investigating the assets of an embarrassed savings-bank, when requested to do so by its managers; and for making loans unauthorized by the order of the court, and on other securities than those ordered to be taken, the president thus violating the order may be dealt with as for contempt. *Una v. Dodd*, 39 N. J. Eq. 173.

The delivery of property which has been sold under decree of partition may be enforced by an attachment for contempt. *Edwards v. Dykeman*, 95 Ind. 509.

1. If the process be impeded, no case can be tried. Hence it is a contempt punishable by summary commitment to interfere with process. *Price v. Hutchinson*, L. R. 9 Eq. 534; *Buck v. Buck*, 60 Ill. 115; *People v. Bradley*, 60 Ill. 390; *State v. Sparks*, 27 Tex. 627; *Adams v. Hughes*, 1 B. & B. 24; *Watson, Ex parte*, 1 D. N. S. 805; *Kitcat v. Sharp*, 52 L. J. Ch. 134; *McGregor v. Barrett*, 6 C. B. 262.

2. Publications.—A publication in a

newspaper in the city where the supreme court of appeals is sitting, charging that three out of the four judges attended a political caucus more than a year before, and advised the action out of which the case then pending arose, promising the caucus to hold its action legal, and also charging that the court agreed to decide the case for political purposes before a certain political convention, *held* to be contempt of court, summarily punishable as "misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice." *State v. Frew*, 24 W. Va. 416; s. c., Am. Rep. 257.

It is a contempt to make a publication reflecting on the court, jury, etc., with reference to a pending suit, or tending to influence the decision. *Hollingsworth v. Duane*, Wall. C. C. 77; and *U. S. v. Duane*, Wall. C. C. 5; s. c., 4 Iowa, 209; s. c., 2 S. & R. (Pa.) 23; *Bayard v. Passmore*, 3 Yeates (Pa.), 438; *In re Moore*, 63 N. C. 397; *State v. Morrill*, 16 Ark. 384; *People v. Wilson*, 64 Ill. 195. *Contra, Ex parte Hickery*, 12 Miss. 751.

Since the act of March 2, 1831, the courts of the United States have no longer power to punish a publication respecting a pending suit as a contempt. *Ex parte Poulson*, 15 Haz. Pa. Reg. 380.

The New York Revised Statutes, vol. ii. (4th Ed.) p. 467, provide that every court of record may punish summarily, for the publication of false or grossly inaccurate reports of its proceedings.

The Penna. Act of Assembly of June 16, 1836, provides that no publication out of court, respecting the conduct of the court or any of its officers, jurors, witnesses, or parties in any cause pending in court, exposes the party to summary punishment, and the only remedy for the person aggrieved is by indictment or action at law.

To publish testimony which the court has ordered not to be published when the injury cannot be otherwise redressed. *In re Wellesley*, 2 Rus. & M. 639.

While proceedings are pending, it is contempt of court to publish anything in reference to the parties to or the subject-matter of a pending litigation, which

short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority is entirely lost among the people.<sup>1</sup>

tends to excite a prejudice against those parties or their litigation. *Tichborne v. Tichborne*, 39 L. J. Ch. 398, 22 L. T. 55. After affidavits filed and before hearing to publish an article attributing falsehood to the persons who have made the affidavits. *Felkin v. Herbert*, 10 Jur. N. S. 62. See *Vernon v. Vernon*, 40 L. J. Ch. 118; *Tyrone Election Petition in re Macartney v. Corry*, 7 Ir. R. Ch. 240; *Metzler v. Gounod*, 30 L. T. 264; *Brook v. Evans*, 29 L. J. Ch. 616; 6 Jur. N. S. 1025; *Littler v. Thompson*, 2 Beav. 129. Advertising for subscriptions to prosecute action not contempt. *Plating Co. v. Farquharson*, 17 Ch. D. 49. Advertisement for evidence. 17 Ch. D. 49.

1. **Interference with Property over which the Court has Supervision.**—One who, after an examination concerning his property in proceedings supplementary to execution, and pending the decision of the referee on the creditors' motion that certain property disclosed be ordered turned over, disposes of it, is guilty of contempt, and may be punished accordingly. *Ex parte Kellogg*, 64 Cal. 343.

The U. S. circuit court will punish for contempt strikers who interfere with a railroad in the hands of the court's receiver. *Re Higgins*, 27 Fed. Rep. 443.

A master's attempting to remove his slave beyond the jurisdiction of the court pending a petition for freedom, attached for contempt. *Richard v. Van Meier*, 3 Cranch C. C. 214; *Thornton v. Davis*, 4 Cranch C. C. 500.

To carry off a ward in chancery, attachment being the only mode of enforcing obedience. *Jones, Ex parte*, 13 Ves. 237; *Littler v. Thomson*, 2 Beav. 129; *Whittem v. State*, 36 Ind. 196.

Where rioters and strikers stopped the trains on a railroad operated by receivers. *Secor v. Toledo, etc., R.*, 4 L. & E. Repr. 283; *Re Doolittle*, 23 Fed. Rep. 544; *U. S. v. Kane*, 23 Fed. Rep. 748; *Re Wabash R. Co.*, 24 Fed. Rep. 217.

Removal of goods pending interpleader. *Day v. Carr*, 7 Ex. Ch. 883.

Interference with receiver in bankruptcy held a contempt. *Hayward, Ex parte, etc.*, 45 L. T. 326.

**Other Improper or Unfair Practices.**—It is contempt to write and send to a grand jury an accusatory, threatening, and insulting letter relative to the subject of

their investigation. *Ex parte Tyler*, 64 Cal. 434.

Unfair practice towards a witness who is to give testimony in court, or oppression under color of its process, although those practices and that oppression were acted out of the district in which the court is sitting; provided the person who has thus demeaned himself should come within the jurisdiction of the court. *U. S. v. Burr*, 1 Burr's Trial, 355.

To obtain an opinion of the court affecting the rights of persons, not parties, to the pretended controversy, declared punishable as contempt of court. *Lord v. Veazie*, 8 How. (U. S.) 251; *Cleveland v. Chamberlain*, 1 Black (U. S.) 419.

False personation and perjury as a surety. *Com. v. Davis*, 1 W. N. C. (Pa.) 18.

Proposing to a juror to signal from the window of the jury-room how the jury stand with regard to the verdict. *State v. Doty*, 32 N. J. 403; *Reg. v. Martin*, 5 Cox C. C. 356.

A purchaser at a master's sale, under decree of court, may be attached for non-compliance with the terms. *Haeg v. Commissioner*, 1 Dessaus. (S. Car.) 112; *Brasher v. Cortlandt*, 2 Johns Ch. (N. Y.) 505.

It is a contempt for a witness or a bystander to communicate with a grand juror touching a complaint under examination before them without their request. *Bergh's Case*, 16 Abb. Pr. (N. S.) 266. Speaking disrespectfully, or publishing in a newspaper defamatory notices concerning them, is a contempt. *Van Hook's Case*, 3 City Hall Rec. (N. Y.) 64; *Matter of Spooner*, 5 City Hall Rec. (N. Y.) 109. But see *Story v. People*, 79 Ill. 45.

A contempt of court, where a *habeas corpus* is pending for the custody of a child, to advise the respondent, by telegram, to avoid the process of the court; such contempt, however, is only punishable by fine. *Com. v. Curtis*, 37 Leg. Int. (Pa.) 83.

The disturbance of a meeting of examiners in an election case will be punished as a contempt. *Ex parte Roach*, 8 W. N. C. (Pa.) 440.

If one procures a witness already subpoenaed to absent himself from the trial in disobedience to the subpoena. *Burk v. State*, 47 Md. 528; *McConnell v.*

**4. Instances of what are not Contempts.**—A disobedience of an order of a court which had no jurisdiction—where there is want of authority.<sup>1</sup> Acting against an erroneous order of court.<sup>2</sup> An offence to the court where there is another remedy.<sup>3</sup> The non-ap-

State, 46 Ind. 298; Com. v. Braynard, Thatcher Crim. Cas. (Mass.), 148.

Barrister threatening master. Curtis v. Bligh, 3 Jur. 1152.

Disobedience to orders. Spokes v. Banbury, etc., 35 L. J. Ch. 105; Cardigan (Earl) v. Bywater, 7 C. B. 794; Wellend, *Ex parte*, 11 C. B. 544; Clare v. Blakesley, 1 Scott N. R. 397; Bowker v. Tebbutt, 2 D. & L. 787; Blade v. Gray, 6 Jur. 587; Stokes v. Woodson, 7 T. R. 6; Welch v. Buck, 10 W. R. 714; Harvey v. Hall, 11 L. R. Eq. 31, and 23 L. T. 391; Rogers v. Rogers, 23 L. T. 796; Gumpertz v. Best, 1 T. & C. 619; Cobbett v. Hudson, 13 Q. B. 457; Harvey v. Morris, 23 W. R. 21.

1. Unless the court making an order had jurisdiction of the case the disobedience of the order will not be punished as a contempt. Evans v. Pack, 7 Repr. (Mich.) 70; *In re* Morton, 10 Mich. 208; Bear v. Cohen, 65 N. Car. 511. Meddling with property constructively attached is not a contempt under Rev. Stat. § 725. Steam Stone Cutter Co v. Windsor Mfg. Co., 3 Fed. Repr. 298; 18 Blatchf. C. C. 291.

Property held by a constable having been seized by him without a warrant, on arresting one charged with felony is not in the custody of the law, in such sense as to render replevying it a contempt of court. Brent v. Beck, 5 Cranch C. C. 461.

Where, as in *New York*, the statute makes it a criminal contempt wilfully to disobey "a process or order lawfully issued or made" by a court of record, disobedience in obeying a *subpoena* issued by the district attorney in a criminal case is not within the statute. Sherwin v. People, 100 N. Y. 351.

A witness summoned before a grand jury, not at the request of that body, but on the motion of the attorney-general, is summoned without authority, and if he refuses to testify, is not punishable as for a contempt. State v. Marner, 13 Lea (Tenn.), 52.

One must be personally served with an order before he can be charged with contempt in not obeying it. McCaulay v. Palmer, 40 Hun (N. Y.), 38; Sanford v. Sanford, 40 Hun (N. Y.), 540.

2. Where in pursuance of a decree of

the supreme court of the United States an injunction had been issued forbidding the rebuilding of a bridge, and subsequent to the decree but before the injunction an act of Congress had been passed making lawful such rebuilding, a majority of the court held that the re-erection of the bridge in disobedience of the injunction was not a contempt. State of Pennsylvania v. Wheeling Bridge Co., 18 How. (U. S.) 421.

Where upon an appeal from a decree declaring a patent to be infringed, and an order enjoining such infringement and a judgment of contempt for violation of such injunction, the patent is declared invalid, it follows that there has been no contempt. Worden v. Searls, 121 U. S. 14.

3. The rule for an attachment was discharged, the offence being indictable at common law. *In re* Lucas Hirst, 9 Phila. (Pa.) 216. The orphans' court will not attach for the non-production of an alleged will; the party aggrieved must resort to his statutory remedy. McDonald's Est., 38 Leg. Int. (Pa.) 34.

Attachment for contempt for insufficient answers to interrogatories refused; more specific answers ordered. Grede v. Ins. Co., 15 W. N. C. (Pa.) 438.

A husband will not be punished as for contempt in not paying costs and counsel-fees which, in an action for a separation, he was ordered to pay; an execution affords the appropriate remedy. Jacquin v. Jacquin, 36 Hun (N. Y.), 378.

The Atlantic Mutual Life Ins. Co. was adjudicated bankrupt upon the petition of one of its officers. The adjudication was subsequently set aside and the proceedings vacated. Upon application of the marshal for an order requiring the petitioner to pay the marshal's fees for serving the notices, and that such order be enforced by attachment, *held*, that the court had no power to grant an attachment in such a case; that the marshal had an adequate remedy by action, to which he must resort. *Re* Atlantic Mutual Life Ins. Co., 17 Bankr. Reg. 368.

Under art. 635 *et seq.*, La. Code, the proper remedy where one refuses to deliver up property called for by a writ of possession is by an action for damages or by distraint of other property. Where

pearance of the governor of the commonwealth in his official capacity to a subpoena *duces tecum*.<sup>1</sup> The refusal to appear when such refusal is the assertion of a constitutional right.<sup>2</sup> For further instances see notes.<sup>3</sup>

a writ of sequestration has been issued in a succession cause, a stranger refusing to deliver up movable property alleged by a party to be in his possession cannot lawfully be committed therefor as for contempt of court, and if so committed he will be released on *certiorari* and *habeas corpus*. *Re Hero*, 36 La. Ann. 352. (Bermudez, C. J., and Manning, J., dissenting.)

1. For failure of governor or secretary of commonwealth to appear in official capacity in obedience to a subpoena *duces tecum*. *Gray v. Pentland*, 2 S. & R. (Pa.) 23.

2. Refusal to attend before a grand jury in assertion of a constitutional right. *People v. Kelley*, 24 N. Y. 74.

One exempt from jury-service by reason of his membership in a military company is not guilty of contempt if, having been summoned, he does not attend to make excuses. *Lewis, P. J.*, dissenting. *Miller v. Commonwealth*, 80 Va. 33.

3. H. filed a libel against I. and a yacht to recover possession of the yacht; a decree was rendered dismissing the libel, and authorizing I. to give a bond and receive possession of the vessel from the marshal, and also authorizing H. to give a bond and receive such possession in case I. failed to do so. I. not giving the bond, H. gave it and received the vessel; H. also appealed from the decree, and the return was duly made to the circuit court. I. then took the vessel by force from one of the sureties on the bond, to whom H. had delivered her. H. then applied for an attachment against I. for contempt of court. *Held*, that the giving of the bond substituted the bond for the vessel, and the taking of her by I. after the bond had been given was not a contempt of court. *U. S. v. Towns*, 7 Ben. (U. S.) 444.

A receiver was appointed in New York of the assets of a firm that had property there and in Pennsylvania. The receiver took possession of the New York property, and one of the firm delivered to him the Pennsylvania property, and then confessed judgments under which certain firm creditors seized it. It did not appear that the debts on which the confessions were based were not just debts of

the firm. *Held*, that the partner so acting was not guilty of a contempt of the authority of the court appointing the receiver. *O'Callaghan v. Fraser*, 37 Hun (N. Y.) 483.

It is not a contempt which the city court of New York has power to punish for defendant to put in a verified answer, known to be false, in order to obtain delay to put property out of the way and thus defeat the collection of plaintiff's judgment. *Moffat v. Herman*, 17 Abb. N. Cas. (N. Y.) 107, reversing s. c., 17 Abb. (N. Y.) 62.

An executor because of insolvency failing to pay a debt due from himself to the testator cannot be proceeded against as for a contempt, the statute making him liable, and providing that he may be ordered by decree to pay over. *Rugg v. Jenks*, 4 Demorest (N. Y.), 105.

Presenting an affidavit for a change of venue, on the ground of prejudice in the mind of the judge, is not a contempt of the court to which it is presented. *Ex parte Curtis*, 3 Minn. 274.

For a witness to leave court when permitted by the party summoning him. *State v. Nixon*, Wright (Ohio), 763.

If the order of the court disobeyed were doubtful, or could be construed in any way consistent with innocence of intention on the part of the violator, the court should not punish for contempt. *Weeks v. Smith*, 3 Abb. P. R. 211.

Under statutes of *New York* it is not a contempt for a witness to refuse to answer before a justice of the peace. *Rutherford v. Holmes*, 5 Hun, 317. For cases arising under Inter. Rev. Acts see *U. S. v. Stanwood*, 13 Int. Rev. Rec. 77, and *Bright*, Dig. Fed. Dec. Supp., tit. "Contempt."

Where a judgment is rendered removing an official from office, and another is appointed to the vacancy knowing that a *supersedeas* has issued, the appointee is not guilty of contempt for assuming to perform the duties of the office where the writ has not been lodged in the office of the clerk of the court where the record remains. Until so lodged the writ is inoperative. *Foster v. Kansas*, 112 U. S. 201.

If the judges of the circuit court disagree as to whether there has been an



**5. Proceedings in Contempt.**<sup>1</sup>—From the distinction between direct contempts or contempts in *facie curiæ* and constructive or consequential contempts, arises a difference in the method of procedure thereon: a direct contempt, which is committed in the presence of the court, it will of its own motion notice and punish summarily;<sup>2</sup>

infringement of a patent in disregard of an injunction, there cannot be a judgment of contempt. *California, etc., Co. v. Molitor*, 113 U. S. 609.

A violation of an injunction, induced by the stratagem of the plaintiff, is not ground for an attachment. *Sparkman v. Higgins*, 2 Blatchf. C. C. 29

A probate judge has no power to imprison a person for contempt in refusing to deliver to a receiver money found on proceedings in aid of execution to have been placed in his hands in fraud of creditors. *White v. Gates*, 42 Ohio St. 109.

Advertising for subscriptions to prosecute action, and also for evidence. *Plating Co. v. Farquharson*, 17 Ch. D 49.

An attorney advised his client who was under indictment for assault and battery, if he could not procure a continuance to escape and forfeit his recognizance, which would work a continuance. *Held*, he was not guilty of contempt in giving such advice. *Ingle v. State*, 8 Blackf. (Ind.) 574.

A receiver of a railway was in the habit of making deposits with a bank designated by the court as a bank of deposit in such cases. The officers of the bank wrecked it, being guilty of gross malfeasance in office, and these deposits were lost. *Held*, that the officers were not liable for contempt of court. *Southern Development Co. v. Houston & Texas Central R. Co.*, 27 Fed. Rep. 344. See *Re Western, etc., Ins. Co.*, 38 Ill. 289.

The failure of a prisoner under recognizance to appear at the proper time and place does not constitute a contempt of court. *Ex parte Dill*, 32 Kan. 668; s. c., 49 Am. Repr. 505.

It is not contempt of court to serve a person while attending at the court as a party in a cause, or as a witness, with a summons. The privilege extends to exemption from arrest, and no further. *Blight v. Fisher*, Peter's C. C. 41.

A rule for contempt for failure to pay money into court will be discharged when it is made apparent that there is an absolute inability to make the payment, but this must clearly appear. *Smith v. Smith*, 92 N. Car. 304.

Perjury is not a contempt of court. *Fenner, J., dissenting. State v. Lazarus*, 37 La. Ann. 314.

Sending an insulting or threatening letter to a judge after the matter has been decided, is not contempt. 2 M. & A. 311.

To criticise in a newspaper the ruling of a judge in a case not pending is not contempt. *Contra* if pending. *Ex parte Poulson*, 15 Haz. Pa. Reg. 380.

Where the statute authorizes the court to punish for a criminal contempt a person guilty of a wilful disobedience to its lawful mandates, a juror cannot be so punished who acquires information out of the court-room pending a trial, no injunction or order having been given by the court. *People v. Oyer & Terminer Court*, 36 Hun (N. Y.), 277.

A mere omission to plead where the objection of the bill is to compel an answer is no contempt. *Perrin v. Oliver*, 1 Minn. 202.

1. As to the practice in proceedings for contempt, see *Comm. v. Snowden*, 1 Brews (Pa.) 218; *Pierce v. Post*, 6 Phila. (Pa.) 494.

2. *Comm. v. Davis*, 1 W. N. C. (Pa.) 18; *Comm. v. Curtis*, 37 Leg. Int. (Pa.) 83.

When a judge in the legitimate exercise of his jurisdiction is defiantly disobeyed, he may commit the offender instantly to prison for contempt of court. *Watt v. Ligertwood*, 2 L. R. H. L. 361.

When a contempt is committed in the presence of the court, the court has immediate jurisdiction of the person of the offender, and although he leaves the courtroom and absconds before any action had, yet the court may in his absence sentence him for contempt, and may do it within any reasonable time before the end of the term, and without process issued for his arrest; and in case of such contempt the offender may be instantly apprehended and imprisoned at the discretion of the court. *Middlebrook v. State*, 43 Conn. 257. Where one in open court is ordered to execute an assignment and refuses to do so, no rule to show cause is necessary in proceedings against him for contempt. *Tolman v. Jones*, 14 Ill. 147; *Wilson, In re*, 7 Q. B. 984; 14 L. J. Q. B. 201; 9 Jur. 394; *Crawford, In re*, 13 Q. B. 613.

those not so committed, as well as constructive contempts, must usually be brought before the court by affidavits,<sup>1</sup> and thereupon a rule is made on the offender to appear and answer, or a rule to show cause why an attachment should not issue against him;<sup>2</sup> only in very flagrant instances of contempt the attachment issues in the first instance.<sup>3</sup> In general, personal service of a rule to show cause why an attachment should not issue for contempt is necessary. Upon proof that the party evades service, or of other reasons, the court may make a special order that service be made by leaving at the last place of abode, or the like. But it will not proceed with a rule granted in the ordinary way, which has not been personally served, upon mere proof that such service could not be made.<sup>4</sup>

To award an attachment is at the discretion of the judge, or may be awarded on his own knowledge or a bare suggestion.<sup>5</sup> The

Where the sentence of the court adjudicates the contempt, setting forth the facts, a warrant is not essential; an order of court is sufficient. *Regina v. Wilson*, 51 E. C. L. Rep. 619; *Cobbett. In re*, 7 Q. B. 187. So, too, if a contempt be committed in the presence of the court an order is sufficient. 8 Conn. 379; 2 Daly (N. Y.). 530.

The summary punishment for contempt is not an infringement of the State constitution which guarantees to the citizen a trial by jury. *State v. Doty*, 32 N. J. L. 403; *State v. Matthews*, 37 N. H. 450; *Patrick v. Warner*, 4 Paige (N. Y.), 397; *Neal v. State*, 4 Eng. (Ark.) 259; *Ex parte Grace*, 12 Iowa, 208; *State v. Becht*, 23 Minn. 411; *King v. Railroad*, 7 Biss. C. C. 329.

Where the court cannot exercise a summary jurisdiction over a party who is not one of its own officers, although the matter is pending there. *Sharp v. Hawkes*, 5 D. P. C. 186.

1. When the contempt is not committed in *facie curiæ*, it must be proved by affidavits of persons who witnessed it; a clear case must be shown. *Re Judson*, 3 Blatchf. C. C. 148.

A substantial and general statement in the affidavit is sufficient to give jurisdiction. *Strait v. Williams*, 18 Nev. 43.

To sustain a motion for contempt on account of the violation of an injunction issued to restrain the infringement of a patent, it must appear clearly and indisputably that the infringement continues. *Smith v. Halkyard*, 19 Fed. Rep. 602.

2. In cases of contempt of an inferior court in usurping jurisdiction, "it seems to be rather the more usual way, first to award a writ of prohibition to such court, and afterwards an attachment upon

its proceeding after such prohibition. 2 Hawk. P. C. 217; *Reg. v. Lefroy*, 8 Q. B. 131; 4 Moak, 250; *Exp. Swenarton*, 40 N. Y. 40.

The resignation of his office by an officer of the court does not oust the court of jurisdiction to proceed against him by attachment for contempt for any acts of misconduct committed by him while in office. *The Laurens*, 1 Abb. Adm. 508; *People v. Pearson*, 3 Scam. (Ill.) 189.

3. 4 Blk. 287; 2 Hawk. 222; 1 Tidd's Prac. (3d Am. Ed.) 38; *In re Judson*, 3 Blatchf. C. C. 148; *Comm. v. Dandridge*, 2 Va. Cas. 408; *State v. Mather*, 37 N. H. 450; *Clay's Case*, Pr. Dec. 221; *Crow v. State*, 24 Tex. 12. And even some constructive contempts the court will take notice of and punish of its own motion. *Exp. Steinman et al.*, 9 W. N. C. (Pa.) 145.

4. *Hollingsworth v. Duane*, Wall. C. C. 141.

When the officers of the company (a corporation) conceal themselves to prevent service upon them, *hehl*, that service upon one who has repeatedly appeared as an attorney of the company was sufficient. *Golden Gate Mining Co. v. Yuba Co.* Superior Ct., 65 Cal. 187.

5. *Bowery Bank v. Richards*, 6 Thompson (N. Y.), 59; 3 Hun (N. Y.), 366. In chancery it is discretionary with the court whether or not to issue an attachment for contempt without the service of a preliminary order to show cause. *Rob v. Pepper*, 11 W. N. C. (Pa.) 407.

A judge on the *rota*, sitting in chambers, has no jurisdiction to commit for contempt. *Tryon Election Petition, In re*, *Macartney v. Correy*, 7 Ir. R. C. L. 242.

The practice must always be strict in the



process of attachment is only to bring the party into court;<sup>1</sup> if he is present in court the process is not necessary,<sup>2</sup> otherwise it is indispensable that the accused be arrested or summoned, except in cases of contempt in *facie curiæ*.<sup>3</sup> When brought in either by attachment or the rule to appear, or the rule to show cause, he is committed or bailed that he may answer on oath interrogatories in the nature of a charge or accusation touching the alleged contempt,<sup>4</sup> and he may demand that the prosecutor file interrogatories.

steps before an attachment is awarded, and all the documents upon which it is awarded must be filed with the court. U. S. v. Caldwell, 2 Dall. (U. S.) 333.

On a motion for an attachment for contempt in a civil suit the proceedings are deemed to be on the civil side of the court until the court directs an attachment; and the papers until then must be entitled with the names of the parties. If the rule to show cause is entitled in behalf of the government, as in criminal proceedings, the defendant on objecting is entitled to have it vacated. U. S. v. Wayne, Wall. C. C. 134.

An attachment issued without a previous rule to show cause was irregular, and set aside. Frey's Estate, 4 W. N. C. (Pa.) 415; May's Est., 10 L. Bar. 22.

Rule for an attachment for non-payment of alimony cannot be served in another jurisdiction. Russell v. Russell, 11 W. N. C. (Pa.) 156.

An attachment does not authorize the marshal to detain the party after return day, unless upon an order of commitment by the court. *Ex parte* Burford, 1 Cranch C. C. 456. The proper practice to punish for contempt in violating an injunction is by motion to commit, upon proper notice to the parties. Worcester v. Truman, 1 McLean C. C. 483; Gray v. Railroad, 1 Woolw. C. C. 63; U. S. v. Berry, 24 Fed. Rep. 730; Folger v. Hoogland, 5 Johns. (N. Y.) 235; *Ex parte* Kearney, 7 Wheat. 8; Durant v. Supervisors, 1 Woolw. 372; Winslow v. Narpon, 113 Mass. 411; McDermott v. Clav, 107 Mass. 501; 5 Duer (N. Y.), 629; 1 Dutch. (N. J.) 209; 16 Ill. 534; 1 Ind. 574; 3 Texas 360; Deeds v. Deeds, 1 Greene (Iowa), 395; 18 Miss. 103; 25 Vt. 680; 20 Conn. 185; 22 E. L. & E. 150; Edwards v. Dykeman, 95 Ind. 509; Comyn's Dig. Attach. (A. 1).

Attachment for contempt in failing to pay over counsel fees will not be granted until order to pay has been served. Waltram v. Waltram, 19 W. N. C. (Pa.) 181.

Motion to commit after motion for leave to issue an attachment. Buist v. Bridge, 43 L. T. 432.

1. Bowery Bank v. Richards, 6 Thompson (N. Y.). 59; s. c., 3 Hun (N. Y.). 366.

2. Though an attachment is the usual process to bring a party into court, where he has not made a true return, yet if he is present in court no such process is necessary, but the court may pass an order directing him immediately to purge his supposed contempt and answer interrogatories. U. S. v. Green, 3 Mass. 482.

3. The arrest and imprisonment must be made by some warrant, *mittimus*, or act of record, a copy of which ought to be given to the officer committing the offender, for his security. 6 Dane's Abr. 528, ch. 193; 7 Dane's Abr. 307, 8 ch. 220; art. 5.

Officers representing a corporation defendant are not in court for punishment for contempt unless they personally knew of the order the disobedience of which is alleged. Fanshawe v. Tracy, 4 Biss. C. C. 490.

A person cannot be arrested on attachment from a circuit court in a State outside of the circuit of the court issuing the attachment for contempt in not appearing in that court, pursuant to a motion served on him in the former circuit to answer in a prize cause. The circuit courts have a jurisdiction which is limited in respect to locality in reference to the person or thing against whom the court proceeds, and the just construction of the judicial system of the United States confines the process of the courts within the limits of the circuit or district in which he is required to appear. Moreover there is no provision of law for the removal of a person so arrested to the circuit or district in which he is required to appear. *Ex parte* Graham, 3 Wash. C. C. 456.

Persons guilty of contempt may be arrested at any time thereafter when they come within the jurisdiction of the court. Bowery Bank v. Richards, 6 Thomp. & C. (N. Y.); s. c., 3 Hun (N. Y.). 366. Even though the contempt were committed out the jurisdiction. 1 Burr's Trial. 352.

4. Bowery Bank v. Richards, 6 Thompson (N. Y.), 59 and 3 Hun (N. Y.), 366.

If by his answers on oath to these he purges himself from criminality, he must be discharged.<sup>1</sup> But interrogatories cannot be forced upon him.<sup>2</sup> If he will not ask them, and the contempt is proved by affidavit or other testimony of the prosecutor, the court will give judgment against him.<sup>3</sup> If a mere acknowledgment of the fact of a contempt will give the court all needful information (as in the case of a rescous), the defendant may be admitted to make such acknowledgment and receive his judgment without answering interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then guilty of a high and repeated contempt.<sup>4</sup>

The party is entitled to be heard, but must appear in proper person, and not by attorney;<sup>5</sup> he has no right to be heard by coun-

1. *Hollingsworth v. Duane*, Wall. C. C. 141.

The appellate court, where counsel has been adjudged guilty of contemptuous language, etc., in open court, will not accept counsel's statement of the language used, as opposed to the judge's statement placed on the record, as required by the statute. *Holman v. State*, 105 Ind. 513.

Disobedience of an order is none the less punishable as a contempt because the act complained of was committed in the belief or under advice that the order did not prohibit it. *Atlantic Giant Powder Co. v. 9 Fed. Rep.* 316, 20 Pat. Off. Gaz. 1380, 12 Repr. 517.

If an inability to pay money in compliance with an order of court existing at the time when the order to pay is disobeyed, is relied upon to excuse the disobedience, it must be set up in answer to the application for an attachment. Defendant will not be discharged from a commitment on allegation of such inability. If, however, the defendant has become an insolvent debtor since the commitment and his property has been transferred to a trustee in insolvency, the court should discharge him from the commitment for contempt, because these facts would create a legal inability to comply with the order to pay. *Wartman v. Wartman*, Taney C. C. 362.

In a proceeding for contempt against a judgment debtor for failing to comply with the judgment, a satisfaction by the plaintiff and an assignee of the judgment on file and of record, is a sufficient answer to the charge of contempt made by one not a party to the suit, but who claims under another assignment of the judgment, the alleged priority of which is disputed. *Ex parte Tibble*, 67 Cal. 261.

An order of the court is necessary for the discharge, under the Debtors' Act,

1869, s. 4, of persons who have been imprisoned twelve months for contempt of court for not paying money into court, which they had been ordered to pay. *Thompson, In re, Nalty v. Aylett*, 43 L. J. Ch. 721.

One who by marrying again in another State, in defiance of a decree of divorce, has rendered himself unable to pay the alimony ordered, is entitled to no consideration when proceeded against for contempt, and his inability to pay constitutes no excuse. *Ryer v. Ryer*, 33 Hun (N. Y.), 116.

Upon a rule issued against an attorney for contempt of court he cannot be punished for general misbehavior in his office of attorney. He cannot be called upon to answer an offence specified, and when the answer comes in without any further notice or opportunity of defence or explanation, be punished for another and distinct offence. *Ex parte Bradley*, 7 Wall. (U. S.) 364.

2. *Hollingsworth v. Duane*, Wall. C. C. 141.

3. *Hollingsworth v. Duane*, Wall. C. C. 141.

Appeal lies from refusal to commit. *Ashworth v. Outram*, 5 Ch. D. 943; *Jarmain v. Chatterton*, 20 Ch. Div. 493.

4. *U. S. v. Dodge*, 2 Gall. C. C. 313.

5. When a contempt is committed out of court, final judgment thereon cannot be rendered without an opportunity for a hearing. *Ex parte Kilgore*, 3 Texas Ct. App. 247. See *McConnell v. State*, 46 Md. 298; *Whittem v. State*, 36 Ind. 196; *Ex parte Wiley*, 36 Ind. 528; *Pollard, In re*, 2 L. R. P. C. 106.

In matters of favor equity may refuse a hearing to one in contempt. *Pickett v. Ferguson*, 45 Ark. 177; *Pollard, In re*, 2 L. R. P. C. 106.

6. *Vin. Abr. Contempt F. 7; People*

sel.<sup>1</sup> nor has he any right to a trial by jury.<sup>2</sup> When in a court of equity he has answered the interrogatories on oath, his answers may be contradicted and disproved by affidavits of the adverse party; whereas in courts of law if he clears himself by his answers the complaint is totally dismissed.<sup>3</sup>

The offence must be judicially established before final judgment can be rendered.<sup>4</sup> A party in contempt may protect himself and make any motion designed to show that an order adjudging him in contempt was erroneous.<sup>5</sup>

Where a party is ordered to pay a sum of money and committed by way of enforcing such order, the commitment is in the nature of a *capias ad satisfaciendum*, and if unable to pay, he may be discharged as insolvent; but he cannot be discharged on this ground where his contempt is wilful; he is then in the position of one fined on conviction of a criminal offence.<sup>6</sup> When a party is

*v. Wilson*, 64 Ill. 195; *Vertner v. Martin*, 10 Sm. & M. (Miss.) 103.

1. And it has been held in Alabama that he has no constitutional or statutory right to be heard by counsel in the matter of contempt. *Ex parte Hamilton*, 51 Ala. 66.

2. Nor under the constitution of the United States has he any right to a trial by a jury. *Hollingsworth v. Duane*, Wall. C. C. 141. See also *U. S. v. Oswald*, 1 Dal. C. C. 319.

3. 4 Blk. 288. See *Thomas' Lessee v. Cummings*, 1 Yeates (Pa.), 40; *Whittem v. State*, 36 Ind. 196; *Buck v. Buck*, 60 Ill. 105; *Stuart v. People*, 3 Scam. (Ill.) 395; *U. S. v. Dodge*, 2 Gall. C. C. 313; *Cartwright's Case*, 14 Mass. 230. Process of contempt in chancery has in England been regulated by a number of modern statutes. 11 Geo. IV. and 1 Wm. IV. 4 c. 36; 2 and 3 Wm. IV. c. 58; 23 and 24 Wm. IV. c. 149.

4. *Anderson v. Knox Co.*, 70 Ill. 65.

5. *Brinkley v. Brinkley*, 47 N. Y. 40; *Halden v. Eckford*, L. R. 7 Eq. 425.

A commissioner to make sale of realty, ordered (to be) imprisoned for alleged contempt in failing to pay over money under what was a void decree, is entitled to have the order reviewed. *Ruhl v. Ruhl*, 24 W. Va. 279. See *Garston v. Garston*, 4 S. & T. 73; *Cavendish v. Cavendish et al.*, 15 W. R. 182.

6. *Matter of Watson*, 3 Lansing (N. Y.), 408; *Ex parte Hilles*, 8 W. N. C. (Pa.) 419; *Stevenson's Est.*, 7 W. N. C. (Pa.) 65; *Wilson v. State*, 57 Ind. 71; *United States v. Wayne*, Wall. Sr. 134; *People v. Craft*, 7 Paige (N. Y.), 325; *Whittem v. State*, 36 Ind. 196; *Crook v. People*, 16

Ill. 534; *Pitt v. Davison*, 37 N. Y. 235; *Ex parte Kearney*, 7 Wheat. (U. S.) 38; *Case of Crosby*, 3 Wilson 188; *Clark v. People*, 1 Breeze (S. Car.), 266. See *Stuart v. People*, 4 Ill. 395; *People v. Turner*, 1 Cal. 152; *Ex parte Adams*, 25 Miss. 883; *Gorham v. Luckett*, 6 B. Mon. (Ky.) 638; *Watson v. Williams*, 36 Miss. 331; *In re Moore*, 63 N. Car. 397; *State v. Tipton*, 1 Blackf. (Ind.); *Matter of Stephens*, 1 Ga. 584.

Many acts are both contempts of court and indictable crimes; others, while analogous to contempts in their nature and tendencies, are indictable, but no more. *Reg. v. Gray*, 10 Cox C. C. 184; *State v. Early*, 3 Harring. (Del.) 562. The indictment and the proceeding for contempt are entirely distinct, and neither will be a bar to the other. 1 Bish. Cr. L. § 264, § 1067; *State v. Woodfin*, 5 Ired. (Ky.) 199; *State v. Williams*, 2 Speers (S. Car.), 26; *Rex v. Pierson*, Andr. 310. See *Vertner v. Martin*, 10 Sm. & M. (Miss.) 103; *Foster v. Com.*, 8 W. & S. (Pa.) 77.

*Ex parte* contempt of court being a criminal offence, no person can be punished for such unless the specific offence charged against him is distinctly stated, and an opportunity given him of answering. *Pollard, In re*, 2 L. R. P. C. 106. *Hrounsall Cowp.* 829; *In re King*, 8 Q. B. 129; *In re Wright*, 1 Exch. 653; *Reg. v. Martin*, 5 Cox C. C. 356.

**Indictment.**—Words "in contempt," etc., necessary in. 1 Biss C. P. 647. Attachments for contempt generally partake of the nature of criminal rather than civil arrests. An arrest for contempt made on Sunday not contrary to 29 Car. II. ch. 7, § 6 prohibiting arrest on Sunday,

committed for contempt the adjudication of the court is conviction, and the commitment in consequence thereof is execution.<sup>1</sup>

**6. The Penalty for Contempt** is usually fine or imprisonment, or both, at the discretion of the court.<sup>2</sup> The commitment, like the contempts themselves, may be properly distributed into two

save for treason, felony, or breach of the peace. A contempt is in the nature of breach of the peace. *Ex parte* Whitchurch, 1 Atk. 55. A statute prohibiting the arrest of women on any mesne process or process of execution does not apply to attachments for contempt. *Clark v. Grant*, 38 N. J. L. 257.

Contempts are of two kinds—civil and criminal. A criminal contempt is of the nature of a breach of the peace, and hence a member of Parliament is not privileged from a commitment for a criminal contempt. *Mr. Long Wellesley's Case*, 2 Russ & My. 667; *Catmus v. Knatchbull*, 7 T. R. 448; *Walker v. Lord Geo. Grosvenor*, 7 T. R. 171.

A witness committed for contempt for disorderly behavior in court is privileged while returning at the expiration of his imprisonment. *R. v. Wigley*, 7 Car. & P. 4.

1. *Ex parte* Kearney, 7 Wheat. (U. S.) 38.

In a commitment for contempt by a superior court it is not necessary to set out on the warrant the cause of commitment; *contra* as to an inferior court, "to which credit is not to be given for conforming itself to the appointed limits of its jurisdiction," and whose proceedings must therefore be set forth to show that they are regular and authorized. *Ex parte* Fernandez, 10 C. B. (N. S.) 3, 40. See also *Doyle v. Falconer*, L. R. 1 P. C. 328; 2 Hawk. P. C. 168; *Howard v. Gossett*, 10 Ad. & E. (N. S.) 359; *Cams Wilson's Case*, 7 A. & E. (N. S.) 1018.

A justice of the peace cannot commit for a contempt without a warrant in writing. *Mayhew v. Locke*, 2 Marsh. 37.

In proceedings in equity between parties to the suit for contempt in not obeying an order in the cause, the fine for such contempt can be imposed by an order made in the original suit. *Fisher v. Hayes*, 6 Fed. Rep. 63.

An order adjudging defendant to be in contempt for non-payment of alimony directed by final decree to be paid, must adjudge that the failure of defendant to pay such alimony has defeated, impaired, impeded, or prejudiced the rights or remedies of plaintiff. *Mendel v. Mendel*, 25 N. Y. W. Dig. 314.

A person committed for contempt cannot be bailed. 20 Am. L. Reg. 44.

The process of attachment for contempt seems to be as ancient as the laws themselves, and was confirmed as a part of the laws of the land by Magna Charta. 4 Blk. Comm. 286.

The acts of 11 Geo. IV. and 1 Wm. IV. c. 36. and 23 and 24 Vict. 149. make provisions for the relief of prisoners in contempt of the court of chancery; and as to the ecclesiastical courts, see 2 and 3 Wm. IV. c. 93. and 3 and 4 Vict. c. 93. and 6 & 7 Vict. c. 38.

2. *Cartwright's Case*, 114 Mass. 238; 7 Cranch, 32 & 34; *U. S. v. Mann*, 2 Brock. 9; *In re Pitman*, 1 Curtis C. C. 186; *Yates v. Lansing*, 9 Johns. (N. Y.) 395; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Hills v. Parker*, 111 Mass. 508. "And sometimes by corporeal or infamous punishment." 4 Blk. Com. 287. And see *People v. Bennett*, 4 Paige (N. Y.), 282.

An order adjudging contempt, and directing proceedings to ascertain what amount should be imposed as a fine, does not prevent the court from subsequently fixing the amount and directing commitment until it is paid. *Fisher v. Hayes*, 6 Fed. Rep. 63; 19 Blatchf. C. C. 13; 20 Pat. Off. Gaz. 601. If the punishment imposed exceeds that permitted in the case of a criminal contempt, it must be presumed on *habeas corpus* that the court proceeded under the law relating to civil contempts; and if the order fails to show the facts required by the statute, there must be a discharge. *Ex parte* Swenarton, 40 Hun (N. Y.), 41. An order which in effect is merely a final judgment for the payment of money, whether the proceeding in which it is made is of equitable or legal cognizance, ought not to be enforced by imprisonment, upon the theory of treating non-payment as a contempt. *Re Hellmar*, 17 Bankr. Reg. 262; *Re Atlantic Mut. L. Ins. Co.*, 17 Bankr. Reg. 368.

While the court may order one into imprisonment until he shall have returned certain property, it cannot fine and imprison him by way of punishment, nor imprison him until he shall have paid the costs of the contempt proceedings, as this would be imprisonment for debt, which the Missouri Constitution prohibits. *Ex parte* Crenshaw, 80 Mo. 447.

classes: either they are the punishment for an act of misconduct, or it is their object to enforce the performance of a duty. The confinement in the one case is for a fixed time, supposed to be commensurate with the offending; in the other it is without prescribed limitation, and is determined by the willingness of the party to submit himself to the law.<sup>1</sup> The period of the imprisonment may reach beyond the term at which the contempt was committed.<sup>2</sup> Imprisonment for non-payment of a fine imposed for contempt is not a punishment, but an incident to the power to fine.<sup>3</sup>

The imposition of a fine for contempt is a judgment in a criminal case, which the court has no power to vary, after the expiration of the term at which the fine was imposed.<sup>4</sup> A contempt of a court of the United States is an offence against the United States, and after the offender has been adjudicated in contempt and committed in punishment thereof, or until payment of a fine imposed therefor, his case is subject to the pardoning power of the president.<sup>5</sup>

The punishment for certain contempts, such as the disobedience of an order of court for the payment of costs, the non-performance of the awards of arbitrators, or, in short, the refusal of a party to do something which he is ordered to do for the benefit or advan-

1. *United States v. Williamson*, 4 Am. L. Reg. 17; *Williamson's Case*, 26 Pa. St. 23, 24; *Commonwealth v. Small*, 26 Pa. St.

For any direct and positive contempt a defendant may be committed during the pleasure of the court, for disobedience of an order, till he obey. *Tom's Appeal*, 50 Pa. St. 285.

A witness refusing to answer may be committed till he answer. *Lott v. Burrell*, 2 Rep. Con. Ct. 167; *People v. Phelps*, 4 Thompson (N. Y.), 467. A witness was committed for contempt in refusing to answer questions, to remain committed until she should make answer to such legal and proper interrogatories "as shall be propounded to her," etc. *Held*, that the commitment was invalid; that it should have been limited to the time when she should be willing to answer the questions actually propounded. *People v. Davidson*, 35 Hun (N. Y.), 471.

When the only statute in relation to the examination of insolvent debtors provides that if the debtor refuses to appear he may be committed for not more than five days, and that any witness refusing to appear may be punished as for a contempt a witness may not be committed for more than five days. *Cole v. Egan*, 52 Conn. 219.

Commitment till further order of court is good. *Yates' Case*, 4 Johns. (N. Y.) 317; *Williamson's Case*, 26 Pa. St. 24; *Tom's*

*App.* 30 Pa. St. 285. *Contra*, *In re Alexander*, 2 A. L. Reg. 44; *Matter of Hammel*, 9 R. I. 248.

Warrant of commitment "to remain until further order of this court" is good. *Green v. Elgie*, 5 Q. B. 99. See *Republic of Costa Rica, v. Erlanger*, 46 L. J. Ch. 375.

2. *Ex parte Maulsby*, 13 Md. 642.

3. Imprisonment for non-payment of a fine imposed for contempt is not a punishment, but an incident to the power to fine, and properly authorized. *Ex parte Sweeney*, 18 Nev. 74. When a statute authorizes or prescribes the infliction of a fine as a punishment for a contempt of court, it is lawful for the court inflicting it to direct that the party stand committed until the fine is paid, although there is no specific affirmative grant of power in the statute to make such direction. *U. S. v. Conway*, 6 Fed. Rep. 49.

4. *Fisher v. Hayes*, 6 Fed. Rep. 63. See *Matter of Rodes*, 65 N. Car. 518; *Morris v. Whitehead*, 65 N. Car. 637.

5. *Ex parte Kearney*, 7 Wheat. (U. S.) 38. As the pardoning power vested in the president is exclusive, it follows that the court cannot remit the penalty or discharge the offender from imprisonment upon proof of his inability to pay the fine. *Re Mullee*, 7 Blatchf. C. C. 23; 1 Am. L. T. U. S. Cts. 123; 8 Int. Rev. Rec. 23.

tage of the opposite party, is rather to be looked upon as a civil execution for the benefit of the injured party,<sup>1</sup> though carried on in the shape of a criminal process for a contempt of the court, for which reason, being civil, is not affected by a general act of pardon.<sup>2</sup> The order in such case is not punitive, but coercive.<sup>3</sup>

7. **Purging.**—Although a contempt have been committed, the defendant has the privilege of purging it if he can, on interrogatories put to him.<sup>4</sup> If he declares that nothing improper was intended and that he acted in good faith, the declaration is in many instances sufficient.<sup>5</sup> Where he relies on an excuse he must

1. *Buck v. Buck*, 60 Ill. 105; *Phillips v. Welch*, 11 Nev. 187; 4 Blk. 285; *Howard v. Durand*, 36 Ga. 346; *Tom's Appeal*, 50 Pa. St. 285; *Robins v. Gorman*, 25 N. Y. 588; *Androscoggin v. Androscoggin R. Co.*, 49 Me. 392.

Where the statutes of Michigan order the payment to an injured party, the imposition of a criminal fine in addition is unlawful. *Haines v. Haines*, 35 Mich. 138.

Where an attorney is required by order of court to pay the costs to which his client was unjustly subjected, growing out of the resistance of the attorney to the substitution of a new one, the payment of such costs may be enforced by an attachment for contempt, notwithstanding the abolition of imprisonment for debt. *Bogart v. Electrical Supply Co.*, 23 Blatchf. C. Ct. 552; s. c., 27 Fed. Rep. 722.

A witness who refuses to answer questions propounded on his examination in a special proceeding, while guilty of a contempt, is not guilty of a criminal contempt. The fine imposed should be limited to the amount necessary to indemnify. *King v. Flynn*, 37 Hun (N. Y.), 329. The court cannot punish a judgment debtor for contempt in failing to obey an order in supplementary proceedings requiring him to appear and submit to an examination by fining him the full amount of the judgment as indemnity to the judgment creditor, unless it is made to appear that the said creditor has sustained loss or injury to that amount by the failure of the debtor to obey such order. *Fall Brook Coal Co. v. Hecksher*, 25 N. Y. W. Dig. 351.

The enforcement of civil rights and remedies by means of proceedings for contempt is forbidden by the statutes of *Arkansas*.

In *New York* the power to enforce a civil remedy by proceedings as for contempts exists under 2 Rev. St. 534, 538. *People v. Compton*, 1 Duer (N. Y.), 512; *Ludlow v. Knox*, Abb. App. Dec. 326.

2. *Buck v. Buck*, 60 Ill. 105; *Phillips v. Welch*, 11 Nev. 187; 4 Blk. 285.

3. *Howard v. Durand*, 36 Ga. 346; *Tome's App.*, 50 Pa. St. 285; *Robins v. Gorman*, 25 N. Y. 588. *Androscoggin, etc., R. Co. v. Androscoggin, etc., R. Co.* 49 Me. 392.

Where the civil rights are concerned, a *mandamus* may issue from the supreme court to an inferior one to punish for contempt. *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49.

4. *Columbia W. P. v. Columbia*, 4 Rich. (N. H.) 388; *People v. Compton*, 1 Duer (N. Y.), 512; *State v. Coulter*, *Wright* (Ohio), 421; *State v. Goff*, *Wright* (Ohio), 78; *Coulson v. Graham*, 2 Chil. 57; *Rex v. Wheeler*, 1 W. Bl. 311; *Rex v. Morley*, 4 A. & E. 849; *Matter of Pitman*, 1 Curtis C. C. 186; *Crow v. State*, 24 Tex. 12; *State v. Earl*, 41 Ind. 464; *Burk v. State*, 47 Ind. 528.

Where the proceeding is discontinued, the person committed for contempt in not answering as a witness should be discharged, as he can no longer purge his contempt. *In re Hall*, 10 Mich. 210.

The Iowa Code, §§ 3490, 3496, provides that one charged with contempt, whether in or out of the presence of the court, may make a written explanation. *Held*, that unless opportunity is given him to do so, a fine cannot lawfully be imposed even for insulting conduct in the court's presence. *Russell v. French*, 67 Iowa, 102.

5. *People v. Few*, 2 Johns. (N. Y.) 290; *St. Clair v. Piatt*, *Wright* (Ohio), 532. And see *State v. Trumbull*, 1 Southard (N. J.), 139; *Ex parte Beebees*, 2 Wall. Jr. C. C. 127; *Ex parte Woodruff*, 4 Pike (Ark.), 630; *Clare v. Blakesly*, 1 Scott N. R. 393; *Hollingsworth v. Duane*, Wall. C. C. 141; *Spink v. Francis*, 19 Fed. Rep. 678.

On an attachment for contempt the court will not hear collateral evidence, but if the respondent by oath discharge himself of the contempt, no proceedings can be had against him. If from collateral evidence

appear in court in his own person;<sup>1</sup> he is made his own witness in his own cause. If he be innocent he will have no trouble in disclaiming the contempt and avowing his innocence. The question is the *quo animo*. His purpose is known to himself, and he is permitted to purge himself by his own avowal;<sup>2</sup> usually his answer must be taken as true, and cannot be traversed; the answer, however, must be credible and consistent with itself, or the court may draw its own inferences from the facts stated.<sup>3</sup> In courts of chancery, at least, his oath is not conclusive in his favor, but may be contradicted by other evidence.<sup>4</sup> And where private right is to be enforced the party interested cannot be defeated in this way.<sup>5</sup>

perjury appears, he will be recognized to answer. *U. S. v. Dodge*, 2 Gall. C. C. 313.

Where an injunction has been violated and no regret for the wrong done or offer to repair it was made, a mere disavowal of an intentional wrong will not purge it. *People v. Freer*, 1 Caines (N. Y.), 519; *Andrews v. Knox Co.*, 70 Ill. 65; *Watson v. Citizens' Savings Bank*, 5 S. Car. 159.

Where a police officer under instructions and order of one of the police commissioners, whom he supposed it was his duty to obey, and meaning no disobedience to the court, committed what would, under ordinary circumstances, have been a contempt, he was allowed to purge. *Matter of Felton*, 16 How. Pr. (N. Y.) 303.

Where persons have been guilty of a technical contempt (herein violating an injunction), but declare on oath that they were not aware of the violation, and submit to the direction of the court, they will be allowed to purge the contempt by undoing or reversing their acts, if doing so is practicable. *Vose v. Reed*, 1 Woods C. C. 647.

A sheriff was attached for contempt in not paying over money or neglecting to collect it on execution. Though the contempt would generally be purged only when the injured party was put in as good a position as if the sheriff had done his duty, the court held that he might be discharged on purging himself of contempt and showing inability to pay the money. *Ex parte Thurmond*, 1 Bailey (S. Car.), 605; *Ex parte Hilles*, 8 W. N. C. (Pa.) 419.

A stranger to a suit cannot purge himself of contempt in reference to order or process made or issued therein, by showing that the court had no jurisdiction, where the court is one of general jurisdiction and acts within it. *Ex parte Stickney*, 40 Ala. 160, 169.

Contempt in not performing decree of court may be purged by showing the party's

inability to do so. *O'Callaghan v. O'Callaghan*, 69 Ill. 554.

Words apparently scandalous or offensive, but susceptible of a different construction, may be explained by the speaker or writer, and he be relieved of the charges of contempt on sworn disavowal of intent to commit it. But where the words are necessarily offensive and insulting, such disavowal may excuse but cannot justify. *Re Woolley*, 11 Bush (Ky.), 95, 110, citing *People v. Freer*, 1 Caines (N. Y.), 484. See *Gould v. Twine*, 22 W. R. 398; *Britnell v. Walton*, 18 W. R. 446; *Felkin v. Herbert*, 10 Jur. N. S. 62.

1. *People v. Wilson*, 64 Ill. 195; *Vertner v. Martin*, 10 Sm. & M. (Miss.) 103.

2. *Re Woolley*, 11 Bush (Ky.), 95, citing *Mr. Wirts'* argument in the case of Judge Peck before the high court of impeachment.

An unwilling compliance with a decree of a court of equity after service of a writ of attachment for refusing to obey will not purge the contempt; where an injunction is disobeyed, the motive or intent in so doing does not as a rule alter the responsibility. *Snowman v. Harford*, 57 Me. 397; *Reg. v. Weston*, 8 Jur. 1122; *Reg. v. Hemsworthy*, 3 C. B. 745.

3. *Re May*, Fed. Rep. 737.

A disclaimer of "intentional disrespect or design to embarrass the administration of justice" is no excuse where the contrary would appear on a fair interpretation of the language used. *People v. Wilson*, 64 Ill. 195.

4. *Emery v. Bowen*, C. J. 5 Ch. (N. S.) 349.

5. *People v. Freer*, 1 Caines (N. Y.), 485, 518; *U. S. v. Coolidge*, 2 Gall. C. C. 364; *Buffum's Case*, 13 N. H. 14; *Mungeam v. Wheatly*, 1 Eng. L. & E. 516, 15 Jur. 110; *People v. Compton*, 1 Duer (N. Y.), 512; *State v. Simmons*, 1 Pike (Ark.), 265. See *McClure v. Gulick*, 2 Harrison (Md.), 340; *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49.

One who is ordered to pay over money

8. The Power of the Court to Punish for Contempt is exercised for two purposes: 1. To indicate the dignity of the court for disrespect shown to it or its orders.<sup>1</sup> 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform, and which he refuses to obey.<sup>2</sup>

All superior courts or courts of record<sup>3</sup> possess this power, not

to the administrator belonging to the estate cannot purge himself of contempt by showing that he has paid it away illegally, or that he has no money. *Wise v. Chaney*, 67 Iowa, 73.

As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done. *Wartman v. Wartman*, Taney C. C. 362; *Gould v. Twine*, 22 W. R. 398; *Britnell v. Walton*, 18 W. R. 446; *Reg. v. Weston*, 8 Jur. 1122; *Reg. v. Hemsworthy*, 3 C. B. 745; *Rex v. Plunket*, 3 Burr. 1329; *Felkin v. Herbert*, 10 Jur. N. S. 62.

1. Every court has a right to protect itself from any violation of its decency and propriety. *Brown v. Brown*, 4 Ind. 627; *State v. Tipton*, 1 Blackf. (Ind.) 166; *Whittem v. State*, 36 Ind. 196; *Ex parte Smith*, 28 Ind. 47; *Kernodle v. Cason*, 25 Ind. 362; *Redman v. State*, 28 Ind. 205.

2. Although there is no act the performance of which by the defendant is important to be enforced in the interest of the other party, yet a fine may be imposed to indicate the dignity of the court. *Re Chiles*, 22 Wall. (U. S.) 157; *United States v. Jacobi*, 4 Am. L. T. 156; 14 Int. Rev. Rec. 45.

Every court has an inherent power to punish for contempt to its rules and orders. *State v. Johnson*, 1 Brev. (S. Car.) 155; *Crossart v. State*, 14 Ark. 541; *Neel v. State*, 4 Eng. (Ark.) 263; *Ex parte Robinson*, 19 Wall. (U. S.) 505; *United States v. Hudson*, 7 Cranch (U. S.), 32; *Ex parte Smith*, 28 Ind. 47; *Brown v. Brown*, 4 Ind. 627; *State v. Earl*, 41 Ind. 464; *In re Moore*, 63 N. Car. 397; *United States v. Dodge*, 2 Gall. C. C. 313; *Ex parte Kearny*, 7 Gall. C. C. 38; *Yeates v. Lansing*, 9 Gall. C. C. 395; s. c., 6 Gall. C. C. 357; *Clark v. People*, 1 Ill. 340; *Taylor v. Moffett*, 2 Blackf. (Ind.) 305; *Reg. v. Wilkinson*, 41 Up. Can. Q. B. 44; *Ex parte Jones*, 13 Ves. 237; *Felkin v. Herbert*, 10 Jur. N. S. 62; *Tichborne v. Mostyn*, L. R. 7 Eq. 55, n.; *Reg. v. Castro*, L. R. 9 Q. B. 219.

And for constructive contempts. *Respublica v. Passmore*, 3 Yeates (Pa.), 441; *United States v. Oswald*, 1 Dall. C. C. 319; *Tenney's Case*, 23 N. H. 162; *Hol-*

*lingsworth v. Duane*, Wall. C. C. 141; *Knott v. People*, 83 Ill. 532; s. c., 2 Am. Cr. R. 184.

Upon the refusal of a witness to appear before an examiner, the court will issue an attachment. *Bowen v. Thornton*, 9 W. N. C. (Pa.) 575.

An auditor has power to issue an attachment against a witness failing to appear before him after due service of a subpoena. *In re Hulburt*, 8 W. N. C. (Pa.) 254.

Where a commissioner of a United States court has power to commit a citizen for an alleged contempt. *Ex parte Doll*, 7 Phila. (Pa.) 595.

Where the court has jurisdiction of the person it may, by the ordinary process of injunction and attachment for contempt, compel a defendant to desist from commencing an action at law, either in that or any foreign jurisdiction. *Mead v. Merritt*, 2 Paige (N. Y.), 402.

3. The district court is a court of record, and not an inferior court; although a subordinate, it cannot be considered an inferior court in a judicial sense. *McLaughlin v. District Court*, 5 W. & S. (Pa.) 272.

A witness who refuses to be sworn in a court of record is guilty of contempt, punishable by fine or imprisonment, and the same power is vested in an alderman or commissioner appointed to take depositions under a rule of court. *Comm. v. Roberts*, 2 Clark (Pa.) 34.

The court of oyer and terminer and of general jail delivery is a superior court, and consequently in a warrant of commitment by the presiding judge for contempt the adjudication of contempt may be general, and the particular circumstances need not be set out. *M'Alleece, In re*, 7 Ir. R. C. L. 146; *Rex v. Clement*, 4 B. & A. 218; *Fernandez, In re*, 6 H. & N. 717, 4 L. T. 296.

A quarter sessions has the power of imposing a fine upon a barrister who, in the performance of his duty, is guilty of a contempt of court. *Pater, In re*, 5 B. & S. 299.

County courts have a limited power to punish for contempt. *Reg. v. Lefroy*, 8 L. R. Q. B. 134; *Martin v. Bannister*, 4 Q. B. D. 491.



subject to the supervision or control of any other court, unlimited at common law, save by the definition of the term "contempt of court,"<sup>1</sup> the presumption *omnia esse rite acta* always prevailing concerning their proceedings, and that they have jurisdiction.<sup>2</sup> Legislative acts have tended to restrict the powers of the courts, usually, as in the United States courts, to cases of misbehavior of officers and parties, and the misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice.<sup>3</sup>

The exercise of the power lies solely in the discretion of the judge before whom the contempt is committed, and will not be examined or re-examined by any other court,<sup>4</sup> except when the

1. *Rex v. Almon*, Wilmot's Notes, 243; *State v. Matthews*, 37 N. H. 400; *Crosby's Case*, 3 Wilson, 188; *Ex parte Batdorff*, 13 W. N. C. (Pa.) 417; *Ex parte Robinson*, 19 Wall. (U. S.) 505.

2. It is not requisite that the cause of commitment be set forth in the warrant: it is sufficient that the commitment be for contempt, for, as regards superior courts, the presumption *omnia esse rite acta* always prevails concerning their proceedings, and that they have jurisdiction. *Regina v. Paty*, 2 Ld. Raym. 1105; *Brass Crosby's Case*, 3 Wilson, 188; *Ex parte Kearney*, 7 Wheat. (U. S.) 41; *Ex parte Nugent*, 1 Am. L. J. (N. S.) 107, 121; *Wilson's Case*, 7 Ad. & E. (N. S.) 984; *Yates's Case*, 4 Johns. (N. Y.) 368; s. c., 9 Johns. (N. Y.) 395; *State v. Tipton*, 1 Blackf. (Ind.) 166; *Hunter v. State*, 6 Ind. 423; *Gist v. Bowman*, 2 Bay (S. Car.), 182; *Ex parte Fernandez*, 10 C. B. (N. S.) 3; *Jordan v. State*, 14 Tex. 436; *Ex parte Martin*, 5 Yerg. (Tenn.) 456.

Pending an appeal for an order committing defendant in a divorce suit for contempt in not paying alimony, the lower court has jurisdiction to make a similar order for not paying alimony accruing after the taking of the appeal. *Ross v. Griffin*, 53 Mich. 5.

But the jurisdiction and power of the court do not depend upon the question whether the offence might or might not be punished by indictment. *Rex v. Ossulston*, 2 Stra. 1107; *Rex v. Pierston*, Andr. 310.

3. "The said courts" (the courts of the United States) "shall have power to impose and administer all necessary oaths, and to punish by fine and imprisonment, at the discretion of the court, contempts of their authority, provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the

misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." Rev. Stat. § 725. See *Oswald's Case*, 4 Lloyd's Debates, 141 *et seq.* (See Act 16th June, 1836, Penna. Legislature, P. L. 793.)

4. Where a cause has been removed from a State to a Federal court pending an application to punish one of the parties for contempt in disobeying an order of the State court, the Federal court has no jurisdiction to hear and determine such application. *Kirk v. Milwaukee Dust Collector Mfg. Co.*, 26 Fed. Rep. 501.

A proceeding in contempt for interfering with a receiver appointed by a United States circuit court is criminal in character, and cannot be heard under the law in a division of a district other than the one in which the acts amounting to a contempt were committed. *United States v. Berry*, 24 Fed. Rep. 780.

A contempt of court is a substantive criminal offence, and the power to punish it belongs to the court in which it is committed. *Passmore Williamson's Case*, 26 Pa. St. g; *State v. McKinnon et al.*, 8 Oregon, 487.

The district court of the United States, like all other courts, has authority to punish a party for contempt in disobeying its process, and its judgment upon an offender of that class is conclusive, and cannot be re-examined in a State court. *Williamson's Case*, 26 Pa. St. g.

"I apprehend that there is not an instance in the English law of a judge in vacation undertaking to decide upon the legality of a commitment in execution by the judgment of any court of record, and much less of a court of the highest degree." *Ex parte Kearney*, 4 Johns. (N. Y.) 317, 357, 358; *Lord Mayor's Case*, 3 Wilson, 188.

proceedings are so grossly defective as to be void.<sup>1</sup> The only other remedy, according to the English and more generally received American doctrine, for any error, injustice, abuse of discretion, oppressive or corrupt conduct on the part of the judge of a court of the superior order, is by resort to an impeachment before the legislature.<sup>2</sup>

*Inferior Courts.*—Justices of the peace acting judicially, although their courts are inferior ones and not of record, have in England and some of the States power to punish summarily, by imprisonment, for contempts committed before them;<sup>3</sup> while in other of the States they have not such power,<sup>4</sup> but may bind the offender over, and compel him to find sureties for his good behavior.<sup>5</sup>

1. *Cossart v. State*, 14 Ark. 540; *Ex parte Rowe*, 7 Cal. 181; *Ex parte Smith*, 53 Cal. 204; *Jordan v. State*, 14 Texas, 436; *Patton v. Harris*, 15 B. Mon. (Ky.) 607; *Middlebrook v. State*, 43 Conn. 257; *Tyler et al. v. Hamersley*, 44 Conn. 393; *City of London*, 8 Rep. 383; *Rex v. Dean of Dublin*, 1 Stra. 536.

2. Case of Judge Peck, of the United States District Court, before the House of Representatives, in 1831, 6 Am. Law. Reg. O. S. 636, which led to the act of March 2, 1831, limiting the power of the courts over contempts.

3. *Rex v. Revel*, 1 Stra. 420; *Reg. v. Rogers*, 7 Mod. 28; 1 Gab. Cr. Law, 287; 1 Chit. Cr. L. 88, 112, 631; *Rex v. Cotton*, W. Kel. 133; *Harwood's Case*, 1 Mod. 79; *Lining v. Benham*, 2 Bay (S. Car.), 1; *State v. Johnson*, 2 Bay (S. Car.), 385; 1 Brev. (S. Car.) 155; *Clarke v. People*, 1 Breesse (S. Car.), 266; *State v. Copp*, 15 N. H. 212; 1 Chit. C. L. Am. Ed. 88, n.; *State v. Applegate*, 2 McCord (S. Car.), 110; *Hollingsworth v. Duane*, Wall. C. C. 100; *In re Cooper*, 32 Vt. 253; *Rex v. Clement*, 4 B. & Ald. 218, 229.

Justices of the peace, acting judicially, have the same power as courts of record. *Murphy v. Wilson*, 46 Ind. 537; 2 Bish. C. L. (6th Ed.) § 244. And disobedience to their orders is indictable. *Rex v. Robinson*, 2 Burr. 799.

The power of an inferior court to commit for contempt does not extend to contempt out of court. *Reg. v. Lefroy*, L. R. 8 Q. B. 134.

4. A justice of the peace in Pennsylvania has no power to punish a person summarily by imprisonment for a contempt committed before him. *Semble*, that the remedy is of binding the contumacious party over to answer at court, and to be of good behavior in the mean time, without the issuing of a special warrant. *Albright v. Lapp*, 26 Pa. St. 99; *Comm. v. McClure*, 10 W. N. C. (Pa.) 466.

The process of committal is one too liable to be abused to be intrusted to an inferior magistrate. *Brooker v. Comm.*, 12 S. & R. (Pa.) 175; *Fitler v. Probasco*, 2 Browne (Mass.) 137; *People v. Webster*, 3 Parker (N. Y.), 503; *Rutherford v. Holmes*, 5 Hun (N. Y.), 317. *Contra*, *Bowen v. Hunter*, 45 How Pr. (N. Y.) 193.

A court of a justice of the peace has no power to adjudge a person in contempt, and to punish him therefor, save in the cases prescribed by statute; and a justice will be liable for a false imprisonment if he causes the imprisonment of a person without a compliance with the requirements of the statute. *Rutherford v. Holmes*, 66 N. Y. (21 Sick.) 368. See *Tracy v. Williams*, 4 Conn. 113.

"When a witness neglects to appear before a magistrate or notary our practice is first to grant a rule to show cause why an attachment should not issue. We do not grant an attachment in the first instance, as when he is subpoenaed to appear in court and fails to do so. We then make an order on him to appear before the notary or magistrate. It is not until the order is disobeyed that the witness is in contempt of court, and then, of course, an attachment will issue. The reason why a witness who refuses to appear before the court itself is attached forthwith, without a rule or order being obtained, is that the proceeding is under the immediate eye and control of the court which is cognizant of the facts; whilst the failure to appear before the magistrate or notary must be established by proof *aliunde*, which the witness has the right to be informed of, and to controvert, if he can, before he is attached. The motion, therefore, cannot be granted, but a rule to show cause may be taken. *Trimble v. Barnard*, 15 W. N. C. (Pa.) 127."

5. *Richmond v. Dayton*, 10 Johns. (N. Y.) 393.

Where a person obstructs the proceed-

When a court acts ministerially, and not judicially, it cannot commit for contempt.<sup>1</sup> Where an inferior court has power to punish for contempt, its exercise of the power is subject to the supervision of the superior courts.<sup>2</sup>

If on appeal it appears that the court below had jurisdiction, the court above will not further consider whether the order should or should not have been made; no other court can, or ought, to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction.<sup>3</sup>

9. **Miscellaneous.**—The design and effect of statutory alterations has been to narrow the definition of the offence, diminish the classes of persons to whom it can be imputed, and restrict the power over it of the courts, especially by limiting their power to fine and imprisonment.<sup>4</sup>

The party against whom the attachment issues, and who has

ings of a magistrate's court, the justice may, without issuing a warrant, hold the offender to bail to answer for the offence, and to be of good behavior in the mean time. *Comm. v. McClure*, 10 W. N. C. (Pa.) 466.

1. *Ex parte Smith*, 28 Ind. 47; *Clarke v. People*, 1 Breese (S. Car.), 266; *Gorham v. Lockett*, 6 B. Mon. (Ky.) 638. See *In re Moore*, 63 N. C. 397; *Stuart v. People*, 3 Scam. (Ill.) 395; *People v. Turner*, 1 Cal. 152; *Watson v. Williams*, 36 Miss. 331.

A magistrate acting ministerially and not judicially stands on a different ground, and cannot commit for contempt. *Fidler v. Probasco*, 1 Browne (Mass.) 137; *Comm. v. Stuart*, 2 Va. Cas. 320.

2. A court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt. *Comm. v. Newton*, 1 Grant's Cas. (Pa.) 453; *Ex parte Rowe*, 7 Cal. 181. Though not on *habeas corpus*. *Jordan v. State*, 14 Texas, 436; *Ex parte Smith*, 53 Cal. 204.

The supreme court of the United States will not grant a *habeas corpus* where a party has been committed for a contempt adjudged by a court of competent jurisdiction. In such a case this court will not inquire into the sufficiency of the cause of commitment. *Ex parte Kearney*, 7 Wheaton (U. S.) 38; *Patton v. Harris*, 15 B. Mon. (Ky.) 607.

When the supreme court will inquire as to whether a subordinate court has jurisdiction. *Middlebrook v. State*, 43 Conn. 257; *Tyler et al. v. Hamersley*, 44 Conn. 393; *City of London*, 8 Rep. 383; *Rex v. Dean of Dublin*, 1 Stra. 536; 8 Mod. 27. See *Hummel & Bishoff's Case*, 9 Watts (Pa.), 416; *Comm. v. Newton*, 1

*Grant (Pa.)*, 453; *Ex parte Steinman*, 9 W. N. C. (Pa.) 145.

Every court of competent jurisdiction is an exclusive judge of contempts against itself. *Williamson's Case*, 26 Pa. St. 9. But the supreme court, where the commitment is by a court over which they possess appellate jurisdiction, may inquire into the regularity of the proceedings, and also as to the jurisdiction. *Comm. v. Newton*, 1 Grant (Pa.), 453. The proper mode of doing so is by *certiorari*. *Hummel's Case*, 9 W. (Pa.) 416.

3. On appeal in contempt proceedings, if the court below had jurisdiction, the court above will not further consider whether the order should or should not have been made. *Tolman v. Jones*, 114 Ill. 147.

No other court or judge can or ought to undertake in a collateral way to question or review an adjudication of a contempt made by another competent jurisdiction. *Crosby's Case*, 3 Wils. 186; 14 East, 1; *Gist v. Bowman*, 2 Bay (S. Car.), 182; *State v. White*, T. U. P. Charlt. (Ga.) 136; *Cossart v. State*, 14 Ark. 538, 544; *Yeates v. People*, 6 Johns. (N. Y.) 337; 9 Johns. (N. Y.) 395; *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *McLoughlin's Case*, 5 W. & S. (Pa.) 276; *Kearney's Case*, 7 Wheat. (U. S.) 38.

4. The power of the United States court in matters of contempt is limited by Rev. St. § 725, to punishment by fine and imprisonment. It has no power to impose any punishment by way of damages or compensation to the plaintiff in the original action. *United States v. Atchison, etc., R. Co.*, 16 Fed. Rep. 853. The power of the United States court is also circumscribed by State laws. *Mallony Mfg. Co. v. Fox*, 20 Fed. Rep. 409.

## CONTENTS—CONTENTION—CONTEST—CONTIGUOUS.

committed a contempt, is not entitled to costs. *Contra*, if party innocent.<sup>1</sup> A contempt by defendant for non-payment of costs may be waived by plaintiff.<sup>2</sup>

**CONTENTS.**—Contained within limits.<sup>3</sup>

**CONTENTION.**—A violent effort to obtain something, or to resist a person, claim, or injury; contest; quarrel.<sup>4</sup>

**CONTEST.**—To make a subject of dispute, contention, or litigation; to call in question; to controvert; to oppose; to dispute.<sup>5</sup>

**CONTIGUOUS.**—In actual or close contact; touching; adjacent; near.<sup>6</sup>

1. *Deeds v. Deeds*, 1 Iowa, 394; *Marshall v. Railroad Co.*, 18 E. L. & E. 500.

Where defendant was innocent of contempt the costs were put on the party applying for the attachment. *State v. Nixon, Wright* (Ohio), 763.

A fine for contempt of an injunction may properly include the plaintiff's costs and counsel fees incurred in consequence of defendant's resistance to the application for an attachment. *Doubleday v. Sherman*, 8 Blatchf. 45.

Under New York statutes counsel fees so named cannot be included; they may, however, form part of the costs. *People v. Railroad Co.*, 14 Hun (N. Y.), 371. See also, as to costs, *Jackson v. Mawby*, 1 Ch. D. 86; *M——, In re*, 46 L. J. Ch. 24; *Bowden v. Russell*, 46 L. J. Ch. 414; 36 L. T. 177; *Hall v. Hall*, 11 L. R. Eq. 290; *Corkery v. Hickson*, 10 Ir. R. C. L. 174; *Vernon v. Vernon*, 40 L. J. Ch. 118.

2. A defendant in contempt for non-payment of costs filed his answer, and left a copy at the office of the plaintiff's solicitor. The plaintiff's solicitor did not return the copy nor move to take the answer off the file, but kept it without reading it till after the time for deeming it sufficient had elapsed. *Held*, that the plaintiff had waived the contempt, and that the defendant was in a position to move to dismiss the bill for want of prosecution if the plaintiff did not proceed in proper time. *Roberts v. Albert Bridge Co.*, 8 L. R. Ch. 753; 42 L. J. Ch. 767.

**Authorities for Contempt.**—For discussion of the law of "Contempt of Court," see Mr. Chauncey's article, 20 Am. Law Reg. 81 *et seq.*, "History of Law of Contempts in the United States courts traced and discussed;" *Goodyear v. Day*, 6 Am. Law Reg. O. S. 632. For general subject of Contempt, 3 Wharton's Criminal Law (7th Ed.), § 3426 *et seq.*, and 2 Bish. Criminal Law (7th Ed.), §§ 241, 273.

3. Webster.

The words "contents unknown," being annexed to a bill of lading, imply that the master only meant to acknowledge the shipment in good order of the cases as to their external condition. He might justify himself by showing that the contents were not in good order. *Clark v. Barnwel*, 12 How. (U. S.) 273.

4. Webster.

5. Webster.

**Contested Elections.**—The phrase "contested elections" has no technical or legally defined meaning. An election may be said to be "contested" whenever an objection is formally urged against it which, if found to be true in fact, would invalidate it. This must be true both as to objections founded upon some constitutional provision as well as upon any mere statutory enactment. It is further defined as meaning "to defend as a suit or other judicial proceeding; to dispute or resist as a claim by due course of law; to litigate." The power, therefore, "to determine contested elections" . . . necessarily carries with it jurisdiction over every possible objection which may under the constitution or any statute be urged against the so-called election of any person. *Per* Niblack, J., *Robertson v. State*, 10 N. E. Rep. 600.

6. Webster.

**Contiguous Proprietors.**—Contiguous proprietors, under a statute which forbids the closing of public roads without the consent of the contiguous property owners, mean those whose land actually touches the road, or through whose land the road passes. Vicinal are not necessarily contiguous proprietors. *Ruxedale v. Seip*, 32 La. Ann. 435.

**In Insurance Policy.**—The word "contiguous," when used in a policy of fire-insurance in reference to a building, means in close proximity, in actual close contact. A policy of fire-insurance con-

**CONTINGENCY.**—An event which may occur; a possibility; a casualty. Contingent on an event which is possible or liable, but not certain to occur; that which is unforeseen, undetermined, or dependent on something future.<sup>1</sup> (See also CLOSES; DEVISE; ESTATES; REMAINDERS.)

**CONTINGENT.** See REMAINDERS.

### CONTINUANCES.

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**1. Definition.**—Continuance is the adjournment of a cause from one day to another of the same or subsequent term. The postponement of the trial of a cause.<sup>2</sup>

**2. Usually Regulated by Statute, etc.**—Continuances are usually

tained a clause prohibiting, unless by special agreement, indorsed on the policy, "the generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting." Plaintiffs after the issuing of the policy constructed works fifty feet from the building for the manufacture of gas from gasoline. The gas was conducted to the building by pipes. In an action on the policy, held that the gas-works were not contiguous to the building within the meaning of said clause. *Arkell v. Commerce Ins. Co.*, 69 N. Y. 191.

1. Webster.

**Contingent Expense.**—A contingency is a fortuitous event which comes without design, foresight, or expectation. A contingent expense must be deemed to be an expense depending upon some future uncertain event. *People v. Yonkers*, 39 Barb. (N. Y.) 272.

**Contingent Demand.**—The word "contingent," when applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present interest exists, and that whether such interest or right ever will exist, depends upon a future uncertain event. The legal definition of the word concurs with its ordi-

nary acceptance in showing that the term "contingent" implies a possibility. The term "contingent demand" would therefore be inapplicable when a present claim exists, or when it is certain to arise in future; and is only appropriate when there is no claim *in presenti*, and when it is uncertain whether in fact any ever will arise. *Jorneson v. Blowers*, 5 Barb. (N. Y.) 692.

**Contingent Liability.**—A contingent liability contracted by a bankrupt in its legal signification means an obligation of the bankrupt arising from his contract, the duty to perform which is dependent as to when or whether the obligation shall become absolute upon the occurrence of an event, the happening of which is a matter of some uncertainty. *Haywood v. Shreve*, 15 Vroom (N. J.), 104.

2. Bouv. Dic.

In the ancient practice, continuances were entered upon the record, and a variety of forms adapted to the different stages of the suit were in use. 1 Chitty Plead. 421; 3 Black. Comm. 316.

It has been laid down that no crime is so great, and no proceedings so instantaneous, but that the trial may be put off for sufficient reasons. 1 Chitt. Crim. Law, 491.

regulated by statute;<sup>1</sup> when such is the case, and a showing is made for such purpose which fully complies with the requirements of the statutes, and nothing is produced against it, the party is generally deemed to have established his right thereto. Ordinarily the same reasons which would be sufficient for a continuance on the part of the defendant will be so applied for by the prosecution.

But where a party has been in custody for a considerable time, charged with a capital offence, the trial will not be postponed at the instance of the prosecution, though the indictment has been but recently found.<sup>2</sup>

But a peremptory rule for trial will never be enforced so strictly as to work injustice. If any unforeseen accident or casualty intervenes, which puts it out of the power of the party to prevent it, a continuance will be granted.<sup>3</sup>

**3. Same Principle Applied in Civil and Criminal Cases.**—The doctrine of putting off trials is the same in principle in both civil and criminal cases.<sup>4</sup>

**4. Application for Continuance.**—(a) *How and When Made.*—An application for continuance must be made by motion,<sup>5</sup> and upon affidavit.<sup>6</sup> And it should be made before trial if possible,<sup>7</sup> for the court is not bound to wait after the case has been called for trial for a party to prepare an affidavit for a continuance.<sup>8</sup> It is too late usually after one of the jury has been sworn,<sup>9</sup> and such affidavit may be made by an agent<sup>10</sup> or any other person.<sup>11</sup>

1. The doctrine of putting off, postponing, or continuing causes or trials, as it is called in the legal nomenclature of different States and countries, rests much upon the discretion and rules of practice of the court where the cause is pending, especially after the first application to postpone, or where this is attended with circumstances which take it out of the ordinary course. *State v. Hildreth*, 9 Ired. (N. Car.) 429; *State v. Patterson*, 1 McCord (S. Car.), 177; *Green v. State*, 13 Miss. 382; *Baxter v. People*, 8 Ill. 368; *McKinney v. People*, 7 Ill. 540; *State v. Thomas*, 8 Rich. (S. Car.) 295; *Fiott v. Com.*, 12 Gratt. (Va.) 564.

But the discretion in such cases cannot override a clear legal right, or dispense with a plain rule of law. *Fox v. State*, 9 Ga. 373.

2. *People v. Fuller*, 2 Park. (N. Y.) 16.

This is upon the constitutional ground that by the constitutions of all the States a person indicted for a crime is entitled to a "speedy trial."

3. *Farr v. McDowell*, 1 Bay (S. Car.) 31; *Bowen v. Douglass*, 2 Dall. (U. S.) 44; *Nixin v. Hallett*, 2 Johns. Cas. (N. Y.) 218; *Livingston v. Delefeld*, 1 Cai. (N. Y.) 6; *Torrey v. Morehouse*, 1 Johns. Cas. (N. Y.) 242; *Hammond v. Hawes*, Wall. C. Ct. 1.

4. *Rex v. D'Eon*, 1 W. Bl. 515; 3 Burr. 1145; *State v. Lewis*, 1 Bay (S. Car.), 1, 2; *People v. Kelley*, Jud. Repos. 51; 1 Chitty Cr. Law, 490; *Smith's Case*, 3 Wheel. Cr. Cas. 114, 171.

"The case of *D'Eon* is a leading case on this subject, and contains principles which have since prevailed in relation to putting off trials. . . . *Wilmot*, J., said the rule is the same in criminal and civil cases; and *Yates*, J., said whatever indulgence the law gives to defendants in civil cases, it ought *a fortiori* to give in criminal. *Ch. J. Savage*, in *People v. Vermilyea*, 7 Cow. (N. Y.) 383.

5. *Burlingame v. Turner*, 2 Ill. 588.

6. The court will not hear oral explanations of an affidavit for continuance. *Smith v. Barker*, 3 Day (Conn.), 280.

An application for a continuance is insufficient unless accompanied by an affidavit of the truth of the facts relied on. *Ralston v. Lothain*, 18 Ind. 303.

7. *Lucas v. Cassady*, 12 Iowa, 567; *Huff v. Freeman*, 15 La. Ann. 240; *Watson v. Welsh*, 10 Mo. 454.

8. *Myers v. Schneider*, 21 Mo. 77.

9. *Coleman v. Hess*, 1 Browne (Pa.), 240; *Fink v. Hall*, 8 Johns. (N. Y.) 437.

10. *Espy v. State Bank*, 5 Ired. (N. Car.) 274.

11. *Lockhart v. Wolfe*, 82 Ill. (1876); 37

(b) *Affidavit for.*—Facts stated in an affidavit in support of a motion for a continuance for the purposes of the motion will be taken as true.<sup>1</sup> An affidavit for a continuance on account of absent witnesses, which fails to show that either their personal attendance or testimony will probably be obtained if time be granted, is insufficient.<sup>2</sup>

Where an affidavit for a continuance of a case is based upon information derived from others, it should give their names and whereabouts, and also sufficient reason for not procuring their own affidavits to facts communicated, which should be done if possible.<sup>3</sup>

An application for continuance on account of absent witness is defective if it fails to show whether or not the subpoenas had been served, or whether diligence to secure service had been used; and it is also defective if it does not show that it was issued by the proper authority.<sup>4</sup>

In order to force the continuance of a cause the affidavit upon which the application is founded must state all the facts required in the statute to be stated.<sup>5</sup> Such affidavit must be sworn to,<sup>6</sup> and must show that the facts expected to be proved by absent witnesses cannot be otherwise proven,<sup>7</sup> and that the testimony of

Guyer v. Cox, 1 Overt. (Tenn.) 184; Wheaton v. Cross, 2 Hayw. (N. Car.) 154. *Contra*, Shepherd v. Cook, 2 Hayw. (N. Car.) 242.

1. Hair v. State, 14 Neb. 503; Quincy Whig Co. v. Tillson, 67 Ill. 351; Wick v. Weber, 64 Ill. 167.

For the purpose of deciding a motion for a continuance the affidavits must generally be taken as true; but when several affidavits are filed for the purpose of obtaining a continuance, which are inconsistent with each other, the court is not bound to treat both as true. It is presumed that in making the showing for the continuance the defendant will make the strongest possible statement in his own favor that the facts will warrant, and so far as the showing is equivocal or uncertain, the intendments must be taken against it. Dacy v. People (Ill. Supreme Ct. 1886), 6 N. E. Rep. 165. See COUNTER-AFFIDAVITS.

The affidavit made by a defendant in order to obtain a postponement of his trial is not necessarily to be taken as true, but it is necessary that the court be satisfied. Com. v. Gross, 1 Ashm. (Pa.) 281.

2. Polin v. State, 14 Neb. 540; State v. Tilghman, 6 Iowa, 496; State v. Sater, 8 Iowa, 420; Lee v. Quirk, 20 Ill. 392.

The affidavit should show the probability of obtaining the desired evidence within a given time. Deming v. Patterson, 40 Ind. 251; Burris v. Wise, 2 Ark. 33.

And a continuance is seldom granted beyond the next term. 1 Chit. Cr. L. 494.

3. Comstock v. State, 14 Neb. 205; Borron v. Mertens, 14 La. Ann. 306; Parker v. McKellvain, 17 Tex. 157.

An affidavit for the continuance of a cause on the ground of the absence of a witness, in which the affidavit speaks only from information and belief, and which does not show what steps have been taken to ascertain the whereabouts of such witness, is not sufficient. McKinlay v. Shank, 24 Ind. 258.

4. Williams v. State, 10 Tex. App. 114.

An application for continuance for the absence of a witness must show that the witness has had reasonable notice by subpoena, and what is reasonable notice depends upon all the circumstances of the case. Conner v. Sampson, 22 Tex. 20.

5. Kent v. Faver, 5 Pac. R. (N. M.) 470.

An affidavit for a continuance, concluding with "the application is not made for delay, but that the law may be administered," where the statute required the language to be "that justice may be done," was held insufficient. Turner v. Eustis, 8 Ark. 119.

6. Reed v. Haynie, Hempst. 700.

7. People v. Quincy, 8 Cal. 89; Fleming v. State, 11 Ind. 234; Eames v. Hennessy, 22 Ill. 628; Thompson v. Abbott,



such witnesses are material,<sup>1</sup> and must state the facts with such certainty that the opposite party may admit them and go to trial,<sup>2</sup> and that the party cannot safely go to trial without them.<sup>3</sup>

Affidavits are construed strictly and most strongly against the applicant,<sup>4</sup> and it is not strengthened by any presumption in its favor.<sup>5</sup> It must show positively that due diligence has been exercised by the party applying.<sup>6</sup> It should also show that the party applying has a good cause of action or defence,<sup>7</sup> and that it is not made for delay.<sup>8</sup> The affidavit should also state, when made on account of the absence of a material witness, at what time he will return.<sup>9</sup> The statements should be made definite and specific enough that an indictment for perjury will lie if they are false.<sup>10</sup>

(c) *Counter-affidavits.*—Upon the hearing of a motion for a continuance, based upon affidavits alleging the existence of excitement and prejudice against the accused throughout the county, the court may receive and consider counter-affidavits in determining the propriety of granting or denying such motion.<sup>11</sup>

11 Iowa 193; *Campion v. Angier*, 16 Tex. 93.

An affidavit for continuance on the ground of absent witness is fatally defective where it fails to show that there are no other persons by whom the same facts could be proved. *State v. Mensbell*, 8 Pac. Rep. (Nev.) 627.

1. *State v. Pettibone*, T. U. P. Charlt. (Ga.) 300; *Hubbard v. State*, 7 Ind. 160; *Steele v. People*, 45 Ill. 152.

2. *McBain v. Enloe*, 13 Ill. 76; *Olds v. Glaze*, 7 Iowa, 86.

3. *Wilson v. Koehnlein*, 1 W. Va. 145.

4. *Mason v. Anderson*, 3 T. B. Mon. (Ky.) 293; *S. P. Owens v. State*, 2 Litt. (Ky.) 233.

5. *Fisk v. Berryhill*, 10 Iowa, 203.

6. *Fiott v. Com.*, 12 Gratt. (Va.) 364; *Weeks v. State*, 31 Miss. 490; *Hurd's Case*, 5 Leigh (Va.), 715; *People v. Barker*, 1 Cal. 403. See DUE DILIGENCE.

7. *Ballston Bank v. Marine Bank*, 16 Wis. 125.

8. *Zuinwalt v. State*, 5 Tex. App. 521; *Peck v. State*, 5 Tex. App. 611.

9. 1 Black. Rep. 514; 1 Barnard Rep. 39.

10. *Ingalls v. Noble*, 15 N. Rep. 351; s. c., 14 Nev. 272.

11. *State v. Wells* (Iowa Supreme Ct. 1883), 6 Criminal Law Mag. 39.

"The defendants applied for a continuance on the ground of excitement and prejudice existing against them in the county where the indictment was pending, which would prevent them from having a fair trial. The application was based upon affidavits of the defendants stating at length the existence of the excitement and prejudice, and the facts upon

which their belief was founded. These affidavits were supported by the affidavits of five citizens of the county, including defendants' attorneys. Objections were filed to the continuance, and the same were overruled, and "thereupon, on its own motion, and against the objections of the defendants' counsel, the court allowed the attorneys for the State to file counter-affidavits as to the condition of the public sentiment, excitement, and prejudice, if any, against the defendants." Then was filed the affidavit of sixty residents of the county, by the State, contradictory to those filed by the defendants. A motion to strike the counter-affidavits from the files was overruled. When a motion for continuance is filed, supported by an affidavit of the party, on the ground of the absence of a material witness, such affidavit is not traversable, but is presumed to be true. *State v. Bowers*, 17 Iowa, 48; *State v. Scott*, 44 Iowa, 93; *State v. Dakin*, 52 Iowa, 395.

In such cases the statute declares what must be stated in the affidavit, and this done, the continuance follows as a matter of course, if the court is satisfied the statute has been complied with. Code, § 2750. The application before us is not based on the section of the code referred to, but upon section 2749, which provides that a continuance may be granted "for any cause which satisfies the court that substantial justice will thereby be more nearly obtained." Under this section there is a judicial discretion reposed in the court, which when exercised will not be reversed unless such discretion is abused. We are not aware that it has ever been held that counter-affidavits



The general rule, however, is that such affidavits cannot be heard.<sup>1</sup>

**5. Grounds for Continuance.—(a) Absence of Counsel.**—A continuance shall not be granted because of the absence of leading counsel for the defence, when it appears that the defendant was faithfully represented by other counsel, and it does not appear that he was prejudiced.<sup>2</sup>

The mere absence of counsel without the consent of client will not be sufficient.<sup>3</sup> But the illness of counsel,<sup>4</sup> where there is but one, or the leading counsel where there is more than one, where the sickness is so sudden that another cannot, under the circumstances, render justice to the case,<sup>5</sup> likewise the death of counsel, will be a good cause.<sup>6</sup> Neither business engagements of counsel,<sup>7</sup> nor absence of counsel with the papers in the

could not be filed when the application for a continuance has been made, which is addressed to the discretion of the court, to the end that "justice will thereby be more nearly obtained." The statute does not require an affidavit to be filed in support of the motion, and in what way is the court to be informed that justice will be more nearly obtained by granting the continuance is left to the discretion of the court. We are not required to determine whether counter-affidavits can be filed in every case where the application is addressed to the discretion of the court, but only whether this can be done under the circumstances in the case before us. . . . We have examined the affidavits, and are not prepared to say the court abused its discretion in overruling the motion for continuance." *State v. Wells*, Sup. Ia. 1883.

1. *Salisbury v. Com.*, 1 Ky. L. J. 181; *Territory v. Kinney*, 9 West Coast Rep. (New Mex. Sup. Ct. 1886) 268; *Manning v. Jameson*, 1 Cranch C. Ct. 285; *Linville v. Golding*, 11 Ind. 374.

The decisions are conflicting on this subject, and cannot be reconciled. On the one hand it is said to be the settled common-law practice to admit such proofs and such counter-proofs,—*Hide v. State*, 16 Tex.,—and the other that it cannot be controverted. *State v. Simion*, 30 La. Ann. 296; *Bishop v. State*, 9 Ga. 121.

2. *Walker v. State*, 13 Tex.

The absence of counsel is not a ground of continuance where a party has been assisted by other counsel, and had no evidence which would have produced a different result if his counsel had been present. *Sager v. O'Connell*, 7 La. Ann. 453.

Cases in which the leading counsel are absent with leave cannot be tried in their absence, unless by consent of the

party employing them, or by consent of other counsel of such party, but must be continued. *Summerlyn v. Dent*, 36 Ga. 54.

Causes will not be postponed, without consent, for the absence of one or several counsel. *State v. Adams*, 5 Harr. (Del.) 107. Absence of counsel is not a favored excuse for not proceeding to trial. *McKay v. Marine Ins. Co.*, 2 Caines (N. Y.), 384; *Hammond v. Hawes*, 1 Wall. C. C. 1.

3. *Allen v. State*, 10 Ga. 85; *Bullock v. State*, 10 Ga. 46; *Wright v. State*, 18 Ga. 383.

If the case is a simple one, such as any practising lawyer would be competent to try without special preparations, a continuance will not be granted. *Jarvis v. Shacklock*, 60 Ill. 378.

4. Say. Rep. 63; Bac. Abr. Trial (H); *Thompson v. Thornton*, 41 Cal. 626; *Rice v. Melendy*, 37 Ia. 166.

The defendant's counsel was taken ill on the morning of the trial, and informed the defendant that he could not try his case. He advised the defendant that he had a good defence on the merits. The defendant endeavored to get other counsel, but was unsuccessful. A continuance should have been granted. *Thompson v. Thornton*, 41 Cal. 626.

5. *Allen v. State*, 10 Ga. 85; *Shults v. Moore*, 1 McLean (U. S.), 520; *Printup v. Mitchell*, 19 Ga. 586; *Rhode Island v. Massachusetts*, 11 Pet. (U. S.) 226.

"When the leading counsel in a case is prevented from attending the court by sickness, and the counsel in attendance is not prepared to go on with the trial, it is sufficient ground for continuance." *Shults v. Moore*, 1 McLean (U. S.), 520.

6. *Hunter v. Fairfax*, 3 Dall. (U. S.) 305.

7. *Burchard v. Boyce*, 21 Ga. 6.

case, will be sufficient.<sup>1</sup> But when the absence is by virtue of a prior engagement, and there appears no want of due diligence on the party applying, it will be sufficient.<sup>2</sup>

Absence in the legislature will not do.<sup>3</sup> Betrayal of counsel will be a good cause for continuance.<sup>4</sup>

(b) *Absence of Witnesses*.—Continuances on the ground of absent witnesses who are out of the State and beyond the process of the court will only be enforced in strong and clear cases, in which three elements must concur: (1) Materiality and admissibility of the evidence; (2) due diligence; (3) affirmative showing that the absent witnesses can and will be produced at a future term.<sup>5</sup> If a

1. *Horshaw v. Cook*, 16 Ga. 526.

The fact that the senior counsel who has prepared and studied the case, and has the papers, absents himself from court to attend important business before another tribunal, is not a ground of continuance where such absence was anticipated by the party employing him, for several weeks before the session of the court. *Haggerty v. Scott*, 10 Tex. 525.

2. *Rossett v. Gardner*, 3 W. Va. 531.

3. *Sharman v. Morton*, 31 Ga. 34; *Stockley v. Goodwin*, 78 Ill. 127.

That the attorney of a party to the suit is engaged in arguing an important case in another court, the conflict in the hearings being caused by an adjournment of the regular term, is good ground for continuance. *Hill v. Clark*, 51 Ga. 122.

When counsel are actually engaged in trying a case in another court, they are entitled to have a case which has been called in their absence kept open until the other is at an end. *Gerlach v. Engelhoffer*, 7 Phil. (Pa.) 241; *Williams v. Baker*, 67 Ill. 238.

4. *State v. Lewis*, 74 Mo. 222.

It is not error to refuse a postponement asked for on the ground that new counsel who have recently been employed in consequence of the death of the original counsel have not as yet been able to obtain papers which were placed in his keeping, and are important for use on the trial, where such papers are not competent as evidence, but can only be used as memoranda for information of counsel. *Williams v. Baltimore P. R.*, 9 W. Va. 33.

5. *State v. Duffy*, La. Ann. 1887; 1 South. Rep. 184.

The authorities, positively and with great reason, discountenance continuances on the ground of the absence of witnesses who are not within the process of the court. As said in one case, 'If trials for capital offences could be postponed on affidavits of this sort, very few cases would ever be tried at all, and none

at the first court after the arrest of the offender unless he was willing. . . . No compulsory process can issue to obtain their testimony. The presumption is that they would not attend at another court, or they would have attended at the trial when the life of the defendant was in jeopardy.' *State v. Files*, 3 Brev. (S. Car.) 304.

The rule is that three things must concur to support such a continuance: (1) That the witness is really material (including, of course, admissibility of his expected evidence), and appears to the court to be so; (2) that the defendant has been guilty of no neglect; (3) that the witness can be had at the time to which the trial is deferred. *King v. D'Eon*, 1 W. Bl. 510; *Mull's Case*, 8 Gratt. (Va.) 695; 3 Wharton Crim. Law. § 3022 *et seq.*; 1 Bish. Crim. Pr. § 951; Whar. Crim. Pl. & Pr. 589.

The judge *a quo* concluded that none of these requisites sufficiently appeared in the affidavits and facts of this case, and expressed his conviction that the application was made for delay. We fail to discover any such manifest error or injustice as would alone authorize us to interfere with the discretion of a trial judge in a question of continuance. *State v. Chevallier*, 36 La. Ann. 86; *State v. Johnson*, 36 La. Ann. 853; *State v. Clark*, 37 La. Ann. 129; *Sherwin v. People*, 69 Ill. 55; *Payne v. Natl. Bank*, 16 Kan. 147.

**Materiality**.—A continuance will not be granted on account of the absence of a witness if the facts expected to be proved by him would not be evidence in the case. *Warburton v. Aken*, 1 McLean (U. S.) 75; *Ward v. Moory*, 1 Wash. T. 538.

To sustain an application for continuance on the ground of the absence of a witness, it must be shown that due diligence has been used to procure his attendance; that he is material; that the same fact cannot be proved by any other

person relies upon the promise of a witness to be present at a trial, he cannot obtain a continuance if the witness does not attend.<sup>1</sup> But if he appears at the trial and then suddenly disappears a continuance will be granted.<sup>2</sup>

A statement that an absent witness, being an accountant, has not had time to make certain necessary examinations of account-books, does not show a valid excuse for failure to procure his attendance.<sup>3</sup>

A continuance will not be granted, generally, for an absent witness unless a subpoena has been issued<sup>4</sup> for him and served.<sup>5</sup>

A party is not entitled to a continuance on account of the absence of seafaring witnesses, unless he has attempted to secure their depositions.<sup>6</sup>

The death of a material witness, occurring unexpectedly, and so short a time before the trial as to prevent the procuring the attendance of another witness who could testify to the facts expected to be proved by the deceased, is sufficient ground for a continuance.<sup>7</sup> A continuance will not be granted in a criminal

witness in attendance; and that the party making the application cannot safely go to trial in the absence of such witness. *Tompkins v. Burgess*, 2 W. Va. 187; *People v. Lee*, Cal. Sup. Ct. 1886.

The statement of a witness that a third party had admitted to him the commission of the offence for which the accused was on trial, is inadmissible because hearsay; and hence a continuance should not be granted for its production. *Aikin v. State*, 10 Tex. App. 610.

Where a homicide has occurred in an affray, and a participant is indicted for murder and brought to trial thereon, all the spectators of the affray are material witnesses, and where the defendant has subpoenaed them at the earliest opportunity, and used due diligence to obtain their attendance, he is entitled to a continuance on account of their absence. *Sutton v. People*, N. E. Rep. (1887) 376.

The fact that a witness was absent who could prove the signature to a deed but not the delivery, and who has not been summoned, is no ground for a continuance. *Chambers v. Handley*, J. J. Marsh. (Ky.) 98.

A continuance sought for on the ground of the absence of witnesses is properly refused, when the motion for the continuance disclosed that the evidence would not have availed the party making the application. *Ware v. Kelley*, 22 Ark. 411; *Earp v. Com.*, 9 Dana (Ky.) 301.

**Future Attendance.**—An affidavit for continuance on account of the absence of a witness in another State or county

must state facts showing whether or not there is reasonable ground for believing that the future attendance of the witnesses can be procured. A statement by the defendant in his affidavit that he is "confident" that he can procure such attendance is not sufficient. *State v. O'Neil*, 9 West Coast Rep. (Oreg. Sup. Ct. 1886) 151.

Where the evidence is material, and diligence has been used to secure witness's attendance, the continuance should be granted if there is reasonable ground to believe that the presence of the witness will be had by a continuance, though he may be a non-resident. *White v. Com.*, 4 Ky. L. J. 1883, 256.

1. *Day v. Gelston*, 22 Ill. 102; *State v. Cross*, 12 Iowa, 66; *Mackubin v. Clarkson*, 5 Minn. 247. *Freeland v. Howell*, Anth. (N. Y.) 198.

A continuance will not be granted because a witness has said that he would be present at the trial and that he had been subpoenaed by the opposite party. The party desiring the testimony of the witness should secure his presence at the trial. *Moore v. Goelitz*, 27 Ill. 18; *Campbell v. Blanke*, 13 Kan. 62.

2. *Searles v. Munson*, 17 Ill. 558.

3. *Brown v. Shearon*, 17 Ind. 239.

4. *Bone v. Hillen*, 1 Treadw. (S. Car.) 198.

5. *Golding v. Castro*, 20 La. Ann. 458.

6. *Deans v. Scriba*, 2 Call (Va.), 415; *King of Spain v. Oliver*, Pet. C. Ct. 217; *McKay v. Marine Ins. Co.*, 2 Caines (N. Y.), 384.

7. *Long v. McDonald*, 39 Ga. 186.

case because of the absence of a witness who will testify to the good character of the deceased.

(c) *Absence or Inability of Party.*—Where a case has been set ten days in advance of trial and parties notified thereof, the absence of the defendant when the case is called is no ground for continuance.<sup>2</sup>

That the defendant is excitable, whether from her state of health or otherwise, will not be sufficient to procure a continuance.<sup>3</sup>

Neither is it a cause for continuance, in a prosecution for murder, that for the six weeks since the time of the homicide the defendant has been in jail, without friends or relatives to hunt up witnesses and make like preparations, and that his attorney has been busy in court.<sup>4</sup>

The death of a party is cause for continuance,<sup>5</sup> but not necessarily so.<sup>6</sup> Attendance upon Congress as a member will not be sufficient for a continuance.<sup>7</sup> Neither will the fact that the defendant is in jail in a distant county grant him a continuance as a matter of right.<sup>8</sup> But absence of a party in the military service of State<sup>9</sup> or the United States will be sufficient.<sup>10</sup> And where a

1. *McNealy v. State*, 17 Fla. 198.

2. *Hayes v. State*, 68 Ga. 833.

Where a defendant, about a week before the trial of his case was reached, left the State on business without making any inquiry of his attorneys as to the probability of his case being reached, or furnishing them with the names of his witnesses, by whom his defence could have been established, so that no preparation was made, *held*, he was not entitled to a continuance. *Partridge v. Wing*, 75 Ill. 236.

The question presented is as to whether the court erred in overruling the defendants' motion for a continuance. The affidavit for continuance was made by one of the defendants, and shows in substance that the defendant was a material witness and was then absent; that the action was brought in the name of one Beeson, the plaintiff's intestate; that a short time before the term at which the motion was made Beeson died; that after the commencement of the term the defendant was advised by his counsel that the case would not be tried that term the plaintiff not having entered his appearance; that the defendant was engaged in an itinerant business in the State, and was at the time of the making of the affidavit, as the affiant understood, about one hundred miles south of Des Moines; that his attorney had tried to keep him notified, but that the case had been called earlier than was expected. It was held that insufficient cause was shown for his absence. *Brant v. McDowell* (Iowa, 1887), 2 N.R. 1100.

3. *Harvey v. State*, 67 Ga. 639; *Allis v. Meadow, etc.* (Wis. 1887), 29 N. Rep. 543.

4. *Burchfield v. State*, 82 Ind. 580.

The plaintiff's death, and consequent substitution of his administrator, do not constitute a sufficient ground for the continuance of an action. *Masterson v. Brown*, 51 Iowa, 442.

5. *Worthy v. Tate*, 42 Ga. 392.

Where counsel moved a continuance on the ground of sickness of his client, and stated in his place he could not safely go on to trial because he needed his client to prove his plea of relief, and the opposing counsel offered to admit such facts, it was held that the motion for a continuance was properly overruled. *Kitchen v. Hutchins*, 44 Ga. 620.

6. *Alexander v. Patten*, 1 Cranch C. Ct. 338.

Where the death of the appellant is suggested, and his administrator is made a party, he is entitled to a continuance to the next term. *Warren v. Ball*, 40 Ill. 117; *Shaoler & Hall Quarry v. Brewster*, 32 N. Y. 472.

Death of a party, for whose use a suit is brought in the name of another, is not a reason for continuance at the instance of such party's representative; but if the defendant objects to going to trial because there is no responsible party on the record, the court may in its discretion continue the cause until such party is introduced. *Christine v. Whitehall*, 16 Serg. & R. (Pa.) 98.

7. *Nares v. Edsall*, 1 Wall. Jr. (U.S.) 189.

8. *Long v. State*, 38 Ga. 491.

9. *Crawford v. Brady*, 35 Ga. 184.

10. *Lucas v. Cassady*, 12 Iowa, 567.

In an action against a firm, one mem-

party and his witnesses are absent they must be accounted for before a continuance can be granted.<sup>1</sup>

(d) *Popular Excitement*.—The law allowing continuances to be had on this ground is intended to apply only to those great crimes which agitate the public mind to a higher degree.<sup>2</sup> Public excitement alone is not sufficient.<sup>3</sup>

But where there is just and reasonable cause to apprehend that, owing to the excited state of the public mind, a jury may not be as free to render justice to the prisoner as to the State, a continuance to a future term should be granted for the purpose of affording an opportunity for the excitement to cool down.<sup>4</sup> A second continuance will, however, not be granted on this ground.<sup>5</sup> And where this ground is alleged the proofs to sustain the application must exhibit specific facts; a general statement by a witness that excitement or prejudice exists is insufficient. A continuance may be granted on the ground of the publication of a libel tending to influence the minds of the jurors.<sup>6</sup>

ber of which was in the military service of the United States, his copartner appeared and admitted a portion of the plaintiff's claim, and judgment was rendered therefor. *Held*, on appeal, that under the statutes of Iowa the defendant in the military service of the United States was entitled to a continuance of the action against him during such service, and that a continuance as to one of the firm operated as a continuance against both, and that said judgment should be reversed. *Butler v. McColl*, 15 Iowa, 431.

The defendant for a continuance stated that he had been unable to prepare for trial in consequence of severe bodily affliction, under which he had labored ever since, and long before the process had been served; that he believed he had a meritorious defence, and could be ready for trial at the next term, and that the affidavit was not made for delay. *Held*, that the affidavit was insufficient. *Pine v. Pro*, 6 Blackf. (Ind.) 426.

1. *Cietes v. Lanier*, 1 Taylor (Vt.) 16; *Post v. Wright*, 1 Caines (N. Y.), 111; *People v. Rales*, 1 Litt. (Ky.) 26.

2. *Poole v. State*, 18 Ga. 567.

3. *Thomas v. State*, 27 Ga. 287; *Revel v. State*, 26 Ga. 275; *Thompson v. State*, 24 Ga. 297.

4. *Comm. v. Durham*, Thach. Cr. Cases (Mass.), 516; *John v. State*, 1 Head (Tenn.), 49.

When a trial for murder was brought on at the first term of the court after the indictment was found, and the next month after the crime was committed, and it appeared that the accused was in jail during the whole of the intervening

term, and that there was considerable excitement in the public mind, it was held that there was good ground for a continuance. *Bishop v. State*, 9 Ga. 121.

But on the trial of a slave for the murder of a white man, a continuance, applied for on account of excitement and prejudice in the public mind, was refused, neither the statements of counsel nor the affidavits which were furnished showing that material testimony could be procured or that a different case could in any wise be made out by a continuance. *Jim v. State*, 15 Ga. 535.

5. *Bishop v. State*, 9 Ga. 121.

In *Wright v. State*, 18 Ga. 385, the court said that popular excitement had never been made the ground for a continuance in that State except at the first term, and that too when the crime had been but recently perpetrated. When, therefore, on a trial for murder it appeared that the killing took place in February, that the indictment was found next June, and that the trial at which the continuance was asked was had the January following, and the continuance was claimed not so much on account of the excitement resulting from the offence as because of the newspaper agitation of the subject, occasioned by the prisoner's subsequent escape and recapture, the court *held*, that there was a sufficient cooling time between February and January—eleven months; and as all that transpired within that interval was the legitimate fruits of the defendant's own wrongdoings, there was no proper excuse for postponing the trial.

6. 4 T. R. 285; 1 Burr 510; 3 Brod. & Bing. 272.



(e) *Surprise*.—Surprise resulting from unexpected testimony will, notwithstanding the trial is in progress, be a cause of continuance.<sup>1</sup> Likewise unauthorized departure of a material witness in the course of a trial will be sufficient cause.<sup>2</sup> Where a party or his counsel was surprised as to the time or place of holding the court a continuance ought to be granted.<sup>3</sup> The rejection of testimony as incompetent is not sufficient.<sup>4</sup> But a continuance will not be granted to enable one to procure testimony to impeach an adverse witness.<sup>5</sup> When evidence legally admissible is introduced to establish facts not disclosed by the pleadings, it should, however, be granted.<sup>6</sup> A motion for continuance on the ground of surprise must be supported by affidavit or other evidence of the fact.<sup>7</sup> The recent filing of a pleading unless affecting the party will be sufficient.<sup>8</sup>

(f) *Public Holiday*.—Where a statute makes a day a public holiday, a cause in progress may be continued over such day.<sup>9</sup>

(g) *Nearness to Time of Crime*.—A motion made for a continuance, made at the first trial of a prosecution for a capital offence charged to have been committed nine days before, ought to be granted.<sup>10</sup>

1. Childs v. State, 10 Tex. App. 183; Branch v. Du Bose, 55 Ga. 21.

2. Eldridge v. State, 12 Tex. App. 208.

But a continuance will not be granted because counsel is surprised at the testimony of his adversary, and because other testimony, by interrogatories sued out by the opposing party, has not arrived, though the counsel states that he expects to show by the other witnesses of the opposing party contradictory evidence to that proven by the witness who surprised him. Branch v. Du Bose, 55 Ga. 21.

3. Ross v. Anstill, 2 Cal. 183.

4. McCutchin v. Bankston, 2 Ga. 244.

5. McCurdy v. Terry, 33 Ga. 49.

6. Davis v. Millaudon, 14 La. Ann. 808.

7. People v. Symonds, 22 Cal. 348.

8. A party not affected by an answer filed on the day of trial. Johnson v. Rankin, 3 Bibb (Ky.), 86. Or an amendment. Cummings v. Rice, 9 Tex. 527.

Where, after a referee has made his report, additional testimony is offered by one party and admitted, and the other objects to its admission and asks for a continuance to enable him to produce testimony to meet it, a continuance will not be granted unless the party moving for it makes an affidavit of surprise, or shows that he could probably controvert it with additional evidence. McKinney v. Jones, 55 Wis. 39; Sapp v. Aikin (Iowa, 1885), 28 N. Rep. 24; Cheney v. Drywood, etc. (Minn. 1883), 26 N. Rep. 236.

9. A statute of the State, made Feb-

ruary 22, the birthday of Washington, a public holiday, and prescribed that no public business, except in case of necessity, should be transacted on that day. The defendant was indicted for murder, and his trial was continued through the 22d of February, a verdict being rendered on the 23d. Held, that the trial judge was necessarily the judge of the necessity for continuing the trial, and that such a continuance did not constitute a mistrial. State v. Sorenson, 15 Chic. L. J. 370.

10. The motion which was made for a continuance went into details to show the verity of the grounds, and was supported by the oath of the accused, which was fortified by that of counsel. It appears from the showing made that it was not until the 8th day of October, the day preceding that fixed for the trial, that the accused could make definite arrangements with counsel for his defence, and that the latter could not, in the short delay ensuing between the occurrence of the act and day assigned for trial prepare the defence in such a manner as the gravity of the case demanded, involving the life of a citizen; that the counsel could not procure necessary books in time, although due diligence had been used; and could not safely proceed to trial in an unprepared condition, as the case, it was alleged, involves many nice and intricate questions of law, requiring long, patient, and careful study and consideration of authorities.

From the foregoing recitals it appears

(h) *Newly-discovered Evidence*.—Newly-discovered evidence may be ground for a continuance of a case, even after trial has commenced.<sup>1</sup>

Also when it was discovered so recently before the trial that a deposition could not be taken.<sup>2</sup>

The discovery of a material witness in another State is a good cause for continuance.<sup>3</sup> It will, however, not be granted unless diligence is exercised.<sup>4</sup>

(i) *To Enable Party to Procure Evidence*.—A continuance will be granted for the absence of evidence only when proper legal means to obtain it have been used, or it is shown to the satisfaction of the court that such means would have been ineffectual; inadvertently omitting to produce evidence in possession of the party himself is insufficient.<sup>5</sup> The evidence must be material,<sup>6</sup> and a cause may be continued after hearing for further proof.<sup>7</sup> The party applying must have used due diligence.<sup>8</sup> Sufficient time after the

that the accused was convicted on the 9th day following the commission of the crime for which he was indicted, and that the application was made for a continuance on the first calling of the case for trial.

In *State v. Ferris*, 16 La. Ann. 425, the court said, in reference to accusals in criminal cases: "The law securing to them the assistance of counsel did not intend to extend a barren right, for of what avail would be the privilege of counsel . . . if on the spur of the moment, without an opportunity of studying the case, the former should be compelled to enter into the investigation of the case?"

In a more recent prosecution, *State v. Simpson*, 38 La. Ann., this court held that the right to be heard by counsel, guaranteed by the constitution to the accused, is not an empty formality, but an inestimable privilege, and that counsel should be allowed reasonable time to prepare the defence. *State v. Brooks* (Supreme Ct. La. 1887), 1 S. Rep. 421.

It is left to the sound discretion of the judge to determine what time should be allowed counsel, appointed by him to defend the accused, for the purpose of preparing the defence, and also grant or refuse an application for a continuance on that score, made on the day of trial. *State v. Wilson*, 33 La. Ann. 261.

1. *Holmes v. Dobbins*, 19 Ga. 630.

2. *Alcorn v. Rafferty*, 4 J. J. Marsh. (Ky.) 220.

A case against an administrator was continued because he had discovered only a few days before material evidence among the intestate's papers. *Homquiber v. Gerard*, 2 Wash. C. C. 164.

3. *Campbell v. Sproat*, 1 Yeates (Pa.),

20; *People v. Vermilyea*, 7 Cow. (N. Y.) 369.

4. *Potter v. Coward*, 1 Meigs (Tenn.), 22.

That the materiality of the evidence for which a continuance is asked was not ascertained by the affiant "until the present term of the court," does not dispense with showing of diligence to procure it. *Wheeler v. Styles*, 28 Tex. 240.

An affidavit for continuance of a chancery suit on the ground of newly discovered evidence must disclose the nature of the evidence, and show that it could not have been discovered sooner by the use of due diligence. *Rossett v. Greer*, 3 W. Va. 1.

The fact that a case has been four years in court is no reason for a refusal of further continuance, provided proper grounds are shown for it, as when it is asked for to obtain newly discovered evidence, and when the party applying is not chargeable with delay. *Hooper v. Memphis*, 19 Ga. 85.

5. *Kuhland v. Sedgwick*, 17 Cal. 123; *State v. Norman*, 16 Ind. 192.

A continuance was properly refused where the party desiring the testimony of a witness absent in a distant parish, instead of taking out a commission to examine him, dispatched a special messenger to bring the witness; by doing so he took upon himself the risk of the witness being in court. *Jeter v. Heard*, 12 La. Ann. 3.

6. *Bird v. McElvaine*, 10 Ind. 40; *Mann v. Waters*, 30 Ga. 220; *Bollston Bank v. Marine Bank*, 16 Wis. 125; *Trammel v. Pilgrim*, 20 Tex. 158.

7. *Washburn v. Holmes*, Wright (Ohio), 67.

8. When a cause is called for trial, a

filing of the pleadings should always be allowed to the testimony of witnesses that are material.<sup>1</sup>

(j) *To Await Depositions*.—A deposition expected, material to the merits, and to obtain which proper diligence has been used, is a good ground for a continuance.<sup>2</sup> But it must be shown that the testimony is material.<sup>3</sup> And it must also appear that the deposition was taken at the time designated in the notice.<sup>4</sup> Depositions taken without notice to the opposite party,<sup>5</sup> or where the party taking it has been deprived of his testimony by a mere trick, will be a ground for a continuance.<sup>6</sup> And even a second continuance may be granted to await the coming of a deposition.<sup>7</sup>

(k) *Loss or Absence of Papers*.—If, because of the destruction of papers, the defendant has been unable to ascertain the nature of the suit, he is entitled to a continuance.<sup>8</sup> But not if they have been taken away by the attorney applying for it.<sup>9</sup> Neither will a case be continued because no declaration is filed in the case that is at issue.<sup>10</sup>

(l) *Agreements of Counsel*.—Agreements made by counsel will be sufficient to grant a continuance,<sup>11</sup> but they must be in writ-

continuance should be granted to either party for the purpose of procuring the necessary evidence, which he proves that he has used due diligence to obtain, but which he has been prevented from obtaining by lack of time or unforeseen circumstances. *Montgomery v. Ins. Co.*, 18 La. Ann. 227.

Where a motion was made for a continuance to allow the defendant to ascertain the existence of a fact, in order that it might be proved, if found to exist, it was held that such motion could not be granted, and that motions for continuances could never be granted except for very strong reasons. *Mayrant v. Gurignard*, 3 Strobb. Eq. (S. Car.) 112; *Spengler v. Davy*, 15 Gratt. (Va.) 381.

1. *Ill. Mu. Fire Co. v. Marseilles Man. Co.*, 6 Ill. 236.

2. *Marsh v. Hubbert*, 4 McLean (U. S.), 364.

3. *Morgan v. Voss*, 1 Cranch C. Ct. 109; *Hawley v. Sterling*, 2 Cal. 470.

4. *Kisskaden v. Grant*, 1 Kan. 328. A notice was served to take depositions on Dec. 9, and thereafter taking was to be continued from day to day, if necessary, until completed. The officer's return stated that the plaintiff appeared by attorney, and the adjournment from day to day, the plaintiff making appearance as aforesaid until Dec. 16. It was held that the return was insufficient, as showing a ground for continuance.

5. *Straus v. Marine Ins. Co.*, 1 Cranch C. Ct. 343; *Barrell v. Simonton*, 3 Cranch C. Ct. 681.

6. *Kenton v. Spencer*, 6 Ind. 321.

7. Where a party has used extraordinary diligence to procure the execution and return of a commission issued to take depositions in a foreign country, a second continuance of the cause will be allowed. *Blagg v. Phoenix Ins. Co.*, 3 Wash. 5; *Waskun v. Diamond*, Hempst. 701.

8. *Suggett v. Bank of Ky.*, 8 Dana (Ky.), 201.

9. *Wright v. Clark*, 2 Greene (Iowa), 86.

Where, on the ground of loss of papers, among which was the deposition of a witness for the defendant, which had been deposited in the clerk's office, and by the clerk charged to the defendant's attorney, who disavowed all knowledge of them, the defendant applied for a continuance, it was held that the party applying for a continuance ought to satisfy the court that the necessity for it had not been occasioned by his fault. *Baker v. Johnson*, 16 Tex. 133.

10. *Close v. Douglass*, Wright (Ohio), 738; *Harvey v. Snow*, 1 Yeates (Pa.), 156.

11. *Hort v. Jones*, 2 Bay (Conn.), 440.

A stipulation made on Oct. 18 to continue a cause, and that any motion which could be made in the October term might be made at the next term, was held to allow of such motion only as could have been made on or after Oct. 18, and not to cover those the right to make which had been already lost at the time of the stipulation. *Reynolds v. Lawrence*, 15 Cal. 359.



ing;<sup>1</sup> and an agreement that the cause will not be hurried or pressed is insufficient.

(m) *To Await Determination of Other Proceedings.*—A suit will not be continued because a suit for the same matter is pending in equity, where a plea of such suit would not avail in abatement.<sup>2</sup>

Where cross-actions are pending, either of them may be continued on the defendant's motion until he shall obtain judgment in his action.<sup>4</sup> And where the same land is attached by several creditors, the subsequent attaching creditors may continue their actions until the actions on which the prior attachments are made are continued.<sup>5</sup> An administrator may have a case against his estate continued until he ascertains whether the estate is solvent.<sup>6</sup>

(n) *Alterations or Amendment of Pleadings.*—After a substantial amendment to a petition, the defendant is entitled to a continuance.<sup>7</sup> But such an amendment must be a material one.<sup>8</sup> A matter of form will not be sufficient,<sup>9</sup> and it must be made near

1. *Peralty v. Marcia*, 3 Cal. 185; *Griswold v. Lawrence*, 1 Johns. (N. Y.) 507.

2. *Hort v. Jones*, 2 Day (Conn.), 440.

Where the plaintiff's suits were pending between different plaintiffs and the same defendant, and the same counsel appeared in all the suits, and agreed that the defence pleaded and answer filed in one suit, which was not the first on the docket, should be considered as pleaded and filed in all, and that the suit should be first tried, and that the judgment rendered therein should be rendered in the other cases, and afterwards the plaintiff, against the defendant's will, who had three days' notice of the motion, moved the court to take up one of the other cases first, which motion was allowed by the court, whereupon the defendant moved for a continuance for time to plead and make defence, to which plaintiff replied that the pleadings already prepared in the other cases could be used in this. *Held*, that a continuance was properly refused. *Hancock v. Winans*, 20 Tex. 320.

3. *Davis v. Hunt*, 2 Bailey (S. Car.), 412.

4. *Adams v. Manning*, 17 Mass. 178; *Winslow v. Hathaway*, 1 Pick. (Mass.) 211; *Goodenow v. Buttrick*, 7 Mass. 140.

5. *Barnard v. Fisher*, 7 Mass. 71; *Hoyt v. Gelston*, 8 Johns. (N. Y.) 178.

6. *Blossom v. Goodwin*, 1 Mass. 502; *Hunt v. Whitney*, 4 Mass. 624.

If, while a trustee process is pending, the principal debtor sues the trustee to recover the property or debt attached, the trustee may have the action continued. *Winthrop v. Carlton*, 8 Mass. 456.

7. *Wyatt v. Harden*, Hempst. 17;

*Croell v. Marks*, 2 Ill. 525; *Tunstall v. Hamilton*, 8 Mo. 500; *Ill. Mutual Ins. Co. v. Marseilles Man. Co.*, 6 Ill. 236.

When the nature of an action is changed by an amendment it is considered as a new cause, and may be continued, although at the fifth term after its commencement. *Schneitzel v. Purcell*, 1 Cranch C. Ct., 246; *Lambart v. Smith*, 1 Cranch C. Ct. 347.

8. *Russel v. Martin*, 3 Ill. 492; *Roberts v. Ward*, 8 Black. (Ind.) 333; *Hawks v. Lavelle*, 8 Ill. 227; *McKinney v. Harter*, 7 Blackf. (Ind.) 385; *Eames v. Morgan*, 37 Ill. 260; *Epperly v. Little*, 6 Ind. 344; *Watts v. McKemay*, 1 A. K. Marsh. (Ky.) 561; *Cabanis v. Lyon*, 3 J. J. Marsh. (Ky.) 332; *Coff v. Couts*, 4 Litt. (Ky.) 235; *McMahan v. Murphy*, 1 Bailey (S. Car.), 535.

9. *Scott v. Cromwell*, 1 Ill. 7; *Richard v. Nixon*, 20 Pa. St. 19.

An amendment by setting out the bond on which suit is brought entitles the defendant to a continuance. *Rountree v. Stuart*, 1 Ill. 43. Otherwise of an amendment of a declaration by changing the word "twenty" to "twenty-five," and inserting the words "promise to pay," if a copy of the note is filed with the application. *Crane v. Graves*, 1 Ill. 37.

Inserting in a declaration on a note at the trial of the suit the words "without defalcation, for value received, payable and negotiable at, etc.," is a material amendment, entitling the party to a continuance. *Ohio R. Co. v. Palm*, 18 Ill. 22.

An amendment by correcting a misspelling of the plaintiff's name does not entitle the party to a continuance. *Beck*

the time of trial.<sup>1</sup> And the amendment or alteration must be such as will cause surprise to the opposite party, not enabling him to prepare for trial.<sup>2</sup>

(o) *Mistake*.—When it appears in the progress of a trial that a cause, if required to proceed, will suffer from the honest mistake of the party or his counsel, a continuance should be granted.<sup>3</sup> But the mistaken advice of counsel not to prepare for trial is insufficient.<sup>4</sup>

(p) *Inability of Witness to Understand the Nature of an Oath*.—A continuance will sometimes be granted where a witness whose evidence is material has no sense of the obligation of the nature of an oath.<sup>5</sup>

*v. Williams*, 5 Blackf. (Ind.) 374; *Nimmo v. Worthington*, 1 Ind. 376.

Or by striking out the names of a part of the defendants. *Taylor v. Jones*, 1 Ind. 17.

An amendment of a mere repetition of a word is no ground. *Chalmers v. Lane*, 5 Mo. 289.

Also allowing the plaintiff to sign it is insufficient. *Harvey v. Renfro*, 7 Mo. 187.

1. A material change in the petition, made less than ten days before the beginning of the term, entitles the party to a continuance. *Lick v. Architectural*, etc., 24 Ill. 551. Likewise a replication after rule day. *Veach v. Haebaugh*, 1 Cranch C. Ct. 402.

When a declaration is amended after plea pleaded, the defendant is entitled to a continuance. *Holmes v. Lansing*, 1 Johns. Cas. (N.Y.) 248; *Le Roy v. Delaware*, etc., 2 Wash. 223.

A cause had been two terms at issue; at a subsequent term an amendment was made in the answer entirely changing the ground of defence, and on application of the plaintiff the cause was continued. *Makepeace v. State*, 8 Ind. 41.

A replication filed at a subsequent term will be sufficient. *Bundine v. Blumenthous*, 8 Mo. 695.

2. *Kirkpatrick v. Holman*, 25 Ind. 293.

A plea claimed to be defective, by its substance sufficiently apprising the opposite party of what he must meet, was allowed to be amended. The opposing party filed an affidavit that he had up to and during the trial fully relied upon these defects to defeat the bill, and moved a continuance. *Held*, that neither the circumstances nor the affidavit showed such grounds for surprise as to render the refusal of the continuance erroneous. *Gillett v. Robbins*, 12 Wis. 354.

3 C. of L.—52

3. *Earnest v. Napier*, 15 Ga. 306; *Bergin v. Riggs*, 40 Ill. 61; *Kelsey v. Berry*, 40 Ill. 69.

4. *Musgrave v. Perkins*, 9 Cal. 211.

The fact that the counsel of the party advised him that a case would not stand for trial at special term is no ground for a continuance. It is a mistake of law in which there is no merit. *Hall v. Mount*, 3 Coldw. (Tenn.) 73.

5. *Leache's Cases*, 435; 3 Wharton Crim. Law (7th Ed.), § 3034.

*Insufficient Causes*.—A cause will not be continued for the following reasons:

Because a report of the recent trial of another cause, depending on the same facts and principles, has been published in a newspaper. *Hurst v. Wickerly*, 1 Wash. C. C. 276.

On the ground that after the trial has begun a juror is found to be incompetent. *Hook v. Stovall*, 26 Ga. 704.

Because the defendant has made application for the benefit of the bankrupt law. *Givens v. Robbins*, 5 Ala. 676.

On the ground that the plaintiff could not discover the place of the residence of his witnesses. *Smith v. Potts*, 1 Cranch C. Ct. 123.

Because the presiding judge has in another case expressed an opinion on one of the points involved. *Simons v. Sheftall*, R. M. Charl. (Ga.) 90.

To allow a party who has an equitable defence to enjoin the proceeding at law. *Dudley v. Love*, 35 Ga. 148.

Because a full report of the decision of the supreme court, in a case remanded for new trial, has not been received in the court below. *Walker v. Floyd*, 3 Ga. 237.

Because a copy of the note on which the action is brought is given with the names only of the payers written on the back. *Roberts v. Thompson*, 28 Ill. 79.

Because of the conscientious scruples of a Jew to appear and attend the trial of

**6. Review of Discretionary Action in Regard to Granting Continuances.**—Quite a number of the courts hold that it is within the discretion of the trial court, and that its decision cannot be reviewed on error.<sup>1</sup> But the better doctrine seems to be that it will only not be reviewed where the discretion has not been abused to the prejudice of the person applying;<sup>2</sup> and that an improper refusal is a matter of error.<sup>3</sup>

But the improper granting of a continuance is never subject to review;<sup>4</sup> and the refusal of the court to grant a continuance after a cause is at issue is not a matter for which error can be assigned.<sup>5</sup> The discretion of the judge in granting or refusing continuances is to be exercised more rigidly after long delays, or several continuances granted, than upon the first application.<sup>6</sup>

his cause on Saturday. *Phillips v. Gratz*, 2 Pa. 412.

Because a *prochein ami* for an infant plaintiff has been appointed at the term to which the writ was returnable. *Harvey v. Coffin*, 5 Blackf. (Ind.) 566.

Because the party who asks for a continuance has been summoned and sworn as a grand juror in a mayor's court. *Browne (Pa.)*, 272.

On the ground that the party in a suit at law, a few days before the time appointed for the trial, filed a bill in chancery for a discovery of usury, as auxiliary to his defence, unless he makes affidavit that the usury had recently come to his knowledge. *Ross v. Norvell*, 3 Munf. (Va.) 170; *Swearingen v. Swearingen*, *Wright (Ohio)*, 108.

Because evidence is expected to arise out of an order or decree of the chancellor beneficial to him who asks a continuance. *McMechen v. McLaughlin*, 4 Harr. & M. (Md.) 166.

Because the plaintiff's attorney furnished the defendant's attorney with a copy of the declaration that varied from the record in some unimportant particular. *Ogden v. Gibbons*, 5 N. J. L. (2 South.) 518.

For want of security of costs, unless the omission has prevented a preparation for trial. *Graham v. Douglass*, *Wright (Ohio)*, 758; *Cox v. Fenwick*, 3 Bibb (Ky.) 183, 297.

1. *Sims v. Hundley*, 6 How. (U. S.) 1; *Thompson v. Selden*, 20 How. (U. S.) 194; *Campbell v. Strong*, *Hempst. (U. S. C. C.)* 265; *Wardlaw v. Hammond*, 9 Rich. (S. Car.) 454; *Knox v. Arnold*, 1 Wis. 70; *Evans v. Bolling*, 5 Ala. 550; *Wilkowski v. Halle*, 37 Ga. 678; *Porter v. Lee*, 16 Pa. St. 412; *State v. Duncan*, 6 Ired. L. (N. Car.) 98; *Bohr v. Steamboat, etc.*, 15 Miss. 715; *Baxter v. People*, 8 Ill. 368.

A motion for continuance is addressed to the sound discretion of the court,

under all the circumstances of the case; and although an appellate court will supervise the action of the court on such motion, it will not reverse a judgment on that ground unless it is plainly erroneous. *Davis v. Walker*, 7 W. Va. 447.

2. *Magruder v. Snapp*, 9 Ark. 108; *Holmes v. People*, 10 Ill. 478; *Spence v. State*, 8 Blackf. (Ind.) 282; *Turner v. Eustice*, 8 Ark. 119; *Fountain v. Anderson*, 33 Ga. 372; *State v. Vigoreux*, 13 La. Ann. 309; *McDaniel v. State*, 16 Miss. 401; *Loeffner v. State*, 10 Ohio St. 598.

Where a sufficient *prima facie* cause for a continuance has been shown on affidavit, which has been refused by the trial court, the supreme court will not reverse the judgment if it satisfactorily appears at the trial that the reasons for which the continuance was asked were false and fabricated, and for delay. *Porter v. State*, 3 Lea (Tenn.), 496.

3. *Bradbury v. Dougherty*, 7 Blackf. (Ind.) 467; *Riggs v. Fenton*, 3 Mo. 28.

Where a witness for the defence was induced to leave the court before testifying by a person who was aiding the prosecution, and the defendant made affidavit that the witness's attendance could not afterwards be procured, and that her evidence would show that the accused took the life of the deceased in necessary self-defence, it was held error to overrule defendant's motion to discharge the jury and continue the case. *Joseph v. Com. (Ky. App. 1886)*, 1 S. W. Rep. 4.

4. *Johnson v. Strader*, 3 Mo. 359; *Holt v. Com.*, 2 Va. Cas. 6, 159; *Wimbenly v. Collier*, 24 Ga. 169.

5. *Woods v. Young*, 4 Cranch C. Ct. 237; *McCourcy v. Doremus*, 10 N. J. L. (5 Hals.) 245; *Burrow v. Hill*, 13 How. (U. S.) 54; *McDougald v. Central Bank*, 5 Ga. 185. I should think that even in such cases there might be instances even in the States adopting this rule where error might be found.

6. *Wilson v. Koehnlein*, 1 W. Va. 145.

The granting a delay of a trial until the party can obtain the attendance of a witness unexpectedly absent will be left to the discretion of the judge.<sup>1</sup> Under some statutes, certain requirements being complied with, no discretion is given the judge;<sup>2</sup> and where the court has discretion, it is presumed to be rightly exercised until the contrary clearly appears.<sup>3</sup> An improper refusal will be caused by the witness appearing and testifying.<sup>4</sup>

**7. Requisite Diligence.**—A party desiring a continuance of a cause is bound to show that he has made reasonable exertions to prepare for trial, or show some good reason for not making such exertions.<sup>5</sup>

And when it is asked on account of an absent witness, it should show such a state of facts and circumstances as will prove that he has used due diligence to obtain the testimony.<sup>6</sup>

1. *Leggett v. Boyd*, 3 Wend. (N. Y.) 377.

2. Under section 2050 of the Compiled Laws of 1884, where in a criminal prosecution a motion and affidavit for a continuance upon the ground of the absence of material witnesses are filed, the opposing party cannot deny the truth of the matters alleged in the application. In such case, where a proper showing is made, the trial court must grant the continuance. *Territory v. Kinney*, 9 West Coast Rep. (1884) 268.

3. *State v. Dunn*, 80 Mo. (1884) 681.

Only upon clear proof of an arbitrary abuse of right will the appellate court interfere with the exercise of the discretion of the lower court in refusing to grant a continuance. *Byers v. McPhee*, 4 Col. 204.

4. *Weeks v. State*, 31 Miss. 490.

5. *Dunlap v. Davis*, 10 Ill. 84; *Toledo, etc., v. Fisher*, 13 Ind. 258; *Coady v. Walker*, 20 Tex. 205.

6. *Burris v. Wise*, 2 Ark. 33; *Pence v. Christman*, 15 Ind. 257.

The degree of diligence required from the party applying for a continuance on account of an absent witness must depend on the circumstances of the case. Greater diligence should be required on a second or any subsequent application. The party should state that he expects to be able to secure the attendance of his witness at the next term, that the witness was not sent away by his permission, and all the facts showing the materiality of his evidence, and that the application is not made for delay. If within the reach of process, an attachment should be issued for the witness. *Shook v. Thomas*, 21 Ill. 87.

Where a defendant in a criminal action asks and obtains a continuance of one week to take a deposition of six wit-

nesses, and at the expiration of that time admits that no steps have been taken to take the depositions, and applies for a further continuance to take depositions of witnesses, five of whom are the same as those in respect of whom time had previously been granted, the continuance is properly refused. *The Gold Brick Case*, Sup. Tenn. 1887, 3 S. W. Rep. 349.

Witnesses for whose evidence a continuance was asked resided in a county other than that in which the action was pending. Process for them was secured by the defendant, and by him delivered to the sheriff of the forum, who promised to transmit the process to the sheriff of the county where the witnesses resided. Non-service was the basis of the application for a continuance. *Held*, that diligence was not shown. *Hailes v. State*, 10 Tex. App. 490.

To authorize a continuance, the party applying must show reasonable diligence in procuring the attendance of witnesses, and in preparing for trial. *Kelly v. Saunders*, 35 Mo. 200; *Doe v. Johnson*, 3 Ill. 522; *Babcock v. Babcock*, 35 Barb. (N. Y.) 52; *Puhain v. Webb*, 26 Tex. 95.

Defendant was served with process July 30; the term of court commenced August 13th following, when application was made for continuance on account of absent witnesses, it appeared that the witnesses in question lived a five hours' ride from the court town; that defendant knew it, and had taken no measures to secure their attendance. *Held*, that due diligence was not shown. *Kirkland v. Kline*, 16 Ind. 313.

An affidavit that a witness had promised to attend court, but owing to inclement weather, or some other cause unknown, had failed to do so, and but for relying on such promise the plaintiff

A subpoena must be issued, unless a good reason for not doing so be shown to exist;<sup>1</sup> but time enough must be allowed that service could be made.<sup>2</sup> And it must appear positively that due diligence has been exercised before the rulings of the trial court will be interfered with.<sup>3</sup>

**8. Avoiding by Admission.**—A continuance will not be granted on account of the absence of a witness if the adverse party will admit that the witness would testify as is supposed by the party moving for a continuance.<sup>4</sup> And in some States it is held that it is not sufficient that the opposite party should merely admit that the witness would have testified to the specific facts: there must be an admission that these facts are absolutely true, and that they cannot be contradicted;<sup>5</sup> and this seems to be the majority

would have had a deposition taken, etc., does not show a case of diligence to warrant a continuance. *Educational Assoc., etc., v. Hilshark*, 4 Kan. 36.

An affidavit of the defendant in a criminal case, that he is "informed and believes" that he obtained an attachment for certain witnesses and mailed it to the sheriff, without stating the grounds of his belief or who mailed it, does not show diligence to entitle him to a continuance. *Labbaite v. State*, 6 Tex. App. (1879) 257.

An affidavit of a defendant in a criminal case stated that he did not know until Saturday that certain of his material witnesses had removed from the State, and that his case had been set down for trial on the next Tuesday. *Held*, that he set forth a good ground for a continuance. *State v. Dakin*, 52 Iowa, 395.

An affidavit stated that the witness was somewhere in the State of Tennessee, but deponent did not know in what county; that deponent had been in jail two months awaiting the term of court at which he would be arraigned; but it did not appear that either the accused or his counsel had written, making any inquiry as to the whereabouts of the desired witness, nor did he furnish any excuse for not so doing. *Held*, that there was no show of sufficient diligence. *Hall v. State*, 8 Ind. 439.

1: *Lampson v. People* (Cal. 1886), 11 Pac. Rep. 593; *Blum v. Bassett*, 3 S. W. (1886) 35; *Adams v. Peck*, 4 Iowa, 551; *Mugg v. Graves*, 22 Ind. 236.

The mere fact that the witness is the sheriff of the county does not excuse the want of ordinary diligence to procure his presence upon the trial; the application for continuance should state that he was accustomed to attend the services of the court, and that the applicant expected him to be in attendance. *Adair v.*

*Cooper*, 25 Tex. 548; *Bone v. Hillen*, 1 Treadw. (S. Car.) Const. 198.

2. But where an attorney of the court was a witness and promised to attend, it was necessary that a subpoena should have been served on him in order to obtain a continuance on account of his absence. *White v. Lynch*, 2 Del. 183.

An application for a continuance, setting forth that a process for an absent witness had been promptly placed in the hands of the sheriff, but not stating whether it had been returned, does not show sufficient diligence. *Cooper v. State*, 7 Tex. App. 194.

Neither will service of a subpoena on a witness residing in another county than that of the forum, with no attachment. *Chaplain v. State*, 7 Tex. App. 87.

3. *Solomon v. Norton* (Ariz. 1886), 11 Pac. Rep. 108.

4. *Farrand v. Bouchell*, Harp. (S. C.) 83; *O'Neal v. New York, etc.*, 3 Nev. 141; *Olds v. Com.*, 3 A. K. Marsh. (Ky.) 465; *Baldwin v. Walden*, 30 Ga. 829; *People v. Brown*, 59 Cal. 345; *Hamilton v. State*, 3 Ind. 552; *State v. Mooney*, 10 Iowa, 506; *State v. McComb*, 18 Iowa, 43; *State v. Brett*, 6 La. Ann. 653; *State v. Hatfield*, 72 Mo. 518.

5. *Willis v. People*, 2 Ill. 399; *Supervisors v. Miss. R.*, 21 Ill. 338; *Brent v. Heard*, 40 Miss. 370; *Pool v. Devers*, 30 Ala. 672; *Nare v. Horton*, 9 Ind. 563; *Murphy v. Murphy*, 31 Mo. 322; *Warren v. State*, 29 Tex. 464.

"The practice of making concessions in such cases is novel, and, I apprehend, not well calculated to advance justice. But if to be encouraged, it seems to me that the prosecutor should admit all that the defendant can possibly obtain by the witness, which is the truth of the facts proposed to be proved. Such seems to have been the opinion of the court in *Brill v. Lord*, 14 Johns. (N. Y.)

rule.<sup>1</sup> Some States have also held that the defendant in a criminal case could not be forced into trial by even admitting the truth of what the absent witness will swear if present.<sup>2</sup>

341." C. J. Savage in *People v. Vermilyea*, 7 Cow. (N.Y.) 387.

In order to avoid a postponement, at the request of the defendant, to procure the testimony of an absent witness, the prosecutor must admit the truth of the facts stated in the affidavit; and in such case evidence in rebuttal to impeach the absent witness is incompetent and inadmissible. *Powers v. State*, 80 Ind. (1883) 77.

1. See cases under n. 5, preceding page. *Contra*, *Olds v. Com.*, 3 Marsh. (Ky.) 467.

If, upon the motion for a continuance of a cause, upon affidavit that a material witness is absent, the opposite party, to prevent a continuance, admits that the absent witness, if present, would testify as stated in the affidavit, he is not thereby precluded from offering evidence at the trial, to disprove or explain away the force of the testimony which he has admitted the witness would give. *Besitor v. Sardo*, 2 Cranch C. Ct. 260.

When application is made for a continuance on account of absent witnesses the court may, in the exercise of its discretion, require the other party to admit the truth of the facts proposed to be proved by the absent witness, or merely that these witnesses, if present, would swear to these facts; but an admission that the absent witness would swear to those facts is not an admission of their absolute truth. *Starr v. State*, 25 Ala. 38.

2. *Domiges v. State*, 15 Miss. 475; *Goodman v. State*, 1 Meigs (Tenn.), 195; *Dewarren v. State*, 29 Tex. 464; *Wassells v. State*, 26 Ind. 35; *People v. Dodge*, 28 Cal. 445.

"It is difficult to see any good reason for either of these latter rulings, unless the statutes clearly and unmistakably lead to such a position. To require the State to admit the absolute truth of the supposed testimony of an absent witness in order to prevent a postponement, would be to require it to give to the statement of others, regarding what the witness would swear to, a higher credit and a greater probative force than the direct testimony of the witness himself would have, if delivered by him in person." Merritt A. Thompson, Esq., in 6 *Crim. Law Mag.* 805.

*Contra*, in Ohio, in *Comerford v. State*, it was held that "in a criminal as in a civil case an application for the postponement of a trial to a subsequent term is addressed to the discretion of the court.

And in a criminal case, where such motion is made on behalf of the accused to enable him to procure the attendance, or, under section 144 of the Criminal Code, the deposition of a witness who resides out of the State, and whose testimony he has not been able to obtain, it is not error for the court to require the applicant to set out in his affidavit, filed in support of the motion, the facts he expects to prove by such witness; or refuse to grant the motion, in case the prosecution elects to admit upon trial that the witness would so testify, and to treat the statement of facts so set out as his deposition." 23 Ohio St. 599.

When, in such case, the prosecutor was permitted, on the argument of the case to the jury, against the objection of the accused, to comment upon such affidavit, and to read the whole of it to the jury, *held* that it was not error to the prejudice of the accused. "The accused has the right to confront his accusers, but it does not follow therefrom that the witnesses for the defendant have the right to confront the witnesses for the prosecution. It is safe to say that a defendant will make a much better case for himself in his affidavit for a continuance than he could with his witnesses in court; and if, notwithstanding what he says, he can prove in his affidavit the Territory is willing to go to trial, and to admit that his witness would, if present, testify as he sets forth, no injury could be done the defendant. If his witnesses were not myths, if they really had being and existence, he would generally gain more than he would lose by not exhibiting them before a jury. It is easy enough for a criminal defendant to set forth in an affidavit the names of witnesses who are absent from the Territory and in a foreign country,—as in this case,—and the higher the crime, the further away the witnesses are declared to be; and if such showing can compel the continuance of criminal cases, then there can be no more criminal trials in this Territory. The defendant should be given a reasonable opportunity to prepare for trial, and to procure the attendance of his witnesses, if the court is satisfied that he has any witnesses, and that his application is not a sham. The trial court should exercise a sound and legal discretion in this regard. No guilty man is ever ready for trial. Every continuance of his cause brings him so much nearer to an acquittal. The trial court

**CONTINUE—CONTINUOUS—CONTINUALLY.**—To remain in a given place; to carry on or extend from one time, place, or condition to another. Without break, cessation, or interruption; constantly prolonged.<sup>1</sup>

**CONTRABAND OF WAR.** See INTERNATIONAL LAW.

**CONTRACTOR.** (See also MASTER AND SERVANT; NEGLIGENCE.)—One who, as an independent business, undertakes to do specific jobs of work, without submitting himself to control as to the petty details.<sup>2</sup>

must judge whether his application for a continuance is made merely for delay or in good faith, to the end that justice may be done; and unless there is a legal discretion in this regard, appellate courts will not interfere." *Temling v. Hauling* (Mont. Terr. 1887), 12 Pac. Rep. 755. See dissenting opinion on this case.

Where an affidavit for the continuance of a case, on the ground of the inability to procure the testimony of the absent witness, contains a statement of what is expected to be proved by the witness, and such statement is given in evidence on the trial as the testimony of the witness, its credibility may be attacked in the same manner as that of a deposition, by impeaching the veracity of the witness. *Insurance Co. v. Wright*, 33 Ohio St. 533.

In a criminal case defendant filed an affidavit for a continuance, on account of absence of witnesses, the prosecution consenting that it might be used as the deposition of said witnesses. *Held*, the affidavit could not be impeached on the grounds (1) that defendant might with reasonable diligence have procured the attendance of the witnesses, or taken their depositions; (2) that he had good reason to believe that if the witnesses would testify, the testimony would be untrue; (3) that there were no such persons in existence as those named in the affidavit. *State v. Roark*, 23 Kan. (1880) 147.

See, generally, ADJOURNMENT; CRIMINAL PRACTICE; PRACTICE; TRIAL.

1. Webster.

"Continuous" means something the use of which is constant and uninterrupted. *Suffield v. Brown*, 4 De G. J. & S. 199.

**Continuous Injury.**—By the term "continuous injury" is not meant never ceasing, but recurring at repeated intervals, so as to be of repeated occurrence, and so as to be of the same sort of damnification to the plaintiff as an actual continuous mischief would be. *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 220.

**Continuing Guaranty.**—One who enters into what is called a "continuing guaranty" is one who undertakes to be responsible for moneys to be advanced or

goods to be sold to another from time to time. *Buck v. Buck*, 18 N. Y. 343.

**Continuing Trustee.**—A continuing trustee is one who continues to act in the trusts after the completion of his appointment. *In re Coates v. Parsons*, 56 Law Jour. Rep. Chan. (N. S.) 242.

The words "continuing trustee" apply to a person who continues to act in a trust together with trustees or a trustee newly appointed, and not to a person who is not to continue to be a trustee after new trustees are appointed, but who ceased to be a trustee at the moment they were appointed. *In re Coates v. Parsons*, 34 Ch. Div. 376.

**"Continuous Carriage" as used in Interstate Commerce Act.**—This act does not include or apply to all carriers engaged in interstate commerce, but only such as use a railway or a railway and water craft "under command, control, management, or arrangement for a continuous carriage or shipment" of property from one State to another; nor does it apply to the carriage of property by rail wholly within one State, although shipped from or destined to a place without the State, so that such place is not in a foreign country. *Ex p. Koehler*, 30 Fed. Rep. 367.

**Continuous Easement.**—See EASEMENT.

2. He represents the will of his employer only as to the result and not as to the means. *Shearm. & R. on Neg.* § 76.

**Job Work.**—Where in unloading a vessel, handling goods, or cutting and delivering timber, the employee exercises distinct and independent employment, and is not under immediate control, direction, or supervision of the employer, it is not work of a servant, but of a contractor. *De Forrest v. Wright*, 2 Mich. 368.

Even though paid by the job the employee is a servant if he is at all times subject to the employer's control, works in the mode he directs, and employs such men as he indicates. *Sadler v. Henlock*, 4 El. & B. 570.

The doctrine exists in favor of municipal corporations employing contractors. *Painter v. Pittsburg*, 46 Pa. St. 213.

See MASTER AND SERVANT.

### CONTRACT (GENERAL PRINCIPLES).

NOTE.—The reader of the article on Contract is especially referred to Pollock's "Principles of Contract," edited by Gustavus H. Wald, Esq., of the Cincinnati Bar (Robert Clarke & Co., Cincinnati). Mr. Wald's notes of all the latest American and English cases will be found of great value as supplementing and enlarging the original work. His annotations have been prepared with great care and ability. The writer of this article is under many obligations to this work, and has, with the permission of Mr. Wald and the publishers, made liberal extracts from it.

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**Definition of Legal Rights.****CONTRACT. Executed and Executory Contracts.**

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**1. Definition of Legal Rights.**—Jurisprudence is concerned only with such rights as are recognized by law and enforced by the power of a State. A "legal right" is a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others.<sup>1</sup>

**2. Rights In Personam and In Rem.**—Rights may be divided into two classes—rights *in personam* and rights *in rem*. The former are those rights which are available against a certain individual; the latter those which are exercisable over an object and available against all the world, but not against one person more than another.<sup>2</sup>

**3. Executed and Executory Contracts.**—Contracts are either executed, which create rights *in rem*, or executory, which create rights *in personam*.<sup>3</sup> Executed contracts are not properly contracts

1. Holland on Jurisprudence, 69.

2. A servant has a right to his wages available against one certain individual—his master. This is therefore a right *in personam*. The owner of a horse, a garden, or other species of property, has a right to the use and enjoyment of that property; but this right is not available against one person more than another. It is a right against all the world, and therefore a right *in rem*. Holland on Jurisprudence, 122, 208; Leake on Cont. 1-6.

3. Thus, a man agrees to buy a horse from another, pays the price, and takes

the horse to his own stable. Here a contract has taken place, but the buyer has become the owner of the horse and the seller has become the owner of the money. The transaction is at an end; the contract is executed. The horse is the property of the buyer: he has a right to it available against all the world—a right *in rem*. Suppose the seller agrees to deliver the horse, and the buyer to pay the price at a future time. The agreement gives the buyer a right to have the horse at the time, but it does not vest the ownership of the animal in him. The contract is executory. He has a right to

at all. The term is used to signify rights in property which have been acquired by means of contract. The parties are no longer bound by a contractual tie. Nevertheless executed contracts are within the meaning of the clause in the constitution of the United States which forbids any State to pass a law impairing the obligation of contracts.<sup>1</sup>

**4. Executory Contracts—Definition—Obligation.**—Executory contracts, or contracts in the usual and proper sense, signify agreements or promises which create rights *in personam*. Every agreement or promise enforceable by law is a contract. That which renders an agreement enforceable by law is called its obligation.<sup>2</sup> An agreement or promise which has no obligation is called a *nudum pactum*.

**5. Contracts Formal and Informal.**—Contracts may be divided into formal and informal, the obligation of the one consisting of the forms and ceremonies which are observed at its making, the obligation of the other arising from facts and circumstances independent of the form.

**6. Classification of Common-law Contracts.**—Contracts at the common law are of three classes: 1, contracts under seal; 2, contracts of record; and, 3, simple contracts. The first two classes are formal contracts, and the third informal.

**7. Contracts under Seal, Deeds, or Specialties.**—The contract under seal or deed is one of the earliest, if not the earliest, forms of contract known to the common law.<sup>3</sup> It is a formal contract; that is, it derives its obligation from the sealing and delivery.

enforce his agreement, but the right is available against the seller only, and is therefore a right *in personam*. Holland on Jurisp. 208.

1. In *Fletcher v. Peck*, 6 Cranch (U. S.), 87, a State by statute granted lands to particular grantees, and subsequently revoked the grant. *Held*, that the grant was a contract, and could not be revoked. "Since the constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former." *Per* Marshall, C. J. See also *Terret v. Taylor*, 9 Cranch (U. S.), 43-52. In *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, Marshall, C. J., says, at p. 656: "If a doubt could exist that a grant is a contract, the point was decided in the case of *Fletcher v. Peck*, 6 Cranch (U. S.), 87, in which it was laid down that a contract is either executory or executed; . . . but whether executed or executory, . . . they both are equally within the provision of the constitution of the United States which forbids the State governments to pass laws impairing the obligation of con-

tracts." In *McGee v. Mathis*, 4 Wall. (U. S.) 143, a State, in order to promote the drainage and sale of certain swamp lands, passed an act exempting such lands from taxation for ten years, and issued transferable scrip receivable for them. *Held*, that the repeal of the exemption act so far as it concerned land paid for by scrip issued before the repeal impaired the contract of the State with the holders of such scrip. See Pomeroy on Const. 349 *seq.*, where the cases are collected and reviewed. As to what constitutes a contract within the meaning of this clause, and what laws impair its obligation, see title CONSTITUTIONAL LAW.

2. An obligation is defined by the Roman lawyers as *juris vinculum quo necessitate adstringimur alicujus solvendæ rei*. The obligation is the bond or chain with which the law joins together persons or groups of persons in consequence of certain voluntary acts. See Maine Ancient Law (10th Ed.), ch. ix., p. 323. For meaning of *obligatio* see Hunter's Roman Law (2d Ed.), bk. ii., p. 451 *seq.*

3. In primitive societies the law does not lend its aid to enforce promises or

**8. Definition of Deed.**—A deed is a writing or instrument written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. A deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted.<sup>1</sup>

agreements unless they are accompanied with certain prescribed formalities. The form is regarded as of greater importance than the promise itself. If the form is observed, no further inquiry is made. If the form is not observed, the promise cannot be enforced. As civilization advances forms are gradually dispensed with, and men become more and more inclined to regard the promise as the real source of the obligation. Maine Ancient Law (10th Ed.), 313; Pollock on Conts. 132 *seq.* The formal contract of the common law was the deed—the writing sealed and delivered. When the defendant was indebted to the plaintiff in a sum certain, for wrongfully detained property which belonged to the plaintiff, the latter had a remedy in the action of debt. Pollock on Conts. 137, 139, 140. For early forms of contract and action of debt, see Holmes Com. Law, lecture vii., 247 *seq.* But where there was no question of property—where a man simply promised to do some act in the future—his promise could not be enforced unless it was made by deed. Pollock on Cont. 141, 142. For a long time no executory contract was binding unless it was made by deed. Such promises derived their obligation from the formality of the deed. In the course of time promises by word of mouth, without any formality, came to be enforced; but as we shall see hereafter, such promises were not binding without a consideration. Their obligation arose not from the promise, but from the consideration.

The history of contract in the Roman law is similar. The Romans started with only formal contracts. Hunter Introduction to Roman Law (3d Ed.), 96. The oldest of these is the verbal contract effected by means of a stipulation—that is, a formal question and answer: "Do you promise to give me your slave Stichus? I promise." This was a binding contract. If the promisor simply said, "I promise to give you my slave Stichus," his promise lacked the requisite formality and could not be enforced. Maine Ancient Law, 328; Hunter Roman Law, 459. Next in order of time is the literal or written contract, which con-

sisted of an entry in the books of the creditor of a sum due him, and a corresponding entry in the books of the debtor. Or, finally, the debtor was not allowed to dispute the entry in the creditor's books if it were made with his consent. Hunter Roman Law, 466-526; Maine Ancient Law, 330, 331. No other formalities were necessary. Next came the contract *re*—the real contract, whose obligation consisted not in the observance of any forms, but in the fact that the plaintiff had performed his part of the agreement. A promise to lend could not be enforced unless made in the form of a stipulation; but if the loan were actually made, the law would compel the borrower to repay according to his promise. Performance by one party imposed an obligation upon the other. Maine Ancient Law, 331; Hunter Roman Law, 471 *seq.*, 527 *seq.* Finally, we have the consensual contracts, in which all formalities are dispensed with, their obligation arising from the mere agreement of the parties. Maine Ancient Law, 332. The consensual contracts were four in number: 1. *Emptio venditio* (sale); 2. *Locatio conductio* (hire); 3. *Societas* (partnership); and 4. *Mandatum* (agency). Mandate or agency is classed with the consensual contracts by Justinian, but Hunter thinks it belongs more properly with the equitable contracts or contract *re*. Hunter Roman Law, 533. In the other three consensual contracts a valuable consideration is essential from their very nature. In the contract of sale the seller receives the price in return for his goods; in hiring, the laborer receives his wages in return for his work; in partnership, two or more persons combine their property or one contributes property and another labor; in either case there is a valuable consideration moving from each partner. Hunter Roman Law, 490 *seq.*; 516, 534.

1. Co. Litt. 35, *b*; 17, 1 *b*; Sheppard's Touchstone, 50; Leake on Conts. 135. The contents of a deed may be written or printed in ink or in pencil. Schneider v. Norris, 2 M. & S. 286.

A written contract is not binding until delivered; nor, if its delivery is con-

9. **Peculiarities Incident to Contracts under Seal.**—There are certain peculiarities incident to a contract under seal.

10. **No Consideration Necessary—Illegal Consideration—Failure of Consideration.**—It needs no consideration to support it.<sup>1</sup> But if a consideration in fact exists it must be a lawful one. If the

ditional, until the condition has been fulfilled. *McFarland v. Sikes*, 3 New Eng. Rep. (Conn.) 252.

Where an agreement is recited in a sealed instrument, the recital will not make the agreement a specialty, unless it appears that the recital was intended to renew the agreement under seal. *Douglas v. Hennessy*, 11 East. Rep. (R. I.) 298.

An agreement involving the sale and purchase of lands used throughout the word "covenant," purported to bind the "heirs" of the respective parties as well as their personal representatives, and was declared to be the "act of the parties, in witness whereof" they thereunto set their hands and seals. *Held*, that the agreement operated as a deed, although no actual seal or scroll was affixed. *Jerome v. Ortman*, 33 N. W. Rep. (Mich.) 759. For the requisites to a valid deed see title DEED.

1. *Pillans v. Microp*, 3 Burr. 1670; *Cooch v. Goodman*, 2 Q. B. (42 E. C. L. R.) 590; *Sherbrick v. Salmond*, 3 Burr. 1639; *Fallowes v. Taylor*, 7 T. R. 475; *Sharrington v. Strotten*, *Plowden Rep.* 308.

A merely gratuitous contract under seal is enforceable at common law. *Aller v. Aller*, 40 N. J. L. 446; *Burkholder's Exr. v. Plank*, 69 Pa. St. 225.

"What effect has want of consideration by the common law in regard to a bond on a judgment? Certainly none to destroy the conclusiveness of the seal or of the recovery. A voluntary bond is both at law and in equity a gift of the money." *Gibson, C. J.*, in *Sherk v. Endress*, 3 W. & S. (Pa.) 255; *Harrell v. Watson*, 63 N. Car. 454; *Parker v. Flora*, 63 N. Car. 474; *Harris v. Harris*, 23 Gratt. (Va.) 737.

A voluntary bond from a father to his child, though it must be postponed to creditors, yet is good against heirs, legatees, and all who stand in no higher equity than the obligor himself. *Candor's Appeal*, 27 Pa. St. 119; *Carter v. King*, 11 Rich. L. (S. Car.) 125; *Walker v. Walker*, 13 Ired. (N. Car.) 335; *Wing v. Chase*, 35 Me. 260.

A bond showing on its face that it was given in consideration of the release of a previous valid agreement more burden-

some than the bond, cannot be impeached for want of consideration. *Buechel v. Buechel*, 65 Wis. 532.

Though courts of equity will not set aside a contract merely because it is voluntary, yet they will not compel specific performance of such a contract. *Jeffreys v. Jeffreys, Cr. & Ph.* 138; *per Knight-Bruce, L. J.*, in *Kekewick v. Manning*, 1 D. M. & G. 176; 21 L. J. C. 581; *Walrond v. Walrond*, *Johns.* 18; 28 L. J. C. 97.

No consideration is required for the validity of a complete declaration of trust, yet an incomplete voluntary gift creates no right which can be enforced. *Dorsey v. Packwood*, 12 How. (U. S.) 126, 137; *Stone v. Hackett*, 12 Gray (Mass.), 227; *Est. of Webb*, 49 Cal. 541; *Crooks v. Crooks*, 34 Ohio St. 610, 615; *Wadhams v. Gay*, 73 Ill. 415; *Carhart's App.*, 78 Pa. St. 100, 119; *Young v. Young*, 80 N. Y. 422; *Perry on Trusts*, § 96 *seq.*

Where specific performance in equity is sought, a voluntary covenant stands scarcely or not at all on a better footing than an unsealed instrument. *Per Knight-Bruce, L. J.*, *Kekewick v. Manning*, 1 D. M. G. 176, 188; *Short v. Price*, 17 Tex. 397; *Hays v. Kershaw*, 1 Sandf. Ch. (N. Y.) 258-261; *Black v. Cord*, 2 H. & G. (Md.) 100; *Buford's Heirs v. McKee*, 1 Dana (Ky.), 107; *Bayler v. Commonwealth*, 40 Pa. St. 37; *Lamprey v. Lamprey*, 29 Minn. 151.

There are some deeds which require a consideration. Those deriving their effect from the Statute of Uses—that is, a bargain and sale, and a covenant to stand seized to uses—are void without a consideration, the first requiring a pecuniary one and the latter a consideration of blood or marriage. *Shep. Touch.* 510; 2 Blk. Com. 338; *Sm. on Confs.* 17.

Contracts in restraint of trade also are void without consideration, although under seal. *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 S. L. C. (8th Am. Ed.) 778; *Mallan v. May*, 11 M. & W. 665; *Palmer v. Stebbins*, 3 Pick. (Mass.) 188.

A consideration must appear on the face of the agreement, and a declaration on a bond in restraint of trade, settling forth no actual consideration, is bad on demurrer. *Gompers v. Rochester*, 56 Pa. St. 194.

consideration is unlawful the contract is void.<sup>1</sup> So a failure of consideration is a good defence.<sup>2</sup>

**11. Estoppel.**—A party is estopped from denying the truth of the recitals and statements made in his deed, in any legal proceedings upon the deed, between the same parties in the same right, or those claiming through them.<sup>3</sup>

1. *Collins v. Blautern*, and notes, 1 Sm. L. C. (8th Am. Ed.) 715. As to what considerations are illegal, see, *infra*, ILLEGALITY.

2. The reason why equity forbids a recovery on a specialty when the consideration fails is not because a consideration is essential to such instrument, but because the parties are shown to have contracted on that basis, and the failure of the end involves that of the means. *Yard v. Patton*, 13 Pa. St. 285.

Chancery will not interfere unless it is shown that the instrument was executed on the faith of some promise or stipulation that has not been fulfilled. *Kennedy v. Howell*, 20 Conn. 349; *Candor's Appeal*, 27 Pa. St. 119.

Future illicit cohabitation is a bad consideration, yet a recovery may be had on a bond given to a mistress, unless there is evidence of undue influence on the one hand, or a stipulation for the continuance of the unlawful connection on the other. *Fisher v. Bridges*, 3 E. & B. 642; *Wyant v. Leshner*, 23 Pa. St. 338; *Doe v. Horn*, 1 Ind. 363; *Shenk v. Mingle*, 13 S. & R. (Pa.) 29.

Mere continuance of cohabitation was held not enough to raise a presumption that a bond was given in consideration of future cohabitation, and the bond was held good. *Vallance v. Blagden*, 26 Ch. D. 353; 50 L. T. N. S. 574.

3. Co. Litt. 352, *a*; notes to *Doe v. Oliver*, and *Duchess of Kingston's Case*, 2 Sm. L. C. 317; *Lainson v. Tremere*, 1 A. & E. 792; *Bowman v. Taylor*, 2 A. & E. 278. The estoppel in a deed extends to its recitals. *Stowe v. Wyse*, 7 Conn. 214; *Jackson v. Parkhurst*, 9 Wend. (N. Y.) 209; *Carver v. Jackson*, 4 Peters (U. S.), 1. The estoppel does not extend to proceedings by a party in a different right. *Metters v. Brown*, 1 H. & C. 686; 32 L. J. Ex. 138. Nor to proceedings by persons not parties to the deed or claiming through them. *Heath v. Crealock*, L. R. 10 Ch. 22. Nor to proceedings for other purposes collateral to the deed. *Carpenter v. Buller*, 8 M. & W. 209; *Exp. Morgan*, L. R. 2 C. D. 72. Although for such purposes the contents of the deed might be evidence. The effect of a deed in estoppel is also restricted to such recitals and statements

as are intended to be agreed upon as true against one or other of the parties; and this intention is to be gathered from construing the deed. *Stronghill v. Buck*, 14 Q. B. 781. The party to a deed is in most cases estopped from controverting any statement therein, or showing that it was executed with a different intent or object from that which the deed itself imports. *Hayne v. Maltby*, 3 T. R. 438; *Com. Dig. Estoppel*; 1 Saund. 216, n. 2; *Willes*, 9. Except in cases of duress, fraud, or illegality, which defences the law admits, notwithstanding the security has the appearance of having been deliberately framed. 3 T. R. 418. The current of authority in America has much relaxed the strictness of the English cases on this subject. Thus it may be considered as settled that evidence is admissible either on the part of the grantor or grantee to show that the consideration named in a deed was really greater or less than there expressed. *Bullard v. Briggs*, 7 Pick. (Mass.) 533; *Wade v. Merwin*, 11 Pick. (Mass.) 288; *Clapp v. Tinnall*, 20 Pick. (Mass.) 247; *McCrea v. Purmonk*, 16 Wend. (N. Y.) 460 (where many cases are cited and commented on); *White v. Miller*, 22 Vt. 380; *Wilkinson v. Scott*, 17 Mass. 249; *Prichard v. Brown*, 4 N. H. 397; *Burbank v. Gould*, 15 Me. 118; *Belden v. Seymour*, 8 Conn. 310; *Meeker v. Meeker*, 16 Conn. 383; *Beach v. Packard*, 10 Vt. 96; *Bingham v. Weiderwax*, 1 N. Y. 509; *Watson v. Blaine*, 12 S. & R. (Pa.) 131; *Jack v. Dougherty*, 3 Watts (Pa.), 158; *Bolton v. Johns*, 5 Pa. St. 145; *Harvey v. Alexander*, 1 Rand. (Va.) 219; *Wilson v. Shelton*, 9 Leigh (Va.), 342; *Curry v. Lyles*, 2 Hill (S. Car.), 404; *Moore v. McKie*, 5 Sm. & M. (Miss.) 238. Unless such evidence is introduced either directly or indirectly for the purpose of defeating the operation of the instrument as a conveyance, as by showing it void for want of a sufficient consideration. *Wilt v. Franklin*, 1 Binn. (Pa.) 502; *Hurn v. Soper*, 6 Harr. & J. (Md.) 276. Thus a grantee may prove the expressed consideration to be greater for the purpose of increasing his damages on the covenants in the deed,—*Belden v. Seymour*, 8 Conn. 310,—while, on the other hand, the grantor may prove it less for the purpose of diminishing

**12. Deed Cannot be Varied or Discharged by Parol.**—A deed cannot be varied or discharged by a parol agreement; but only by an instrument under seal.<sup>1</sup>

**13. Priority in Administration of Decedents' Estates.**—Contracts under seal or specialty debts are in some places given priority over simple contract debts in the administration of the personal estates of decedents.<sup>2</sup>

**14. Limitation of Actions.**—A right of action arising from a contract under seal is barred if not exercised within twenty years; if it arises from a simple contract it is barred after six years.<sup>3</sup>

**15. Merger.**—Where parties have made a simple contract for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract merges in the deed and becomes extinct.<sup>4</sup>

**16. Authority of Agents to Execute Deeds.**—A deed is necessary for authorizing an agent to execute a deed for another.<sup>5</sup>

them. *Morse v. Shattuck*, 4 N. H. 229; *Harlow v. Thomas*, 15 Pick. (Mass.) 70; *Murphy v. Branch Bank of Mobile*, 16 Ala. 90; *Den v. Shotwell*, 23 N. J. 465; *In re Young's Est.*, 3 Md. Ch. D. 461; *Hammond v. Woodman*, 41 Me. 177; *Harwell v. Fitts*, 20 Ga. 723; *Farrington v. Barr*, 36 N. H. 86; *Thompson v. Allen*, 12 Ind. 539. The consideration clause in a deed estops the grantor from denying that a consideration has been received. In all other respects it is open to explanation or correction by parol evidence, and it may be shown that the consideration has not been actually paid, or that it has been overpaid by fraud or mistake. *Goodspeed v. Fuller*, 46 Me. 141; *Irvine v. McKeon*, 23 Cal. 472; *Carbrey v. Willis*, 7 Allen (Mass.), 364; *Allen v. Allen*, 45 Pa. St. 468; *Dodge v. Walley*, 22 Cal. 224; *Simson v. Eckstein*, 22 Cal. 580. See *Smith Conts.* 20, 21; *Leake Conts.* 153, 154. See title ESTOPPEL.

1. See, *infra*, DISCHARGE OF CONTRACTS, where the limitations of this doctrine are stated. *Sm. on Conts.* 30; *Leake on Conts.* 154.

2. This priority has been taken away in England by the statute 32 & 33 Vict. c. 46, and specialty debts are put upon the same footing with simple contract debts. At the common law, if a man by contract under seal bound himself and his heirs, the heir might be charged with the liability in an action of debt or covenant to the value of all the freehold land he took by descent. The creditor's remedy was extended by statute so as to include the devisee as well as the heir. 3 W. & M. 14; 1 W. IV. c. 47. Contracts under seal, in which the obligor binds himself and

not his heirs, gave no remedy against the heir or devisee, the only remedy being against the executor or administrator in respect of the personal assets, but with priority over simple contracts. *Co. Litt.* 209 *a*; 383, *b*; 386, *a*. By statute 3 & 4 W. IV. c. 104, real estate is made assets for the payment of all debts, simple contract as well as specialty. In this country lands are in general liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract. In the two latter cases, although they create no lien during the debtor's life, yet by his death they become liens on the real estate which descends to the heir or passes to the devisee, subject to the payment of the debts of the ancestor according to the local laws of the State. The remedies for the enforcement of specialty debts are governed by the statutes of the different States, but the tendency of those statutes is to abolish the priority in favor of specialty debts over debts by simple contract when the specialty is not a lien upon property. *Sm. Conts.* 34 *n*. See title DECEDENTS' ESTATES.

3. The time within which actions must be brought depends, of course, upon the statutes of the various States. See title LIMITATION OF ACTIONS.

4. See, *infra*, DISCHARGE OF CONTRACTS. See title MERGER.

5. *Steiglitz v. Egginton*, 1 Holt N. P. C. 141; *Harrison v. Jackson*, 7 T. R. 207; *Rowe v. Ware*, 30 Ga. 278; *Harshaw v. M'Kisson*, 65 N. Car. 688. Where an agent having only parol authority to bind his principal executes a contract under seal, if not essential to the validity of it it should be regarded as mere surplusage, and the contract held good as a simple

**17. Contracts of Record—Definition.**—A record is a memorial or remembrance on rolls of parchment, and such memorial is not a record until enrolled in the proper office.<sup>1</sup>

**18. Examples.**—Contracts of record comprise judgments, recognizances, statutes merchant and staple, and recognizances in the nature of statute staple.<sup>2</sup>

**19. Peculiarities.**—Contracts of record have certain peculiar incidents: 1. They prove themselves, i.e., their bare production without any further proof is sufficient evidence of their existence, should it be controverted. 2. They may be enforced by *scire facias*—a writ which lies on a record only.<sup>3</sup> An obligation of record may be discharged by a deed of release, although a deed is a matter of inferior degree.<sup>4</sup>

**20. Simple Contracts—Consideration Necessary.**—Simple or parol contracts are those whose validity does not depend upon their form, but upon the presence of a consideration. With the exception of contracts under seal and contracts of record, every contract requires a consideration to support it.<sup>5</sup>

contract. *Long v. Hartwell*, 34 N. J. 116. See also *Thomas v. Joslin*, 30 Minn. 388. See title AGENCY.

1. Co. Litt. 260 a; *Q. v. Hughes et al.*, 36 L. J. P. C. 23; Com. Dig. "Record." A statute provision requiring a deed or contract to be recorded for safe keeping, and notice to purchasers, does not thereby make it a record in the technical sense of that term. And it has been so held even in cases in which the legislature have directed the process upon such deed or contract to be by *scire facias*, a writ which at common law lies on a record only. Thus in *Pennsylvania* it has been decided that *nul tiel record* is no plea to a *scire facias* on a mortgage. *Frear v. Drinker*, 8 Pa. St. 520. The registry of a mechanics' lien is no record, and to a *scire facias* on it the plea of *nul tiel record* is a nullity. *Davis v. Church*, 1 W. & S. (Pa.) 240. See title RECORD.

2. *Anson on Conts.* 37; 2 Blk. Com. 465. The judgment of a court of record is treated for some purposes as a contract. 2 Blk. Com. 464, 465; *Leake on Conts.* 125, 155; *Morse v. Tappan*, 3 Gray (Mass.), 411; *Gebhard v. Garnier*, 12 Bush (Ky.), 321; *Stuart v. Landers*, 16 Cal. 372; *Burnes v. Simpson*, 9 Kan. 658. Thus a judgment awarding a sum of money to the plaintiff imposes an obligation on the defendant to pay that sum. But a judgment is not, properly speaking, a contract. *Roe v. Hulbert*, 17 Ill. 572-580; *In re Kennedy*, 2 S. Car. 216; *Burnes v. Simpson*, 9 Kan. 658; *Larrabee v. Baldwin*, 35 Cal. 155, 168; *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486-489. At an early period of English law, statutes merchant and

statutes staple, which are both contracts of record for the payment of debts, were commonly in use. Subsequently recognizances in the nature of a statute staple were established. These may have been resorted to in some of the States in early times (see *Kilty Rep. Stats.* 143), but are now unknown. The only contract of record now to be met with is a recognizance, i.e., "a debt of record entered into before some court, judge, or magistrate having authority to take the same." *Com. v. Emery*, 2 Binn. (Pa.) 431; *Pace v. Mississippi*, 25 Miss. 54. Recognizances are most frequently employed in criminal cases obligating the parties and witnesses, and their bail and other sureties for them, to appear in court to prosecute, defend, pay adjudged costs, testify, and the like. 1 *Bishop Crim. P.roc.* § 264, and note.

3. An action of debt is also maintainable, or in some States there is a statutory proceeding. *Bishop Crim. P.roc.* § 264, note. By statute in *Pennsylvania*, and perhaps in some other State, *scire facias* is the method of proceeding to foreclose a mortgage. See *Bouvier's Law Dict. sub voce*; *Bispham's Eq.* (3d Ed.) § 156.

4. *Barker v. St. Quintor*, 12 M. & W. 441; *Shep. Touch.* 322; *Sewall v. Sparrow*, 16 Mass. 24-26; *State v. Moody*, 69 N. Car. 529.

5. "All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol, nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing." *Rann v. Hughes*, 7 T. R. 350, n. See remarks



**21. Consideration<sup>1</sup>—Definition.**—"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."<sup>2</sup>

**22. Adequacy—Promise to which One is Already Bound—Forbearance—Compromise of Disputed Claims.**—As a general rule, the law will not inquire into the adequacy of the consideration, although gross inadequacy may be evidence of fraud.<sup>3</sup> But an agreement to

of Prof. Langdell, *Sel. Cas. Cont.* p. 1013 *seq.*, and of Prof. Ames, 2 *Cas. Bills and Notes*, p. 872 *seq.*, amounting, in the writer's opinion, to a demonstration of the fact that on principle negotiable bills of exchange and promissory notes are binding of their own force, and require no consideration.

Some contracts are required by statute to be in writing, but the writing is only evidence of the contract, and consideration is as necessary as if the contract rested merely in spoken words. See title STATUTE OF FRAUDS.

An executory agreement, supported only by a meritorious as distinguished from a valuable or pecuniary consideration, cannot be enforced either at law or in equity, and an executory covenant falls within the operation of the rule. *Wilbus v. Warren*, 9 *East. Rep.* (N. Y.) 425.

"Love and affection" for a deceased brother's widow is not a sufficient consideration to support a bond and a mortgage securing it; and neither a partial payment of interest on the bond by some of the obligors, nor the mutual promise of all, nor the acceptance of the trust by the trustee who was directed to invest the proceeds of the bond for the use of the beneficiary, is sufficient to supply the want of consideration. *Cotton v. Graham*, 2 *S. W. Rep.* (Ky.) 647.

A promise to pay the debt of another must be supported by valuable consideration. *Strough v. Brown*, 38 *Hun* (N. Y.), 307.

1. As to the origin and early history of consideration, see O. W. Holmes, Jr., "The Common Law," *lec.* vii. p. 247 *seq.*; "The History of Contracts," by John W. Salmond, 3 *Law Quar. Rev.* 166; *Hare on Contracts*, 117 *seq.*; *Pollock on Contracts*, Appendix, note F.

2. *Currie v. Misa*, L. R. 10 *Ex.* 162. Consideration means not so much that the promisee is benefited as that the promisor suffers a detriment.

Consideration may be either the doing of an act or the giving of a promise. When the consideration consists of performance, the promise becomes binding

when the act is performed. If A promise to pay B a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding though B at the time does not engage to do the act. *Train v. Gold*, 5 *Pick. (Mass.)* 380, 385. Where several stockholders agree each to contribute for sale, for the benefit of the corporation, a certain number of shares, one cannot repudiate the agreement after the others have acted on it. *Conrad v. La Rue*, 52 *Mich.* 83. Where the consideration consists of a promise, it is the promise and not the performance thereof which is the consideration of the counter-promise. *Matthews' Admr. v. Meek*, 23 *Ohio St.* 272, 292; *Philpot v. Gruening*, 14 *Wall. (U. S.)* 570. See, *infra*, OFFER AND ACCEPTANCE, p.

For examples of consideration, see *infra*, n. 3.

3. *Westlake v. Adams*, 5 *C. B. N. S.* 248, 265; 24 *L. J. C. P.* 271, *per* Byles, J., "It is enough that there is actually a consideration, that such consideration is legal, and that it has some value." *Tindal, C. J.*, in *Hitchcock v. Coker*, 6 *A. & E.* 438; *Skeate v. Beale*, 11 *A. & E.* 983. If there be any consideration the court will not weigh the extent or value of it. *Phillips v. Bateman*, 16 *East*, 356, 372; *Payne v. Wilson*, 7 *B. & C.* 423; *Callisher v. Bischoffsheim*, L. R. 5 *Q. B.* 449; *Hesser v. Steiner*, 5 *W. & S. (Pa.)*, 476; *Silvis v. Ely*, 3 *W. & S. (Pa.)* 420; *Downing v. Funk*, 5 *Rawle (Pa.)*, 69. "There is no case where mere inadequacy of price independent of other circumstances has been held sufficient to set aside a contract between parties standing on equal ground and dealing with each other without any imposition or oppression." *Per Rogers, J.*, in *Hind v. Holdship*, 2 *Watts (Pa.)*, 104; *Wolford v. Powers*, 85 *Ind.* 294; *Williams v. Jensen*, 75 *Mo.* 681; *Lawrence v. McCallmont*, 2 *How. (U. S.)* 426, 452; *Goree v. Wilson*, 1 *Bailey (S. Car.)*, 597; *Worth v. Case*, 42 *N. Y.* 362, 369; *Smock v. Pierson*, 68 *Ind.* 405; *Train v. Gold*, 5 *Pick. (Mass.)* 380, 384; *Perkins v. Clay*, 4 *N. H.* 518, 520; *Giddings v. Giddings' Admr.* 57 *Vt.* 227; *Cates v. Bales*,



accept a smaller sum in payment of a larger is not binding<sup>1</sup> Where, however, the consideration is something new or different, it is good.<sup>2</sup> On this principle a negotiable instrument for a less sum may be a satisfaction of a greater.<sup>3</sup> A promise to do what one is already bound to do is not a consideration.<sup>4</sup>

good and valuable consideration, sufficient to support the promise to pay as a new agreement, separate and independent from plaintiff's agreement with the village. *Hooker v. Russell*, 30 N. W. Rep. (Wis.) 358.

A gift of bonds *inter vivos*, invalid by reason of no delivery having been made, is not a sufficient consideration to support an executory contract by the donor to pay the donee the value of the bonds in return for their use and appropriation by him for the purposes of his own business. *Flaggers v. Blandy*, 12 N. E. Rep. (Ohio) 321.

A promise to pay a certain sum to a university, to be used exclusively to liquidate a then indebtedness of the university, but if used for any other purpose the sum to be refunded to the donor, *held* to be without sufficient consideration, though the sum was used to create a fund for said liquidation. *Johnson v. Otterbein Univ.*, 41 Ohio St. 527.

A. promised to give £20,000 to a fund of the Congregational Union, and paid certain instalments of the amount, but died leaving £8000 unpaid and unprovided for. The Union claimed that sum from A.'s executors, alleging that they had been led by A.'s promise to contribute larger sums to churches than they would otherwise have done, that money had been given and promised by other persons in consideration of A.'s promise, and that the committee of the Union had incurred liabilities in consequence of A.'s promise. *Held*, that the promise was without consideration. *In re Hudson*, 54 L. J. Ch. 811; 33 W. R. 819.

1. *Smith v. Bartholomew*, 1 Met. (Mass.) 276; *Harriman v. Harriman*, 12 Gray (Mass.), 341; *Smith v. Phillips*, 77 Va. 548; *Mechanics' Bank v. Huston*, 11 W. N. C. (Pa.) 389; *Foakes v. Beer*, L. R. 9 App. Cas. 605; 1 Sm. L. C. (8 Am. Ed.) 648; *Shepard v. Rhodes*, 7 R. I. 470; *Schnell v. Nell*, 17 Ind. 29; *Wolford v. Powers*, 85 Ind. 294, 301. See, *infra*, DISCHARGE OF CONTRACTS.

2. *Pinnel's Case*, 5 Co. Rep. 117, a. Payment of a lesser sum in satisfaction of a greater cannot be a satisfaction of the whole; but the gift of a horse, hawk, or robe in satisfaction is good, because it shall be intended that the thing which the plaintiff has agreed to take will be

more beneficial to him than the money in respect of some circumstance, or otherwise he would not have so agreed. See *Singleton v. Thomas*, 73 Ala. 205; *Earl v. Peck*, 64 N. Y. 596.

An agreement between judgment debtor and creditor that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment. *Foakes v. Beer*, 9 App. Cas. 605, following *Pinnel's Case*, 5 Rep. 117, a, and *Cumber v. Wayne*, 1 Str. 426.

Where certain drafts were paid by the financial agents of a railroad corporation in consideration of the release of the balance of the contract in payment of which the drafts were drawn, the corporation being then insolvent, and the agents having no funds in their hands out of which they could have paid the drafts, *held*, that the voluntary payment by the financial agents of the drafts out of their own means, and not out of the means of the railroad corporation, was a sufficient consideration to support the release. *Indianapolis Rolling Mill Co. v. St. L., Ft. S. & W. R. Co.*, 7 Sup. Ct. Rep. 542; s. c., 120 U. S. 256.

3. *Goddard v. O'Brien*, 9 Q. B. D. 37; *Sibree v. Tripp*, 15 M. & W. 23; *Thompson v. Percival*, 5 B. & Ad. 925; *Sheehy v. Mandeville*, 6 Cranch (U. S.) 253; *Mechanics' Bank v. Huston*, 11 W. N. C. (Pa.) 389; Notes to *Cumber v. Wayne*, 1 Sm. L. C. (8 Am. Ed.) 633, 640 seq.; Article by Elisha Greenhood, Esq., 17 C. L. J. 302.

If a creditor agrees to relinquish a part of his debt on receiving a new or additional security for the balance, or if he agrees to receive a chattel of less value than his debt in satisfaction of his debt, his promise will have a good consideration and will be held to be valid. *Day v. Gardner*, 7 Atl. Rep. (N. J.) 365.

4. *Deacon v. Gridley*, 15 C. B. 295; Judgment on 7th plea in *Mallalieu v. Hodgson*, 16 Q. B. 689; *Vanderbilt v. Schreyer*, 91 N. Y. 392, 401; *Withers v.*

**Adequacy.****CONTRACT. Promise to which One is already Bound.**

Ewing, 40 Ohio St. 400; Conover v. Stillwell, 34 N. J. L. 54; Crosly v. Wood, 6 N. Y. 369; McCaleb v. Price, 12 Ala. 753; City v. Lenze, 27 Ohio St. 383; Cobb v. Cowdry, 40 Vt. 25, 28; Runnamaker v. Cordray, 54 Ill. 303; Ford v. Garner, 15 Ind. 298; Reynolds v. Nugent, 25 Ind. 328. A promise of extra pay to sailors in consideration of their agreeing to finish a voyage for which they had signed articles is without consideration. Bartlett v. Wyman, 14 Johns. (N. Y.) 260. So a promise to pay a witness for attendance at court more than the fees prescribed by law. Dodge v. Stiles, 26 Conn. 463; Sweeney v. Hunter, 1 Murphey (N. Car.), 181. Or any promise made in consideration of the payment in whole or in part of a debt already due. Warren v. Hodge, 121 Mass. 106; Smith v. Bartholomew, 1 Met. (Mass.) 276; Smith v. Tyler, 51 Ind. 512; State v. Davenport, 12 Iowa, 335; Pabodie v. King, 12 Johns. (N. Y.) 426; Pomeroy v. Slade, 16 Vt. 220; Barron v. Vandverk, 13 Ala. 232; Price v. Cannon, 3 Mo. 453; Pemberton v. Hoosier, 1 Kans. 108; Leining v. Gould, 13 Cal. 598; Watts v. French, 19 N. J. Eq. 407; Jenness v. Lane, 26 Me. 475; Parmalee v. Thompson, 45 N. Y. 58; Jenkins v. Clarkson, 7 Ohio, 72; Trumbull v. Brock, 31 Ohio St. 649; Smith v. Phillips, 77 Va. 548; Thompson v. Robinson, 34 Ark. 44.

A promise by a judgment debtor to pay part of the judgment is no consideration for an agreement to make him a deed of the land. Phoenix Ins. Co. v. Rink, 110 Ill. 538.

A promise by a debtor to a creditor to pay what he owes affords no consideration for the creditor's promise to convey land to the debtor. Tucker v. Bartle, 85 Mo. 114.

If a purchaser of chattels, who has agreed to weigh them in order to determine the price, weighs them on incorrect scales, the promise of the seller, upon discovering the error, to pay him a certain sum if he will reweigh them on correct scales is not supported by a sufficient consideration. Billings v. Filley, 32 N. W. Rep. (Neb.) 567.

A promise of reward to an officer for arresting a criminal whom the duties of his office require him to apprehend is both without consideration and against public policy. Gilmore v. Lewis, 12 Ohio, 281; Marking v. Needy, 8 Bush (Ky.), 22; Pool v. Boston, 5 Cush. (Mass.) 219; Day v. Ins. Co., 16 Minn. 408; Smith v. Whilden, 10 Pa. St. 39.

A constable will not be allowed to recover upon a *quantum meruit* for services

which he has performed in his official capacity, especially if an agreement is made to pay him a greater sum for services than the statutes allow him for his fees. Andrews v. Wilcoxson, 33 N. W. Rep. (Mich.) 533; Kick v. Merry, 23 Mo. 72; Bent v. Wakefield, etc., Bank, 4 C. P. D. 1; Stamper v. Temple, 6 Humph. (Tenn.) 113. And see Davies v. Burns, 5 Allen (Mass.), 349; Callaghan v. Hallet, 1 Caines (N. Y.), 104. Consenting to rescind an unlawful agreement is no consideration for a promise. Hooker v. De Palos, 28 Ohio St. 257, 258. But the doing or undertaking of anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration. A promise to reward a constable for rendering services beyond his ordinary duty in the discovery of an offender is binding. England v. Davidson, 11 A. & E. 856; Davis v. Munson, 43 Vt. 676; Brown v. Godfrey, 33 Vt. 120; Gregg v. Pierce, 53 Barb. (N. Y.) 387; Morrell v. Quarles, 35 Ala. 544. Compare Hatch v. Mann, 15 Wend. (N. Y.) 44.

A contract by the marshal of a city for reward of his services in the detection and conviction of a murderer in another county, is not void as against public policy, his duty not requiring him to perform these services. Bronnenberg v. Coburn, 11 N. E. Rep. (Ind.) 29. So is a promise of extra pay to a ship's crew for continuing a voyage after the number of hands has been so reduced by accident as to make the voyage unsafe, so that the crew are not bound to proceed under their original articles. Hartley v. Ponsonby, 7 E. & B. 872. So a promise of reward to a fireman for recovering at the peril of his life a body from a burning building. Reif v. Page, 55 Wis. 496. See also Texas C. P. & Mfg. Co. v. Mechanics' Fire Co., 54 Texas, 319; Pilie v. New Orleans, 19 La. Ann. 274. An agreement to give a debtor time in consideration of his paying the same interest that the debt already carries is inoperative. Kellogg v. Olmstead, 25 N. Y. 189; McCann v. Lewis, 9 Cal. 246; Abel v. Alexander, 45 Ind. 523; Hume v. Mazelin, 84 Ind. 574; Crossman v. Wohlleben, 90 Ill. 537; Hunt v. Postlewait, 28 Iowa, 427; Hale v. Forbis, 3 Mont. 395; Wilson v. Powers, 130 Mass. 127. Otherwise when there is an express or implied stipulation that the debt shall not be paid until the time fixed by the agreement arrives. McComb v. Kittredge, 14 Ohio, 348; Fawcett v. Freshwater, 31 Ohio St. 637; Pierce v. Goldsberry, 31 Ind. 52; Chute v. Pattee, 37 Me. 102; Fowler v. Brooks,

### Forbearance to exercise a right is a good consideration.<sup>1</sup>

13 N. H. 240; *Keim v. Andrews*, 59 Miss. 39. Where a contract is made for the sale of corn upon condition that a given sum is paid down in advance, and the purchaser, not having the money, is given until the next morning to get the same, no new consideration is necessary for the extension of the time of performance. *Biederman v. O'Conner*, 117 Ill. 493; s. c., 57 Am. Rep. 876. An agreement to give time or accept reduced interest in consideration of having some new security would be good. *Gates v. Hamilton*, 12 Iowa, 50; *Kinsey v. Wallace*, 36 Cal. 462, 476.

The surrender of an old note is sufficient consideration for a new one executed by the surety, who, knowing the facts but mistaking the law, erroneously supposed himself liable when in fact he was discharged. *Churchill v. Bradley*, 58 Vt. 403. An antecedent debt constitutes a good and sufficient consideration for a new contract. So held where one negotiable instrument was given in payment of another past due and protested. *Merchants' Bk. v. McClelland*, 13 Pac. Rep. (Colo.) 723.

An agreement to give time would be good if made in consideration of the payment of the same interest in advance or of a promise to pay increased interest. *Warner v. Campbell*, 26 Ill. 282; *Dickerson v. Commissioners*, 6 Ind. 128; *Wright v. Bartlett*, 43 N. H. 548; *Clarkson v. Creely*, 35 Mo. 95; *Royal v. Lindsay*, 15 Kans. 591; *Bank v. Mallett*, 34 Me. 547; *Williams v. Scott*, 83 Ind. 405; *Hubbard v. Ogden*, 22 Kans. 363; *Preston v. Henning*, 6 Bush (Ky.), 556; *Mfg. Co. v. Bradley*, 105 U. S. 175.

A. and several others being liable as makers of two notes aggregating \$350, the holder of the notes agreed to release A., and also to release a lien which he held as security for the notes, if A. would pay \$100 cash and give his note for \$115, payable at an earlier date than the last maturing of the joint notes. Held, that there was sufficient consideration to support the promise to release, as the original notes were satisfied to the extent of \$215 earlier than they matured, and the original obligors other than A. still continued liable for the balance. *Kirchoff v. Voss*, 3 S. W. Rep. (Tex.) 548.

A promise to do what one is already bound by contract with a third person to do has been held to be a good consideration. *Scotson v. Pegg*, 6 H. & N. 295. The following cases hold that it is not a good consideration: *Davenport v. First*

*Congregational Society*, 33 Wis. 387; *Johnson's Admr. v. Sellers' Admr.*, 33 Ala. 265; *Gordon v. Gordon*, 56 N. H. 170, 173. There are cases which hold that where one party to a contract refuses to perform his part, a promise by the other party to pay something beyond the consideration agreed upon if he will go on and perform is binding. *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Cooke v. Murphy*, 70 Ill. 96; *Holmes v. Doane*, 9 Cush. (Mass.) 135; *Lattimore v. Harsen*, 14 Johns. (N. Y.) 330; *Coyner v. Lynde*, 10 Ind. 282; *Lawrence v. Davey*, 28 Vt. 264; *Bishop v. Busse*, 69 Ill. 403; *Stewart v. Keteltas*, 36 N. Y. 388, 392; *Rollins v. Marsh*, 128 Mass. 116; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489. Compare *Endress v. Belle Isle Ice Co.*, 49 Mich. 279. These cases are perhaps open to the objection that they hold the doing of what one is legally bound to do a consideration for a promise. *Ayres v. Railroad Co.*, 52 Iowa, 478; *McCarty v. Hampton Bldg. Assn.*, 61 Iowa, 287; *Festerman v. Parker*, 10 Ired. L. (N. Car.) 474; *Erb v. Brown*, 69 Pa. St. 216; *Vanderbilt v. Schreyer*, 91 N. Y. 392. See, *infra*, DISCHARGE OF CONTRACTS.

1. *Mather v. Lord Maidstone*, 18 C. B. 273. The commonest case of this kind of consideration is forbearing to sue. The allowance of time in which to pay a debt is a valuable consideration. *Lipsmeier v. Vehslage*, 27 Fed. Rep. 175. The forbearance must be for a definite or ascertainable time; forbearance for a reasonable time is sufficient. *Oldershaw v. King*, 2 H. & N. 517; *Hake v. Hotchkiss*, 23 Vt. 231; *Sidwell v. Evans*, 1 P. & W. (Pa.) 383; *King v. Upton*, 4 Me. 387; *Lonsdale v. Brown*, 4 Wash. (U. S.) 148; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Calkins v. Chandler*, 36 Mich. 320; *Glasscock v. Glasscock*, 66 Mo. 627; *Willis v. Ross*, 77 Ind. 1; *Hockenbury v. Meyers*, 34 N. J. L. 346; *Cathcart v. Thomas*, 8 Baxt. (Tenn.) 172; *Howe v. Taggart*, 133 Mass. 284; *Shupe v. Galbraith*, 32 Pa. St. 10; *Cary v. White*, 52 N. Y. 138; *Mecorney v. Stanley*, 8 Cush. (Mass.) 85; *Manter v. Churchill*, 127 Mass. 31; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Edgerton v. Weaver*, 105 Ill. 43. Compare *Holzworth v. Koch*, 26 Ohio St. 33; *Boyd v. Freize*, 5 Gray (Mass.), 553; *Breed v. Hilhouse*, 7 Conn. 523; *Lomax v. Smyth*, 50 Iowa, 223; *Johnston Harvester Co. v. McLean*, 57 Wis. 258. A promise to forbear generally, without naming any particular time, has been

The compromise of a disputed claim is a good consideration.<sup>1</sup>

construed to mean perpetual forbearance. *Clark v. Russell*, 3 Watts (Pa.), 213.

A promise not to prosecute a demand which has no existence in law or fact is no consideration. *Forth v. Stanton*, 1 Wms. Saund. 210; *Hamaker v. Eberly*, 2 Binn. (Pa.) 509; *Jones v. Ashburnham*, 4 East. 455; *Palfrey v. Railroad Co.*, 4 Allen (Mass.), 55; *Tucker v. Ronk*, 43 Iowa, 80; *Prater v. Miller*, 25 Ala. 320; *Jarvis v. Sutton*, 3 Ind. 289; *Kidder v. Blake*, 45 N. H. 530; *Stewart v. Bradford*, 26 Ala. 410; *Sullivan v. Collins*, 18 Iowa, 228; *Long v. Towl*, 42 Mo. 545; *Foster v. Metts*, 55 Miss. 77; *Gunning v. Royal*, 59 Miss. 45; *Mulholland v. Bartlett*, 74 Ill. 58; *Cline v. Templeton*, 78 Ky. 550; *Smith v. Easton*, 54 Md. 138; *Ecker v. McAllister*, 54 Md. 362; *Schroeder v. Fink*, 60 Md. 436; *Graham v. Johnston*, 8 Eq. 36; *Edwards v. Baugh*, 11 M. & W. 641; *Leake on Cont.* 625.

Where a loan company claims that its agent, who is liable to it for arrears of interest on the loans effected by him, is responsible to it for interest on mortgages, which interest had all been realized by the company by being embraced in various decrees of foreclosure under which the company had sold the properties and bid them in for the full amount of the decrees, the claim of the company for such interest is groundless and colorless; and a compromise based thereon, and notes made in pursuance thereof, are void for want of consideration, even though made to avoid litigation. *U. S. Mortgage Co. v. Henderson*, 12 N. E. Rep. (Ind.) 88.

Forbearance to file a *bona fide* though invalid claim is good consideration for a promise. *Hewett v. Currier*, 63 Wis. 386.

A contract of license provided for a forfeiture by the licensee of all rights thereunder upon his default in any quarterly payment of royalties. Such default was made and the patentee gave notice, but subsequently withdrew it at the request of the licensee, who promised to pay the amount due. The patent was subsequently declared void. *Held*, that the withdrawal of the forfeiture was of itself sufficient consideration to support the promise to pay. *Hyatt v. Dale Tile Mfg. Co.*, 12 N. E. Rep. (N. Y.) 705.

The compromise of a disputed claim, made *bona fide*, is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it would ulti-

mately appear that the claim was wholly unfounded. The detriment to the party consenting to a compromise arising from the alteration in his position, forms the real consideration which gives validity to the promise. *Grandin v. Grandin*, 9 Atl. Rep. (N. J.) 756; s. c., 11 East. Rep. 561.

An agreement to relinquish a timber culture claim was held a sufficient consideration for a contract. *Palmer v. March*, 34 Minn. 127.

The waiver of a legal right on the part of a promisee is a sufficient consideration for a promise made on account of such waiver. *Vogel v. Meyer*, 23 Mo. App. 427.

The sale and relinquishment of an inchoate homestead or other possessory right upon the public domain, together with the ranch and other improvements thereon, were held to constitute a good and valid consideration for a promissory note. *Paxton Cattle Co. v. First Nat. Bk. of Arapahoe*, 33 N. W. Rep. (Neb.) 271.

1. A compromise of a disputed claim or the discontinuance of a suit already brought may uphold a promise, although the demand was unfounded. *Cook v. Wright*, 1 B. & S. 559; *Longridge v. Dorville*, 5 B. & Ald. 117; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Payne v. Bennet*, 2 Watts (Pa.), 427; *Rice v. Bixler*, 1 W. & S. (Pa.) 445; *Worrall's Accounts*, 5 W. & S. (Pa.) 111; *Jones v. Rittenhouse*, 87 Ind. 348; *Bank v. Geary*, 5 Pet. (U. S.) 98; *Grasselli v. Lowden*, 11 Ohio St. 349; *Adams v. Morton*, 37 Iowa, 255; *Fleming v. Ramsey*, 46 Pa. St. 252; *Logan v. Matthews*, 6 Pa. St. 417; *Fisher v. May*, 2 Bibb (Ky.), 448; *Taylor v. Patrick*, 1 Bibb (Ky.), 168; *Craus v. Hunter*, 28 N. Y. 389; *Ins. Co. v. Watson*, 59 N. Y. 390; *Feeter v. Weber*, 78 N. Y. 334; *Russell v. Cook*, 3 Hill (N. Y.), 504; *Holcomb v. Stimpson*, 8 Vt. 141; *Blake v. Peck*, 11 Vt. 483; *Bellows v. Sowles*, 55 Vt. 391; *Miller v. Hawker*, 66 Ill. 185; *Parker v. Enslow*, 102 Ill. 272; *Richardson v. Comstock*, 21 Ark. 69; *Hewett v. Currier*, 32 Alb. L. J. (S. C. Wis.) 178; *Morris v. Munroe*, 30 Ga. 630; *Stover v. Mitchell*, 45 Ill. 213; *McClellan v. Kennedy*, 8 Md. 230, 248; *Smith v. Penn*, 22 Gratt. (Va.) 402; *Warren v. Williamson*, 8 Baxt. (Tenn.) 427; *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 546; *Lipsmeier v. Vehslage*, 29 Fed. Rep. 175.

A *bona fide* compromise of a real claim is a good consideration, whether the claim would have been successful or not.



**23. Past Consideration—Moral Obligation—Effect of Subsequent Promise.**—The consideration must consist of a present or future act; a past act cannot serve as a consideration for a promise.<sup>1</sup>

*Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266.

Where an action has been commenced by a landlord against his tenant for damages for misuser and bad cultivation, an arrangement by which the litigation is to be stopped and the lease surrendered without fraud, carries with it a sufficient consideration to support it. *Baumier v. Antian*, 31 N. W. Rep. (Mich.) 888; s. c., 8 West. Rep. 115.

With regard to the settlement of a disputed boundary-line, it was held that the mutual concessions of the parties in fixing the disputed boundary-line, and the relinquishment by one of them of his claim to the disputed strip of land, were sufficient consideration to support the promise of the other to pay the value of the strip. *Finley v. Funk*, 12 Pac. Rep. (Kans.) 15.

Where plaintiff put furnaces into defendant's building, with warranty that they would heat the building suitably; if not, that they should be removed, if he were notified before Jan. 1; and after Jan. 1 the defendant company notified him that they did not comply with the warranty, excusing its failure to do so before on the ground that the weather was not cold enough to test the furnaces,—it was held that a compromise made in good faith under these circumstances, by which plaintiff agreed to accept a less sum than the contract price, unless it should show to defendant thereafter that the furnaces would heat the building as stipulated, was supported by sufficient consideration. "The law favors such settlements of controversies, and finds a consideration for the contract looking to the compromise in the mutual agreement of the parties to abide the result of the settlement." *Richardson & Boynton Co. v. Indep. Dist. of Hampton*, 31 N. W. Rep. (Iowa) 871. The parties must believe that the claim is a good one, and it must be such a claim as they could reasonably regard as serious. *Wade v. Simeon*, 2 C. B. 548; *Davisson v. Ford*, 23 W. Va. 6, 17; *Ex parte Banner*, 17 Ch. D. 490. If the party knows or ought to know that the claim has no foundation, it is not a consideration. *Pitkin v. Noyes*, 48 N. H. 294; *McKinley v. Watkins*, 13 Ill. 140; *Headley v. Hockley*, 50 Mich. 43; *Ormsbee v. Howe*, 54 Vt. 182; *Feeter v. Weber*, 78 N. Y. 334.

1. A past consideration will not support an express promise. *Johnson v. Johnson's Admr.*, 31 Pa. St. 450; *Chamberlin*

*v. Whitford*, 102 Mass. 448; *Summers v. Vaughn*, 35 Ind. 323; *Hopkins v. Richardson*, 9 Gratt. (Va.) 485; *Shealy v. Toole*, 56 Ga. 210; *Barlow v. Smith*, 4 Vt. 139; *Bulkley v. Landon*, 2 Conn. 404; *Roscorla v. Thomas*, 3 Q. B. 234. When a part of the consideration is past and a part is not, it is enough to sustain a promise. *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Wiggins v. Keizer*, 6 Ind. 252; *Roberts v. Griswold*, 35 Vt. 496. If the nature of the transaction is such as to give rise to an obligation, the law will imply a promise to fulfil it; if it is not, a subsequent promise will not create the liability which was wanting in the first instance. *Hayes v. Warren*, 2 Strange, 933; *Docket v. Voyel*, Cro. Eliz. 885; *Jereny v. Goochman*, Cro. Eliz. 442; *Hunt v. Bate*, Dyer, 272; *B. Comstock v. Smith*, 7 Johns. (N. Y.) 87. Where a son of full age fell sick among strangers and was supported by them until he died, a subsequent promise of repayment by the father was without consideration. *Mills v. Wyman*, 3 Pick. (Mass.) 207. "The rule of the law seems now well established, although it may formerly have been left in doubt, that the past performance of services constitutes no consideration even for an express promise, unless they were performed under the express or implied request of the defendant, or unless they were done in performance of some duty resting on him." *Shaw, C. J.*, in *Mills v. Wyman*, 3 Pick. (Mass.) 207. See also *Dearborn v. Bowman*, 3 Met. (Mass.) 155; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Dodge v. Adams*, 19 Pick. (Mass.) 429; *Balcom v. Craggin*, 5 Pick. (Mass.) 295; *Shepherd v. Young*, 8 Gray (Mass.), 152; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Carson v. Clark*, 1 Mo. 159; *Snevily v. Reed*, 9 Watts (Pa.), 396; *Geer v. Archer*, 2 Barb. (N. Y.) 420; *Ingraham v. Gilbert*, 20 Barb. (N. Y.) 151. Goods furnished a third party at the maker's request are a good consideration for a note given in payment therefor. *Lipsmeier v. Vehslage*, 29 Fed. Rep. 175. A service rendered voluntarily without a request is not a consideration for a subsequent promise, unless the promisor accepts the benefit under circumstances which leave him free to refuse. The use of goods sent without orders is evidence of an acceptance which may supply the want of a request; but the case is different where one constructs a building on the land of another without

**Past Consideration****CONTRACT. will not Support Express Promise.**

his knowledge or assent, or erects a structure differing materially from that specified in the agreement under which the work was done. *Bryant v. Stillwell*, 24 Pa. St. 319; *Shaw v. The Turnpike*, 2 Pa. 454; *Munroe v. Butt*, 8 E. & B. 738; *Smith v. Brady*, 17 N. Y. 173; *Trustees v. Bennett*, 3 Dutch. (N. J.) 512.

When the plaintiff relies on a subsequent promise it must be coextensive with the consideration, and such as to time, manner, and amount as the law would imply had no express promise been given. *Hopkins v. Logan*, 5 M. & W. 241; *Jackson v. Cobbin*, 8 M. & W. 790. A warranty given after the sale is not binding on the vendor. *Roscorla v. Thomas*, 3 Q. B. 234; *Hunt v. Bate*, Dyer, 272, B; *Thornton v. Jenyns*, 1 M. & G. 166; *Kaye v. Dutton*, 7 M. & G. 807; *Ehle v. Judson*, 25 Wend. (N. Y.) 97; *Vandakin v. Soper*, 1 Aiken, 287. A promise by a husband to pay an antenuptial debt of his wife will not make the debt his own. *Cole v. Shurtleff*, 41 Vt. 311. A promise by an executor to pay a debt due by his testator does not impose a personal obligation. *Rann v. Sughes*, 7 T. R. 350, *m.* A promise by a debtor to pay the debt to a third person, or by a third person to pay a debt, is invalid. *Hopkins v. Logan*, 5 M. & W. 241.

Although a subsequent promise will not alter the contract, it may be material evidence of what the contract is. Where a note was given for past services, the fact that it was given was held to raise a presumption that there had been a previous understanding that such compensation should be made. *Pitts v. Pitts*, 21 Ind. 309.

If A advances to B a sum of money towards the purchase of a house by B, this is a sufficient consideration for a subsequent promise by B to pay the amount, although the deed was taken in the name of A as security for the advance, and the debt is not extinguished. *Hennessey v. Connor*, 139 Mass. 120.

When an act is done at the request of another, the law will imply a promise to pay what the service is reasonably worth, but a subsequent promise to give a specific sum may be binding. It operates by reducing to certainty what the parties have left undetermined. In *Lampleigh v. Brathwait*, Hobart, 105. 1 Sm. L. C. (8th Ed.) 267, the declaration averred that whereas the defendant had previously slain one Patrick Mahune, and after the said felony done instantly required the plaintiff to labor and do his endeavor to obtain the king's pardon for the said felony, to wit, in riding and journeying at his own charges

from London to Boston, where the king then was, and to London back, and so to and from Newmarket, to obtain the pardon of the defendant, and afterwards the defendant in consideration of the premises promised the plaintiff £100, which he had not paid. *Held*, that the promise related back to the request, and was binding. See also *Elderton v. Emmens*, 4 C. B. 479; *Townsend v. Hunt*, Cro. Car. 408; *Riggs v. Bullingham*, Cro. Eliz. 715; *Sidenham and Worlington's Case*, 2 Leon. 224. A promise of a sum certain in consideration of an antecedent marriage contracted at the defendant's request, is binding. *Marsh v. Karenford*, Cro. Eliz. 59; *Waters v. Howard*, 8 Gill. 262. An act done at the request of another will not be a consideration, unless the intention was to charge him, or his credit was the inducement to the act. When the relation between the parties is one of charity or beneficence, it cannot be made legally obligatory by the most express promise. *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Russell v. Clark*, 7 Cranch (U. S.), 69; *Hamor v. Moore*, 8 Ohio St. 239. A subsequent promise may, however, be evidence of the understanding of the parties. *Hatch v. Purcell*, 1 Foster (N. H.), 544; *Wilson v. Edmonds*, 4 Foster (N. H.), 517; *Paul v. Stackhouse*, 38 Pa. St. 302. The rule that a past transaction will not sustain any promise which the law would not imply cannot be evaded by the introduction of a nominal consideration or of a consideration which is inadequate to the promise. *Shepard v. Rhodes*, 7 R. I. 470. In *Schnell v. Nell*, 17 Ind. 29, a promise by a husband to pay a legacy left by his wife in consideration of one cent, of natural love and affection, and of the services she had rendered to him during her life, was held to be without consideration. A promise to fulfil an obligation which could be enforced in equity is in some cases binding. *Geer v. Archer*, 2 Barb. (N. Y.) 420; *Stewart v. Eden*, 2 Caines (N. Y.), 150; *Hudson v. Critcher*, 8 Jones (N. Car.), 485; *La Touche v. La Touche*, 3 H. & C. 576. Thus if the principal debtor promises the surety to discharge the debt when due, the latter may sue at once if the promise is not fulfilled. *Keller v. Rhoads*, 39 Pa. St. 513; *Swift v. Crocker*, 21 Pick. (Mass.) 241; *Haseltine v. Guild*, 11 N. H. 390. So an assignee of a chose in action who receives a promise of payment from the debtor may enforce it by suit in his own name. *Crocker v. Whitney*, 10 Mass. 316; *Cromelien v. Mauger*, 17 Pa. St. 169; *Tierman v. Jackson*, 5 Peters (U. S.), 580.

An existing debt is not a consideration for any promise which the law will not

It was at one time held that a moral obligation would support a subsequent express promise. This doctrine has been generally repudiated,<sup>2</sup> although it is still occasionally to be met with.

Although a subsequent promise is not a good consideration, it may operate as a waiver of a defence that would otherwise be valid.<sup>4</sup> Thus a promise to pay a debt which has been barred by the Statute of Limitations,<sup>5</sup> or by a discharge in bankrupt-

imply from it. *Hopkins v. Logan*, 5 M. & W. 241; *Roscorla v. Thomas*, 3 Q. B. 234. The doctrine that a past consideration will not support a promise may seem at variance with the forms of pleading, which aver that the defendant being indebted to the plaintiff promised to pay. But in such cases the promise relied on is not the express promise, but the promise which the law implies from the existence of the debt. If the express promise is different from that which the law implies, it is without consideration, and cannot be enforced. Where a debt is barred by the Statute of Limitation, a promise to pay in goods will not revive it. *Reeves v. Hearne*, 1 M. & W. 323; *Earle v. Oliver*, 2 Ex. 71; *Short v. McCarthy*, 3 B. & Ald. 626; *Titus v. Ash*, 4 Foster (N. H.), 319.

1. *Hawkes v. Saunders*, Cowp. 290; *Atkins v. Banwell*, 2 East, 505; *Cooper v. Martin*, 4 East, 76; *Wing v. Mill*, 1 B. & Ald. 104; *Lee v. Muggeridge*, 5 Taunt. 36; *Doty v. Wilson*, 14 Johns. (N. Y.) 378; *Willing v. Peters*, 12 S. & R. (Pa.) 177; *Trumbull v. Tilton*, 1 Foster (N. H.), 128; *Cunningham v. Garvin*, 10 Pa. St. 366, 368; *Greeves v. McAllister*, 2 Binn. (Pa.) 591; *Montgomery v. Lampton*, 3 Met. (Ky.) 519; *Stewart v. Eden*, 2 Caines (N. Y.), 150; *Bently v. Morse*, 14 Johns. (N. Y.) 468; *Glass v. Beach*, 5 Vt. 172; *Hemphill v. McClimans*, 24 Pa. St. 367; *Vance v. Wills*, 8 Ala. 399.

2. The fallacy of the doctrine was exposed in a note to the case of *Wennall v. Adney*, 3 Bos. & P. 247, 249, where it was shown that the cases where a past consideration had been upheld on the ground of moral obligation were all cases of a precedent consideration, which would have given rise to an implied promise but for the intervention of some positive rule of law which might be waived by the party for whose benefit it was introduced. See also *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Hatchell v. Odorn*, 2 Dev. & Bat. (N. Car.) 302. As was said by Lord Denman in *Eastwood v. Kenyon*, 11 A. & E. 438, if it were true that a moral obligation will support a promise every promise would be legally binding, because every promise carries with it a moral obligation. It is now generally held that

to render a subsequent promise valid some act must have been done or service rendered on the faith of an express or implied request, and that when this element is wanting it will not be enough to show that the defendant was morally bound to remunerate the plaintiff, and ratified the obligation by an express promise. *Hamor v. Moore*, 8 Ohio St. 239; *Updike v. Titus*, 2 Beas. (N. J.) 151; *Nightingale v. Barney*, 4 Greene (Iowa), 106; *Paul v. Stackhouse*, 38 Pa. St. 302; *Geer v. Archer*, 2 Barb. (N. Y.) 420, 424; *Dearborn v. Bowman*, 3 Met. (Mass.) 165; *Wiggins v. Keizer*, 6 Ind. 252; *Eakin v. Fenton*, 15 Ind. 59; *Ingraham v. Gilbert*, 20 Barb. (N. Y.) 151; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Watkins v. Halstead*, 2 Sandf. (N. Y.) 311; *Cook v. Bradley*, 7 Conn. 57; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Dodge v. Adams*, 19 Pick. (Mass.) 429; *Bates v. Wilson*, 1 Sneed (Tenn.), 376; *Holt v. Robinson*, 21 Ala. 106.

3. The moral duty of a father to provide for his child is a sufficient consideration for a promise to pay money. *Knowles v. Erwin*, 43 Hun (N. Y.), 150. Cases are sometimes decided on this ground, when they fall within the well-recognized exceptions to the rule that a past consideration will not support a promise. See for instances cases of promises to pay debts after a discharge in bankruptcy, *infra*.

4. One cannot render a contract without consideration valid by promising not to take advantage of the want of consideration. *Belknap v. Bender*, 75 N. Y. 451. Or a contract which is contrary to the policy of the law. *Shister v. Vandike*, 94 Pa. St. 447. But when a consideration moves from the plaintiff under circumstances which would render the defendant liable but for some positive rule of law, he may affirm the contract by a subsequent promise. See *infra*.

5. *Winnall v. Adney*, 3 Bos. & P. 247; *Kingston v. Wharton*, 2 S. & R. (Pa.) 208; *Maxim v. Morse*, 8 Mass. 127; *Yates v. Hollingsworth*, 5 Har. & J. (Md.) 216; *Walbridge v. Harroon*, 18 Vt. 448; *Farmers' & M. Bank v. Flint*, 17 Vt. 508; *Johnson v. Evans*, 8 Gill. (Md.)

cy,<sup>1</sup> is good. But a promise to pay a debt which the creditor has by his own act effectually released is without consideration.<sup>2</sup> So a promise made by a woman when single to perform a promise previously made by her while married is not binding without a new consideration.<sup>3</sup> Such a promise has been sustained when the original promise was an engagement binding her separate estate.<sup>4</sup>

**24. Classification of Simple Contracts.**—Simple contracts may be divided into two classes: 1, those arising from agreement; and, 2, those arising independently of agreement or implied in law.

**25. Agreement Consists of Offer and Acceptance.**—The most essential element of agreement is the consent of the parties. If two or more parties express their consent to a common purpose with a view to forming a contract, this is an agreement. An agreement usually consists of an offer by one party and an acceptance by the other. Indeed every agreement may be reduced to an acceptance of an offer. The agreement is perfect as soon as the offer is accepted.<sup>5</sup>

155; *Ross v. Ross*, 20 Ala. 105; *Phelps v. Williamson*, 26 Vt. 230; 1 Sm. L. C. (8 Am. Ed.) 988; *Turner v. Chrisman*, 20 Ohio, 332.

One who admits his liability for and promises to pay a debt just before the Statute of Limitations is about to bar a suit, admits and promises on a consideration. *Parsons v. Frost*, 55 Mich. 230.

A promise by one debtor to pay the whole or part of a joint debt which has been barred by the Statute of Limitations is binding. *Lechmere v. Fletcher*, 1 C. & M. 623.

1. *Trueman v. Fenton*, Cowp. 544; *Field's Est.*, 2 Rawle (Pa.), 351; *Bolton v. King*, 105 Pa. St. 78; 1 Sm. L. C. (8th Am. Ed.) 1462.

The moral obligation to pay a debt is sufficient consideration to support the promise of a bankrupt, made after his discharge from bankruptcy, to pay a debt from which he had been discharged. *Wislizenus v. O'Fallon*, 3 S.W. Rep. (Mo.) 837.

A moral obligation supports a promise after a discharge in bankruptcy. *Post v. Losey*, 12 N. E. Rep. (Ind.) 121.

2. *Snevily v. Reed*, 9 Watts (Pa.), 396; *Valentine v. Foster*, 1 Met. (Mass.) 520; *Stafford v. Bacon*, 1 Hill (N. Y.), 532; *Shepard v. Rhodes*, 7 R. I. 470; *Warren v. Whitney*, 24 Me. 561; *Montgomery v. Lampton*, 3 Met. (Ky.) 519; *Wright v. Clarke*, 34 Miss. 116; *Carver v. Bank*, S. C. Ohio, 9 Wkly. Law Bull. 80; *Ingersoll v. Martin*, 58 Md. 67; *Hale v. Rice*, 124 Mass. 292; *Mason v. Campbell*, 27 Minn. 54; *Stafford v. Bacon*, 1 Hill (N. Y.), 532. *Contra*, *Willing v. Peters*, 12 S. & R. (Pa.) 177; *Baeder v. Barton*, S. C. Pa., 25 Alb. L. J. 377; 11 W. N. C. (Pa.) 165.

3. *Musick v. Dodson*, 76 Mo. 624; *Kennerly v. Martin*, 8 Mo. 698; *Maher v. Martin*, 43 Ind. 314; *Hetherington v. Hixon*, 46 Ala. 297; *Hayward v. Barker*, 52 Vt. 429; *Felton v. Reid*, 7 Jones L. (N. Car.) 269; *Waters v. Bean*, 15 Ga. 358; *Littlefield v. Shee*, 2 B. & Ad. 811. *Contra*, *Goulding v. Davidson*, 26 N. Y. 604; *Hemphill v. McClimons*, 24 Pa. St. 367; *Lee v. Muggeridge*, 5 Taunt. 36; *Brown v. Bennett*, 75 Pa. St. 420; *Front v. McDonald*, 83 Pa. St. 144; *Wilson v. Burr*, 25 Wend. (N. Y.) 386.

4. *Vance v. Wells*, 8 Ala. 399; *Forrest v. Robinson*, 4 Porter (Ala.), 44; *Sadler v. Houston*, 4 Porter (Ala.), 208; 1 L. C. Eq. (5 Am. Ed.) 742; *Viser v. Bertrand*, 14 Ark. 267; *Hubbard v. Bugbee*, 55 Vt. 506.

A promise by a married woman, having a separate estate, to pay for necessities furnished her upon the credit of her separate estate, is a sufficient consideration for a new promise after the death of her husband. *Sherwin v. Sanders*, 9 Atl. Rep. (Vt.) 239; s. c., 11 East. Rep. 473.

A mortgage of her separate estate by a married woman to secure her husband's debt is not in South Carolina a "contract as to her separate estate." *Aultman & Taylor Co. v. Rush*, 2 S. E. Rep. (S. Car.) 402.

5. *Pollock on Contrs.* 4, 5; *Anson on Contrs.* 11.

6. In an action against a railroad company to recover damages for failure to provide transportation for A.'s cattle as agreed, A. testified that he met S., the general freight agent, on May 27, and told him he wanted twenty-three cars on May 30, eight at Mound City and fifteen



**26. Express and Implied Agreements.**—An agreement may be either express or implied: express, where it consists of words written or spoken, expressing an actual agreement of the parties: implied, when it is evidenced by conduct manifesting an intention of agreement.<sup>1</sup>

**27. Proposal and Acceptance.**—A proposal, to be made binding by acceptance, must be intended to affect legal relations; it must be the offer of a contract.<sup>2</sup> Its terms must be sufficiently certain to en-

at Maitland, for Chicago, and asked him if he could get them ready. S. said he could, and called the clerk to take down the order, and asked A. if he would have the cattle there, and was told he would, and that he wanted the cars on Monday so he could bed them. S. told him he could have the cars, and to see the agent at Mound City and Maitland, which A. did. *Held*, that the evidence proved a valid contract, the consideration of which was the mutual promises of the parties. *Baker v. Kans. City, etc., R. Co., 3 S. W. Rep. (Mo.) 486.*

A written proposal for plans contained the provision that each architect should receive \$500 dollars for his plans, irrespective of relative merit, and that "the architect who is successful shall not receive \$500, but he shall be engaged as architect and superintendent, and shall be paid." *Held*, that the architect whose plans were accepted had a right of action for a refusal to employ him. *Walsh v. St. Louis Expos. and Mus. Hall Assoc., 16 Mo. App. 502.*

The acceptance of a legally made bid for a proposed building was held not in itself to constitute a contract, but to entitle the bidder to one in accordance with the proposals. *Hughes v. Clyde, 41 Ohio St. 339.*

Upon the amalgamation in 1882 between the S. and C. banking companies, A., a holder of 100 shares in the S. bank, received a circular asking whether he would exchange his shares in the S. bank for shares in the C. bank, which took over the business of the other. A. died shortly afterwards without having sent any reply to the circular. On Feb. 27, 1883, a letter was sent on behalf of A.'s executors to the C. bank, "enclosing certificate for 100 shares of the S. bank in the name of" A., "and will thank you to let us have shares in your bank in exchange." On Feb. 28 the manager replied that when probate had been exhibited to the London agents of the bank he would send share certificates in the bank "in the name of the executors individually." A certificate was made out to the executors of 100 shares in the C. bank, and an

entry made in the share register with the description "executors of A." The executors wrote that they objected to have the certificate in their names, and requested the bank to forward them one in the name of A. The directors accordingly ordered the certificate to be cancelled and one made out in the name of A. for 100 shares. On summons by the liquidator for rectification of the register by striking out the name of A. and putting in place of it the names of the executors as holders of the 100 shares, *held*, that the letters of Feb. 27 and 28 constituted by application and acceptance a completed contract between the executors and the bank that 100 shares should be taken in the name of the executors individually, and further that such completed contract was not and could not have been afterwards rescinded by the company. *In re Cheshire Banking Co., 32 Ch. D. 301.*

1. "The only difference between an express and an implied contract is in the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the consequences resulting must be the same." *Per Parke, B., in Manzetti v. Williams, 1 B. & Ad. 425. See Bixby v. Moore, 51 N. H. 402.*

"An implied promise does not differ from an express promise except in the evidence by which it is proved." *Chilcot v. Trimble, 13 Barb. (N. Y.) 502.*

Contracts implied from conduct must be distinguished from contracts implied in law. The latter are not properly contracts at all. *See, infra, IMPLIED PROMISES.* For examples of contracts implied from conduct, *see, infra, PROPOSAL AND ACCEPTANCE.*

2. A mere statement of intention made in the course of conversation will not constitute a binding promise, though it be acted upon by the party to whom it was made. *In Week v. Tibold, 6 Roll. Abr. 6,* the defendant told plaintiff that he would give £100 to him who married his daughter with his consent. Plaintiff

married the daughter and claimed the £100. *Held*, that he could not recover. "It is not reason that the defendant should be bound by such general words, spoken to excite suitors." *Velv. 11; Richards v. Richards*, 46 Pa. St. 78, 82.

A baker hired a man for a year under a contract that the employment should terminate within that time on the burning of the bakery. The bakery having burned, *held*, that a request that the man should stay until things could be got straight, when something should be found for him to do, could not be regarded as a waiver of the contract, even though the man waited five weeks, and refused other offers of employment. *Edwards v. Block*, 73 Ga. 450.

Loose expressions of intention and purposes do not constitute a contract. *Recknagle v. Schmalz*, 33 N. W. Rep. (Iowa) 365.

But where A, being about to sue C was told by B, C's father, who had taken from C a bill of sale of all his property, "You keep quiet and you will have your money. I guess I am worth it," and A, relying on B's promise, forbore further proceedings, it was held that A could maintain an action against B. *Bowen v. Tipton*, 64 Md. 275.

It must be considered in particular cases whether some act or announcement of one of the parties is really the proposal of a contract, or only an invitation to other persons to make proposals for his consideration. In *Denton v. G. N. R. Co.*, 5 E. & B. 860; 25 L. J. Q. B. 129, the plaintiff arranged, on the faith of the company's time-tables, to take the 7.20 from Peterborough to Hull; he applied for a ticket and offered to pay the proper fare. The company's clerk refused to issue the ticket for the reason that the 7.20 train no longer went to Hull. The plaintiff missed an appointment at Hull and sustained damage. *Held*, that he was entitled to recover. The time-table was a proposal, and was accepted by a tender of the fare. This view was not necessary to the actual decision, for it was only necessary to decide whether the plaintiff could succeed in any form of action, and there was no doubt that he could recover in tort for a false representation. See *Heirn v. McCaughan*, 32 Miss. 17. In *Gordon v. Railroad Co.*, 52 N. H. 596, it was held that the company would not be liable for failure to transport the plaintiff (who was the holder of a season ticket over its road) in accordance with its published time-table, if it "had done all that due care and skill could do" to transport him

punctually. "The publication of a time-table in common form imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated in the table, but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence." Compare *Sears v. Railroad Co.*, 14 Allen (Mass.). 433. In *Crocker v. Railroad Co.*, 24 Conn. 249, the defendants had established and given public notice of a regulation that the fare on their line from N. to N. L. would be fifty cents to passengers purchasing tickets before entering their cars, but to others fifty-five cents. Plaintiff took a seat in the train at N., and after it had started, being called upon by the conductor offered to pay fifty cents and refused to pay more for his fare from N. to N. L., and was thereupon removed from the train by the defendants' servants. An action of trespass having been brought by him for having been wrongfully removed from the train, it appeared that plaintiff, on going a reasonable time before the time of departure of the train to defendants' office, where tickets were usually sold, found it closed, and was unable then or afterward at any time before the train left to procure a ticket, of which fact he informed the conductor when the latter demanded his fare. The regulation of the defendants was admitted to be lawful and reasonable. *Held*, "1. That as common carriers the defendants were under no legal obligation to furnish tickets or carry passengers from N. to N. L. for less than fifty-five cents each. 2. That the plaintiff's claim to such a passage for fifty cents rested entirely on the assumed engagement of the defendants to furnish tickets, and the plaintiff's endeavor to procure one defeated by the defendants. 3. That said regulation of the defendants was not a contract creating a legal debt or duty, but a mere proposal which might be suspended or withdrawn by closing the defendants' office and the retirement of their agent therefrom. 4. That the proposal being withdrawn, the parties were in the same condition as before it was made; the defendants, continuing common carriers, were bound to carry the plaintiff for fifty-five cents, but not otherwise. 5. That The plaintiff refusing said sum, the conductor had a right to remove him from the cars, using no unnecessary force for that purpose, and for such removing the

able the court to say what the agreement is.<sup>1</sup> And it must not

defendants were not liable in an action for trespass." *Compare* Railroad Co. v. Dalby, 19 Ill. 353; Railroad Co. v. South, 43 Ill. 176; Railroad Co. v. Rogers, 28 Ind. 1; 38 Ind. 116; Railroad Co. v. Richard, 46 Ind. 293; Du Larans v. Railroad Co., 15 Minn. 49; Swan v. Railroad Co., 132 Mass. 116. In Marlow v. Harrison, 1 E. & E. 295, 28 L. J. Q. B. 18; in Exch. 1 E. & E. 309, 29 L. J. Q. B. 14, a sale by auction was announced as without reserve, the name of the owner not being disclosed. The lot was put up, but in fact bought in by the owner. The plaintiff, who was the highest real bidder, sued the auctioneer as on a contract to complete the sale as the owner's agent. *Held*, that he was entitled to recover, holding in effect that where the sale is without reserve the contract is completed, not by the acceptance of the bidding, but by the bidding itself, subject to the condition that no higher *bona fide* bidder appears. In *Mainprice v. Westly*, 6 B. & S. 420; 34 L. J. Q. B. 229, *held* that an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without reserve. When an auctioneer in good faith advertises a sale of certain goods, he does not by that advertisement enter into any contract with those who attend the sale that the goods shall be actually sold. *Harris v. Nickerson*, L. R. 8 Q. B. 286. A simple offer of stock in trade for sale by tender does not amount to a contract to sell to the person who makes the highest tender. *Spencer v. Harding*, L. R. 5 C. P. 561. In *Moulton v. Kershaw*, 59 Wis. 316 (48 Am. Rep. 516), the defendants wrote to the plaintiff as follows: "In consequence of a rupture in the salt trade we are authorized to offer Michigan fine salt in full cargo lots of eighty to ninety-five bbls., delivered in your city, at eighty-five cents per bbl., to be shipped per C. & N. W. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order." On the following day the plaintiff telegraphed: "Your letter of yesterday received and noted. You may ship me 2000 bbls. Michigan fine salt, as offered in your letter. Answer." It was held that the letter and telegram did not together make a contract; the letter was construed as being in the nature of an advertisement that the writers were in condition to supply salt at the price named, and requesting the person to whom it was addressed to deal with them,

but not an offer by which, if accepted, defendants were to be bound.

A wrote B, "At what price will you fill my orders for gauge-glasses?" to which B replied: "We will supply you with gauge-glasses at the same rates we supply C," and subsequently wrote: "Our understanding with C is bill at sight immediately on receipt of goods, and we hope you will comply with the same conditions." *Held*, that there was no completed contract created by A's sending an order, and on his failing to pay by sight bill B was not bound to fill further orders. *Ashcroft v. Butterworth*, 136 Mass. 511. See also *Ahearn v. Ayres*, 38 Mich. 692; *Beaupre v. Telegraph Co.*, 21 Minn. 155. And see *per Compton, J.*, in *Denton v. G. N. R. Co.*, 5 E. & B. 860.

If a tradesman agrees to supply on certain terms such goods as a customer may order during a future period, the better opinion is that this is not a promise, but an offer. If the customer does order, the condition of the offer is fulfilled, and there is a complete contract. *G. N. R. Co. v. Witham*, L. R. 9 C. P. 16. *Compare* *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Smith v. Morse*, 20 La. Ann. 220; *National Furnace Co. v. Keystone Mfg. Co.*, 23 A. L. Reg. (S. C. Ill.) 800, 801; *Drake v. Vorse*, 53 Iowa, 417. See *Bailey v. Austrian*, 19 Minn. 535.

The tender is simply a continuing offer during the period named, subject to revocation at any time, but while unrevoked converted into a distinct contract by each order of goods from time to time. *Thayer v. Burchard*, 99 Mass. 508; *Keller v. Ybarra*, 3 Cal. 147. *Compare* *Railroad Co. v. Dane*, 43 N. Y. 240; *Railroad Co. v. Mitchell*, 38 Tex. 86; *Campbell v. Lambert*, 56 La. Ann. 35; s. c., 51 Am. Rep. 1.

1. The parties may have come to a real agreement, but they must take the consequences of not having made it intelligible. *Adams v. Adams*, 26 Ala. 272; *Sherman v. Kitzmiller*, 17 S. & R. (Pa.) 45; *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.), 313; *Whelan v. Sullivan*, 102 Mass. 204; *Cummer v. Butts*, 40 Mich. 322; *Bumpus v. Bumpus*, 19 N. W. Rep. (Mich.) 29. See, in general, *Baxter v. Bishop*, 65 Iowa, 582; *Clay v. Ricketts*, 66 Iowa, 362.

In *Gutking v. Lynn*, 2 B. & Ad. 232, the buyer of a horse promised that if the horse was lucky to him he would give £5 more at the buying of another horse. *Held* to be "much too loose and vague

be illusory, or dependent upon a condition which in fact reserves an unlimited option to the promisor.<sup>1</sup>

to be considered in a court of law." "The 'buying of another horse' is a term to which the court cannot assign any definite meaning." An agreement to sell an estate, reserving "the necessary land for making a railway," is too vague. *Pearce v. Watts*, 20 Eq. 472. An agreement to take a house "if put into thorough repair," and if the drawing-rooms were "handsomely decorated according to the present style," is too uncertain. *Taylor v. Partington*, 7 D. M. & G. 328. An agreement to execute a deed of separation containing the usual covenants is not too vague. *Hart v. Hart*, 18 Ch. D. 670, 684.

A father's agreement that the child should not be an expense to the town during such time as, under the statute laws of the State, the father would be liable for its support, limiting his liability, however, to the amount to which under those laws he would be liable, was held not void for indefiniteness, as in referring to the statute it contemplated a determination of the extent of liability in the mode provided by the statute. *Town of Hamden v. Merwin*, 8 Atl. Rep. (Conn.) 770; s. c., *New Eng. Rep.* 534.

1. In *Taylor v. Brewer*, 1 M. & S. 290, a committee had resolved that for certain services "such remuneration be made as shall be deemed right." *Held*, that this gave no action to the person who had performed the services, because the committee alone were to judge whether any or what recompense was right. See also *Roberts v. Smith*, 4 H. & N. 315, 28 L. J. Ex. 164.

A promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back upon any contract to pay a reasonable remuneration which would be inferred from the transaction if there were no express agreement at all. Where, by the terms of the agreement, an article is to be furnished which shall be satisfactory to the defendant, if he refuses, though from mere caprice, to be satisfied therewith, neither the contract price nor reasonable remuneration can be recovered. *Zaleski v. Clark*, 44 Conn. 218; *McCarren v. McNulty*, 7 Gray (Mass.), 139; *Brown v. Foster*, 113 Mass. 136; *Gibson v. Cranage*, 39 Mich. 49; *Wood Reaping, etc., Co. v. Smith*, 50 Mich. 565; *Gray v. Railroad Co.*, 11 Hun (N. Y.), 70. *Contra*, *Daggett v. Johnson*, 49 Vt. 345. See 33 Am. Rep. 353, note; 42 Am. Rep. 158, note. Where one exe-

cuted an instrument under seal acknowledging an indebtedness to another, and promising to pay the same whenever, in his opinion, circumstances should enable him to do so, such instrument was held to impose no legal obligation enforceable by action. *Nelson v. Von Bonnhorst*, 29 Pa. St. 352.

In *Moorhouse v. Colvin*, 15 Beav. 341, 348, affirmed by L. J., 15 Beav. 350, n., a testator having made a will by which he left a considerable legacy to his daughter, wrote a letter in which he said, after mentioning her other expectations, "This is not all: she is and shall be noticed in my will, but to what further amount I cannot precisely say." The legacy was afterwards revoked. It was contended on behalf of the daughter's husband, to whom the letter had with the testator's authority been communicated before the marriage, that there was a contract binding the testator's estate to the extent of the legacy given by the will as it stood at the date of the letter. *Held*, that the testator's language expressed nothing more than a vague intention. "He expressly promises such provision only as he in his will and pleasure shall think fit." See *Graham v. Graham*, 34 Pa. St. 475; *Thompson v. Stevens*, 71 Pa. St. 161. Service rendered on a mere expectation of a legacy is not good cause of action; but if there be an express promise to pay for it by a legacy, which promise is broken, an action will lie. *Stone v. Todd*, 8 Atl. Rep. (N. J.), 300.

A promise to dispense with performance of an act so long as it may please the promisor is no consideration for a counter-promise. *Lydick v. Railroad Co.*, 17 W. Va. 427.

These cases were decided upon the ground that the promisor alone was to decide whether any remuneration at all should be given. Each case must be decided upon its own circumstances; and when a man agrees to do work for another, and says (in effect), I expect to be paid what is reasonable, and am content to take your estimate as that of a reasonable man, he can recover the value of his work upon a *quantum meruit*. See 3 Blk. Com. 161; 1 Chitty on Plead. (16th Am. Ed.) 352; *Bryant v. Flight*, 5 M. & W. 114; *Jewry v. Bulk*, 5 Taunt. 302; *Millar v. Cuddy*, 43 Mich. 273; *Butler v. Winona Mill Co.*, 28 Minn. 205.

Under a contract to deliver goods of such quality as to be satisfactory to cer-

**28. Conditions of Proposal.**—The proposer may prescribe a certain time within which the proposal is to be accepted, and the manner and form in which it is to be accepted.<sup>1</sup> He may prescribe a particular place for acceptance, and if he do, an acceptance elsewhere will not bind him.<sup>2</sup> In the absence of an express stipulation as to time, the proposal is limited to a reasonable time.<sup>3</sup>

**29. Proposal to Unascertained Person—Offers of Reward—Bidding at Auction—Letters of Credit.**—A proposal need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.<sup>4</sup> When an offer of reward is

tain officers, the law requires the latter to exercise a fair, just, and honest judgment on the subject; in case of an adverse decision in good faith, the purchaser is not obliged to accept, but if their rejection is fraudulent, the purchaser is not excused by it. *B. & O. R. Co. v. Brydon*, 65 Md. 198.

If by the terms of a construction contract the decision of the architect is made "final, binding, and conclusive on the parties," it is no defence to an action for the price, alleging the architect's acceptance of the work, to aver that in certain particulars the work does not conform to the specifications of the contract. *Vulcanite Paving Co. v. Phila. Traction Co.*, 8 Atl. Rep. (Pa.) 777.

Under a contract making an engineer's decision upon disputed questions final and conclusive, such decision will be binding and conclusive in the absence of fraud, or such gross mistake as would necessarily imply bad faith. *Hot Springs R. Co. v. Maher*, 3 S. W. Rep. (Ark.) 639.

A stipulation in a contract that the final estimates of work by engineers of a railroad shall be conclusive as against contractors "without recourse or appeal," does not deprive the latter of the right to bring suit where the engineers act in bad faith. *Louisv., Ev. & St. L. R. Co. v. Donnegan*, 9 West. Rep. (Ind.) 641; s. c., 12 N. E. Rep. 153.

1. Where the proposal stipulated for an acceptance by return mail, and the acceptance was not posted until two days after the receipt of the proposal, it was held that the promisor was not bound. *Macclay v. Harvey*, 90 Ill. 525. And see *Carr v. Duval*, 14 Pet. (U. S.) 77, 82. Though the proposer may prescribe a form of acceptance, he cannot prescribe a form of refusal so as to fix a contract on the other party if he does not refuse in some particular way or within some prescribed time. Thus where a person wrote to another offering to buy a horse, and stating that if he received no answer he should assume that his offer was ac-

cepted, to which letter no answer was returned, *held*, that there was no contract. *Felthouse v. Bindley*, 11 C. B. N. S. 869, 875; 31 L. J. C. P. 204. A written order for goods delivered to the selling agent of a manufacturer, with the understanding that the agent was to hold it for three or four days subject to the order of the signer, and to destroy it if the latter should so decide, is not a contract, nor an offer, until delivered to the manufacturer with the consent of the signer. *Morris v. Brightman*, 9 N. E. Rep. (Mass.) 512; 3 New Eng. Rep. 302.

2. *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225; *Langdell Sel. Ca. on Cont.* 70. The real question in cases of this kind is whether the condition as to time, place, or manner of acceptance was in fact part of the terms of the proposal.

3. *Bailly's Cas.*, 5 Eq. 428; 3 Ch. 592; *Ramsgate Hotel Co. v. Montefiore*; *Same v. Goldsmid*, L. R. 1 Ex. 109; *Moxley v. Moxley*, 2 Metc. (Ky.) 309; *Railroad Co. v. Dane*, 43 N. Y. 240; *Loring v. Boston*, 7 Metc. (Mass.) 409; *Averill v. Hedge*, 12 Conn. 424; *Mizzel v. Burnett*, 4 Jones L. (N. Car.) 240; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dillon (U. S.), 431; *Ferrier v. Storer*, 63 Iowa, 484.

4. It is important to distinguish that executory contracts are of two kinds, bilateral and unilateral. When the consideration on each side is a promise, the contract is bilateral; a binding promise, the consideration of which is anything else than a promise, is a unilateral contract. See *Langdell Sel. Ca. Cont.* 1092-1094. In a bilateral contract both parties must be bound at the same time, or neither is bound. *Tucker v. Woods*, 12 Johns. (N. Y.) 190; *Livingston v. Rogers*, 1 Caines (N. Y.), 583; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *James v. Fulcro*, 5 Tex. 512; *Turnpike Co. v. Coy*, 13 Ohio St. 84, 92; *Jones v. Durgin*, 16 Mo. App. 370; *Board of Commis. of Cass Co. v. Crockett*, 12 N. E. Rep. (Ind.) 486.

A party who is not himself bound by the acceptance of a contract to sell land by one claiming to be his agent, but who in fact had no authority to accept on the terms proposed, cannot afterwards, when he finds the contract is advantageous to him, affirm it and recover damages from the vendor for his failure to make a conveyance as agreed, as, to render a contract valid, both parties must be bound thereby. *Athe v. Bartholomew*, 33 N. W. Rep. (Wis.) 110.

An executory contract to be valid must be binding on both parties. *King v. Warfield*, 8 Cent. Rep. (Md.) 801.

A written agreement not showing upon its face mutuality of obligation, or other consideration, may be supported as a contract by another written contract made at the same time, and shown to have been a consideration for the former agreement. *Bolles v. Sachs*, 33 N. W. Rep. (Minn.) 862.

In a unilateral contract the offeree is not bound to perform at all, nor until performance by him is the offerer bound; but upon performance by the offeree the proposal of the offerer is converted into a binding promise. "Thus, if A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act." *Train v. Gold*, 5 Pick. (Mass.) 380, 385; *Turnpike Co. v. Coy*, 13 Ohio St. 84, 93; *Cottage Street Church v. Kendall*, 121 Mass. 528-530; *Barnes v. Perrine*, 9 Barb. (N. Y.) 202; *L'Amoureux v. Gould*, 7 N. Y. 349; *Todd v. Urber*, 95 N. Y. 181, 191, 192; *Miller v. McKenzie*, 95 N. Y. 575; *Beckwith v. Brackett*, 97 N. Y. 52; *Morse v. Bellows*, 7 N. H. 549; *Mathews v. Fitch*, 22 Cal. 86; *Perkins v. Hadsell*, 50 Ill. 216.

A promise by an owner of land if a church was built thereon to convey it and the land as soon as the society was organized, was held supported by a sufficient consideration where the church was so built on subscriptions and donations. *Whitsitt v. Pre-emp. Presb. Church*, 110 Ill. 125.

A promissory note executed in pursuance of a promise to subscribe \$2500 toward the payment of a church debt on condition that the church would raise the balance by voluntary subscriptions, which condition is performed, is founded upon a sufficient consideration, and binding upon the maker. *Roberts v. Cobb*, 35 Alb. L. Jour. (N. Y.) 75; 103 N. Y. 600.

Where there is a contract between two parties to a controversy over land to the

effect that one of them shall make a "give or take" offer, and, in consideration of making such offer, shall receive from the other a quitclaim deed to part of the land, he becomes entitled to the deed immediately on making such offer; both the contract and the deed being founded on sufficient consideration. *Buckingham v. Ludlum*, 7 Atl. Rep. (N. J.) 851; 41 N. J. Eq. 348.

*Powers v. Bumcratz*, 12 Ohio St. 273; *White v. Baxter*, 71 N. Y. 254; *Weaver v. Wood*, 9 Pa. St. 220; *Brogden v. Railway Co.*, 2 App. Cas. 666, 691. "If I say that if you will furnish goods to a third person I will guarantee the payment, you are not bound to furnish them; but if you do furnish them in pursuance of the contract, you may sue me on the guarantee." *Per Patteson, J.*, in *Morton v. Burn*, 7 A. & E. 19. See also, *per Maule, J.*, in *Fishmongers' Co. v. Robertson*, 5 M. & G. 131, 171.

If a person requests a creditor to forbear from suing the original debtor, and the creditor, though he does not bind himself to forbear, does, as a fact, forbear from suing the debtor, that constitutes a good consideration for that other person becoming a guarantor. It is not necessary that there should be a binding promise to forbear. *Crears v. Hunter*, 31 Solic. Jour. 642.

In *Patton v. Hassinger*, 69 Pa. St. 311, a man of full age became ill while working for the plaintiff, and was taken care of by him. His father, on learning what had occurred, declared, though not in the plaintiff's presence, that whoever took care of his son should be well paid. These words were related to plaintiff, who continued to provide for the son till he died. *Held*, that plaintiff was entitled to recover. *Lent v. Padelford*, 10 Mass. 230; *Duval v. Trask*, 12 Mass. 154; *Train v. Gold*, 5 Pick. (Mass.) 380; *Morse v. Bellows*, 7 N. H. 549; *Barnes v. Perrine*, 9 Barb. (N. Y.) 202; *Kennaway v. Treleavan*, 5 M. & W. 498; *Cooper v. Altimus*, 62 Pa. St. 486. A unilateral contract may be retracted at any time before performance. *Weaver v. Wood*, 9 Pa. St. 220; *Offord v. Davies*, 12 C. B. N. S. 748.

An offer proposing a unilateral contract becomes a binding promise immediately upon the performance of the act or acts requested to be done; and therefore, unless communication to the proposer is one of the things requested, it is not necessary. See *Reif v. Page*, 55 Wis. 496; *Harson v. Pike*, 16 Ind. 140; *Hayden v. Songer*, 56 Ind. 42; *Powers v. Bumcratz*, 12 Ohio St. 372; *Douglass*

made by advertisement for the procuring of information, apprehension of a criminal, or the like, there is a contract with any person who performs the condition mentioned in the advertisement.<sup>1</sup> A

*v. Howland*, 24 Wend. (N. Y.) 35; *Yard v. Eland*, 1 Ld. Ray. 368; 2 Am. L. C. (5th Ed.) 94-106; Langdell Sum. Law Cont. §§ 2, 4, 6, 12. A request for time followed by forbearance will uphold a promise by a third person to pay the debt although the creditor does not bind himself by a promise. *Downing v. Funk*, 5 Rawle (Pa.), 69; *Clark v. Russel*, 3 Watts (Pa.), 213. It is held in *Massachusetts* that forbearance in pursuance of a request is not a consideration unless the creditor binds himself to give time. *Mecorney v. Stanley*, 8 Cush. (Mass.) 85; *Manter v. Churchill*, 127 Mass. 31; *Boyd v. Freiz*, 5 Gray (Mass.), 553. A guaranty of such advances as the creditor may think fit to make may be binding without other evidence of assent than the making of the advances. *Johnston v. Nicholls*, 1 C. B. 251; *Chapman v. Sutton*, 2 C. B. 634; *Boyd v. Moyle*, 2 C. B. 643; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Smith v. Dann*, 6 Hill (N. Y.), 543; *Union Bank v. Coster*, 3 N. Y. 203, 205; *Caton v. Shaw*, 2 Harris & G. (Md.) 13; *Powers v. Bumcratz*, 12 Ohio St. 273; *Bright v. McKnight*, 1 Sneed (Tenn.), 158; *Farmers' & M. Bank v. Kercheval*, 2 Mich. 504; *Clark v. Russel*, 3 Watts (Pa.), 213; *Yard v. Eland*, 1 Ld. Ray. 368; *Bradbury v. Morgan*, H. & C. 249; 2 Am. L. C. (5th Ed.) 107; *Marshall v. McCleary*, 42 Md. 374. It has, however, been held that a guaranty is not binding unless the assent of the person to whom it is addressed is communicated to the guarantor, or the circumstances are such as to excuse the want of notice by showing that he knew the intention of the creditor to accept and act under the guaranty. *Douglass v. Reynolds*, 7 Peters (U. S.), 113; *Zee v. Dick*, 10 Peters (U. S.), 482; *Adams v. Jones*, 12 Peters (U. S.), 207; *Mussey v. Rayner*, 22 Pick. (Mass.) 223; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *White v. Reed*, 15 Conn. 457; *Kay v. Allen*, 9 Pa. St. 320; *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 184; *Oaks v. Weller*, 13 Vt. 106, 16 Vt. 63; *Lowry v. Adams*, 22 Vt. 160; *Emerson v. Graff*, 29 Pa. St. 358; *Kellogg v. Stockton*, 29 Pa. St. 460; *King v. Baterson*, 13 R. I. 117; *Thompson v. Glover*, 78 Ky. 193; *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409; *Same v. Richards*, 115 U. S. 524; *Cooke v. Orne*, 37 Ill. 186. See also *Davis v. Wells*, 104 U. S. 159; *Hare on Confs.*,

315 *seq.* Where a guaranty is for the fulfilment of a contract already made or executed contemporaneously therewith or for the payment of an existing debt, or where the guaranty is upon a consideration distinct from the credit extended to the principal debtor, and moving directly between the guarantor and guarantee, notice of acceptance is unnecessary. *Furst & Bradley Mfg. Co. v. Black*, 12 N. E. Rep. (Ind.) 504. See title GUARANTY.

1. *Williams v. Carwardine*, 4 B. & Ad. 621. The advertisement is a proposal which is accepted by the performance of the conditions. *Per Willes, J.*, *Spencer v. Harding*, L. R. 5 C. P. 563. The performance of an act for the doing of which a reward is offered gives rise to a unilateral contract. The promise of a reward "was but an offer until its terms were complied with. When that was done it thenceforth became a binding contract, which the offerer was bound to perform his share of." *Cummings v. Gann*, 52 Pa. St. 484, 490. "Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if before it is retracted one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation." *Wentworth v. Day*, 3 Metc. (Mass.) 352, 354; *Furman v. Parke*, 21 N. J. L. 310; *Gilmore v. Lewis*, 12 Ohio, 281; *Ryer v. Stockwell*, 14 Cal. 134; *Janvrin v. Exeter*, 48 N. H. 83; *Alvord v. Smith*, 63 Ind. 58, 62; *Hanson v. Pike*, 16 Ind. 140; *Loring v. Boston*, 7 Met. (Mass.) 409; *Powers v. Fowler*, 4 E. & B. 511; *Oldershaw v. King*, 2 H. & N. 517; *Wadsworth v. Allen*, 8 Gratt. (Va.) 174; *Goward v. Waters*, 98 Mass. 596.

To entitle one to the reward he must show that the terms of the offer have been complied with. *Cornelson v. Ins. Co.*, 7 La. Ann. 345; *Jones v. Bank*, 8 N. Y. 228; *Furman v. Parke*, 21 N. J. L. 310; *Clanton v. Young*, 11 Rich. L. (S. Car.) 546. The decisions in *Symmes v. Frazier*, 6 Mass. 344, and *Hawk v. Marion County*, 48 Iowa, 472, that where a reward is offered for the recovery of a sum of money lost, the finder of a part is entitled to a *pro rata* portion of the reward offered, cannot, it is believed, be sustained.

bid at auction accepted by the fall of the hammer constitutes a complete contract with the bidder to whom the lot is knocked down.<sup>1</sup> A letter of credit operates as a general offer of a contract, which may be accepted by any person acting upon it and negotiating bills drawn in conformity with its terms.<sup>2</sup>

It has been held in several cases that it is not necessary that the person who does the act for doing which the reward is offered should have had any knowledge of the offer in order to entitle him to the reward. *Eagle v. Smith*, 4 Houst. (Del.) 293; *Auditor v. Ballard*, 9 Bush (Ky.), 572; *Russell v. Stewart*, 44 Vt. 170; *Dawkins v. Sappington*, 26 Ind. 199. But this is utterly inconsistent with the idea that the obligation to pay the reward arises out of contract. "Where a contract is proposed to all the world in the form of a proposition any party may assent to it and it is binding, but he cannot assent without knowledge of the proposition." *Howland v. Lounds*, 51 N. Y. 604, 609; *Fitch v. Snedaker*, 38 N. Y. 248; *Stamper v. Temple*, 6 Humph. (Tenn.) 113; *Lee v. Flemingsburg*, 7 Dana (Ky.), 28. That the act must be done not only with knowledge of but with the intention of accepting the offer, see *Hewitt v. Anderson*, 56 Cal. 476.

The cases turn on the question whether the party claiming the reward has in fact performed the required condition according to the terms of the advertisement. *Lancaster v. Walsh*, 4 M. & W. 16; *Smith v. Moore*, 1 C. B. 438; *Thatcher v. England*, 3 C. B. 254; 15 L. J. C. P. 241; *Turner v. Walker*, L. R. 1 Q. B. 641; 2 Q. B. 301; *England v. Davidson*, 11 A. & E. 856; *Shuey v. United States*, 92 U. S. 73; *Loring v. Boston*, 7 Metc. (Mass.) 409; *Crawshaw v. Roxbury*, 7 Gray (Mass.), 374; *Jenkins v. Kebren*, 12 Gray (Mass.), 330; *Besse v. Dyer*, 9 Allen (Mass.), 151; *Kincaid v. Eaton*, 98 Mass. 139; *Pilie v. New Orleans*, 19 La. Ann. 274; *Salbadore v. Ins. Co.*, 22 La. Ann. 338; *Goldsborough v. Cradie*, 28 Md. 477; *Bank v. Bangs*, 2 Edw. Ch. (N. Y.) 95; *Bank v. Hart*, 55 Ill. 62; *Marvin v. Treat*, 37 Conn. 96; *Matter of Kelly*, 39 Conn. 159; *Ryer v. Stockwell*, 14 Cal. 134; *Morrell v. Quarles*, 35 Ala. 544; *Pierson v. March*, 82 N. Y. 503.

One finding lost property for the restoration of which a reward is offered has a lien upon it so that he need not deliver it until the reward is paid. *Wentworth v. Day*, 3 Met. (Mass.) 352; *Cummings v. Gann*, 52 Pa. St. 484. A general proposal made by public advertisement may be effectually revoked by an announcement of equal publicity, such as an ad-

vertisement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it has been revoked. *Shuey v. U. S.*, 92 U. S. 73. Such an offer expires after the lapse of a reasonable time. *Loring v. Boston*, 7 Met. (Mass.) 409. Compare *Matter of Kelly*, 39 Conn. 159; *Langdell Sel. Ca. Cont.* 1073.

1. *Payne v. Cave*, 3 T. R. 148; *Blossom v. Railroad Co.*, 3 Wall. (U. S.) 196; *Fisher v. Seltzer*, 23 Pa. St. 308; *Grotenkemper v. Achtermeyer*, 11 Bush (Ky.), 222.

2. *Ex parte Asiatic Banking Corp.*, L. R. 2 Ch. 391; *Maitland v. Chartered Bank of India*, 38 L. J. Ch. 363. See *Scott v. Pilkington*, 2 B. & S. 11; *Same v. Same*, 15 Abb. Pr. 280. "A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." *Coolidge v. Payson*, 2 Wheat. (U. S.) 66, 75; *Steman v. Harrison*, 42 Pa. St. 49; *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264; *Boyce v. Edwards*, 4 Pet. (U. S.) 111; *Bayard v. Lathy*, 2 McLean (U. S. C. C.), 462; *Storey v. Logan*, 9 Mass. 55; *Bank v. Rice*, 98 Mass. 288; *Bank v. Richards*, 109 Mass. 413; *Greele v. Parker*, 5 Wend. (N. Y.) 414; *Goodrich v. Gordan*, 15 Johns. (N. Y.) 6. It is well settled that if A give B a letter (which though addressed to B is designed to be shown to and acted upon by others) promising to pay any bills which B may draw or to stand as surety for any indebtedness which he may incur, an action will lie against A in favor of any person who gives value to B on the faith of and within the terms of the letter. *Lawrason v. Mason*, 3 Cr. (U. S.) 492; *Lansdale v. Bank*, 18 Ohio, 126; *Dorland v. Mulhollan*, 10 Ohio St. 192; *Nisbett v. Galbraith*, 3 La. Ann. 690; *Smith v. Ledyard*, 49 Ala. 279; *Whilden v. Bank*, 64 Ala. 1; *Griffin v. Rembert*, 2 S. C. 410; *Nelson v. Bank*, 48 Ill. 36; *Bissell v. Lewis*, 4 Mich. 450; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Russell v. Wiggin*, 2 Story (U. S.), 213; *Bank v. Lynch*, 52 Md. 270; *Lowry v. Adams*,



**30. Revocation.**—A proposal may be revoked at any time before acceptance, but not afterwards.<sup>1</sup> Even if the proposer purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed.<sup>2</sup> But the revocation of

22 Vt. 160; Cassel v. Dows, 1 Blatchf. (U. S.) 335; McNaughton v. Conkling, 9 Wis. 316; Bank v. Coster's Ex'rs, 3 N. Y. 203; Dist. Bank v. Kaufman, 93 N. Y. 273.

1. Before acceptance there is no agreement, and therefore the proposer cannot be bound to anything. Stitt v. Huidekopers, 17 Wall. (U. S.) 384; Crocker v. Railroad Co., 24 Conn. 249, 261; Johnson v. Pilkington, 39 Wis. 62; Railroad Co. v. Bartlett, 3 Cush. (Mass.) 224; Craig v. Harper, 3 Cush. (Mass.) 158; Foster v. Boston, 22 Pick. (Mass.) 33; Brown v. Rice, 29 Mo. 352; Houghwout v. Boisaubin, 18 N. J. Eq. 315; McDonald v. Bewick, 51 Mich. 79; Burton v. Shotwell, 13 Bush (Ky.), 271.

In an action against an irrigation company for failure to deliver water purchased, where it appears that there was a contract to be delivered to purchasers, restricting the liability of the company for failure to deliver water in certain cases, and providing for a *pro rata* distribution when there was an insufficiency of water to fill all the orders, the plaintiff, not having received such contract, is not bound by the terms thereof, although, as a stockholder of the company, he is cognizant of its provisions. Gray v. Salt R. V. C. Co., 12 Pac. Rep. (Ariz.) 607.

A gratuitous subscription, with only one signer, is but an offer, which, until accepted by the promisee in express terms, or by a performance of the conditions stipulated therein, is but a *nudum pactum*, and cannot be enforced against the will of the subscriber by suit at law. Broadbent v. Johnson, 13 Pac. Rep. (Idaho) 83.

A subscription becomes a contract when accepted by the beneficiary and acted upon by the incurring of an obligation or the expenditure of money. McCabe v. O'Conner, 69 Iowa, 134.

A, of Charleston, S. C., ordered of B, of Fredericksburg, Va., a cargo of corn at so much a bushel and at so much freight, to be shipped "on receipt" of the order. B could not fill the order at once, and wrote that he would try to do so. Two weeks later he wrote that he had procured the corn, and after waiting three days, after an answer should have been received by due course of mail, he resold the corn. Held, that his letter was a new proposal, which, not

being accepted, reasonably could be withdrawn. Burmester v. Phillips, 25 Fed. Rep. 805.

If the offer is modified or withdrawn before an unconditional acceptance, there is no contract. Schenectady Stove Co. v. Holbrook, 101 N. Y. 45.

The same rule applies to a proposal to vary an existing agreement. Gilkes v. Leonino, 4 C. B. N. S. 485. Where, on a treaty for a sale, an article is taken on trial, with an option to purchase if liked, there is no contract, but only an offer until the option is determined. Hunt v. Wyman, 100 Mass. 198. But where the article is taken with an option to return if not liked, there is a contract in the first place, subject to a right of rescission. Withersby v. Sleeper, 101 Mass. 138.

2. If in the morning A offers goods to B for sale at a certain price, and gives B till four o'clock in the afternoon to make up his mind, yet A may sell the goods to C at any time before four o'clock, so long as B has not accepted his offer. Cooke v. Oxley, 3 T. R. 653. It is far from clear what the court meant to decide in that case, and it has been the subject of much criticism. For conflicting views see Benjamin on Sale (3d Ed.), 66; 4th Am. Ed., by Bennett, § 64 *seq.*; and Langdell's Summary of Law of Contracts, p. 246, § 182. The decision in Cooke v. Oxley has been generally condemned in this country. "The criticisms which have been made upon the case are sufficient to destroy its authority." 2 Kent, 477, n. (a). "It cannot be considered as of any authority." Railroad Co. v. Bartlett, 3 Cush. (Mass.) 224, 228. And see Metcalf on Contracts, 19-23; 1 Duer on Ins. 118; 2 Amer. Jurist, N. S. 17 *seq.* Every offer once made remains open until expressly or impliedly revoked. If not sooner expressly revoked, it is presumed to be revoked after the lapse of a reasonable time without acceptance. When an offer is in terms made to remain open until a fixed time, it comes to an end of itself at the end of that time, and there is nothing for the other party to accept. Longworth v. Mitchell, 26 Ohio St. 334, 342; Potts v. Whitehead, 20 N. J. Eq. 55, 59; Larmen v. Jordan, 56 Ill. 204. But a willingness to contract on the part of the party making the offer on the terms named in it is presumed to continue during the time limited. Railroad

a proposal must be communicated before acceptance, otherwise it is too late, the contract being complete as soon as the offer is accepted.<sup>1</sup> A proposal is revoked by the death of the proposer before acceptance. So if the person to whom the offer is made dies before acceptance.<sup>2</sup>

*Co. v. Bartlett*, 3 Cush. (Mass.) 224, 227; *Mactier's Admr. v. Frith*, 6 Wend. (N. Y.) 103, 122; *Cheney v. Cook*, 7 Wis. 357. In the absence of an intermediate express revocation, an acceptance of the offer within that time gives rise to a contract. In the modern civil law a promise to keep a proposal open for a definite time is treated as binding, the doctrine of consideration being foreign to that system. Indeed, there is held in every proposal to be an implied promise to keep it open for a reasonable time. *Vangerow, Pand.* § 603 (3, 253); *L. R.* 5 Ex. 337, *n.*; *Railroad Co. v. Bartlett*, 3 Cush. (Mass.) 224, 227. Of course, if there is a promise upon consideration to keep an offer open until a time named, an action would lie for a breach of the promise, although if the offer were revoked within the time an acceptance after the revocation would not make a contract.

1. An express revocation communicated after acceptance, though determined upon before the date of the acceptance, is too late. *Wheat v. Cross*, 31 Md. 99; *Thomson v. James*, 18 Dunlop, 1; *Langdell Sel. Ca. Cont.* 125. In *Byrne v. Van Tienhoven*, 5 C. P. D. 344, the defendants at Cardiff wrote to the plaintiffs at New York, on Oct. 1, 1879, offering for sale 1000 boxes of tin plates on certain terms. Their letter was received on the 11th, and on the same day the plaintiff accepted the offer by telegraph, confirming this by a letter sent on the 15th. Meanwhile the defendants, on Oct. 8th, had posted a letter withdrawing their offer of the 1st. This reached the plaintiff on the 20th. The plaintiff insisted on the completion of the contract; the defendants maintained that there was no contract, their offer having been withdrawn before the acceptance was either received or dispatched. *Lindley, J.*, stated as follows the questions to be considered: 1. "Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent. 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?" The first he answered in the negative, on the principle "that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is

for all practical purposes and in point of law no revocation at all." See *White v. Corliss*, 46 N. Y. 467, 469, 470. The second he likewise answered in the negative, on grounds of both principle and convenience.

The prompt mailing of a letter accepting a proposed contract, where the negotiations are by letter, will complete the agreement unless there has been some intimation that the sale would not be made. A letter written after sending a proposed contract, withdrawing the proposition, will not effect a revocation if it is received after the mailing of a letter of acceptance. *Kempner v. Cohn*, 23 Repr. (Ark.) 104.

In *Dickinson v. Dodds*, 2 Ch. D. (C. A.) 463, A offered in writing to sell certain houses to B, the offer to be "left over" until a time named. Before the time had expired B heard that A had agreed to sell the property to C. B then within the time formally accepted A's offer, but A answered, "You are too late. I have sold the property." *Held*, that there was no contract. Mr. Pollock is of opinion that the ground of this decision is that knowledge in point of fact of the proposer's changed intention, however it reaches the other party, will make the proposer's conduct a sufficient revocation. *Pollock on Contracts*, 28. While Sir Wm. Anson thinks the case decides that where the parties are in immediate communication a proposal may be revoked without notice to the person to whom it has been made, and cites *Cooke v. Oxley*, 3 T. R. 653. *Anson on Contracts*, 17.

2. *Per Mellish, L. J.*, in *Dickinson v. Dodds*, 2 Ch. D. 475; *Pratt v. Trustees*, 93 Ill. 475; *Phipps v. Jones*, 20 Pa. St. 260; *Helfenstein's Est.*, 77 Pa. St. 328; *Foust v. Board of Publication*, 8 Lea (Tenn.), 552, 555.

If one subscribes for railroad stock on condition of the construction of a road along a certain route, and dies before his offer is delivered to and accepted by the company, the death revokes the subscription. *Wallace v. Townsend*, 43 Ohio St. 537; *s. c.*, 54 Am. Rep. 829.

A contract, terminable at the will of either party, is terminated by the death of one of the parties. *Browne v. McDonald*, 129 Mass. 66. There is no dis-

**31. Acceptance of Proposal—Agreement to Draw Formal Writing.**—The acceptance of an offer must be absolute and unqualified, for until there is such an acceptance, the negotiations of the parties amount to nothing more than proposals and counter-proposals.<sup>1</sup>

distinct authority to show whether notice to the other party is material or not, but in the analogous case of agency the death of the principal puts an end *ipso facto* to the agent's authority, without regard to the time when it becomes known either to the agent or to third parties. *Blades v. Free*, 9 B. & C. 167; *Campavari v. Woodburn*, 15 C. B. 400; 2 Kent Comm. 646.

Death of agent terminates contract of agency. *Adriance v. Rutherford*, 57 Mich. 170. This is not true at the civil law. D. 46, 3, De solut. et liberat. 32. The Indian Contract Act, s. 208, illust. (c), adopts the rule of the civil law. That insanity of the proposer before acceptance will operate as a revocation of the offer, see *Beach v. First M. E. Church*, 96 Ill. 177; *The Palo Alto, Davies*, 343; also *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Drew v. Mun*, 4 Q. B. D. 669.

His representatives are not capable of acting upon it if the deceased had not accepted it in his lifetime. *Humphrey v. Werner*, 2 M. & G. 853.

1. *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225, 228; *Harlow v. Curtis*, 121 Mass. 320; *Hutchinson v. Blakeman*, 3 Metc. (Ky.) 80; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Plant Seed Co. v. Hall*, 14 Kan. 553; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Hough v. Brown*, 19 N. Y. 111, 115; *Johnson v. Stephenson*, 26 Mich. 63; *Eggleston v. Wagner*, 46 Mich. 610; *Barrow v. Ker*, 10 La. Ann. 120; *McCotter v. Mayor*, 37 N. Y. 325; *Bruner v. Wheaton*, 46 Mo. 363; *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 378; *Deshon v. Fosdick*, 1 Woods (U. S. C. C.), 286; *N. W. Iron Co. v. Meade*, 21 Wis. 474; *Baker v. Holt*, 56 Wis. 100; *Merriam v. Lapsley*, 2 McCrary (U. S.), 606; *Martin v. Northwestern Fuel Co.* (C. C. U. S. D. Minn.), 22 Fed. Rep. 596; *Foster v. Ulman*, 64 Md. 523; *Siebold v. Davis*, 67 Iowa, 560; *Derrick v. Monette*, 73 Ala. 75.

Acceptance must be unequivocal, unconditional, and without variance from proposal. *Strange v. Crowley*, 7 West. Rep. (Mo.) 106.

Any modification proposed in an acceptance must be accepted by the offeror, before he can hold the acceptor to a contract. *Nundy v. Matthews*, 34 Hun (N. Y.), 74.

An offer to sell lands and acceptance.

"provided the title is perfect," does not constitute a binding contract. *Corcoran v. White*, 117 Ill. 118; s. c., 57 Am. Rep. 858.

An instrument signed by A alone, and wherein he agrees to sell to B standing timber, and declares that he will make a contract with B, giving him the right to enter on the land, and cut and remove the timber upon payment being made by B, is not a contract, but simply an offer to make one. *McDonald v. Bewick*, 51 Mich. 79.

An offer to sell real estate by one person to another imposes no obligation upon the former so as to make him liable in an action for specific performance, unless it is accepted by the latter, according to the terms on which it is made, without qualification, or the introduction of any new term. *Langellier v. Schaefer*, 31 N. W. Rep. (Minn.) 690.

The acceptance of an order "to be paid out of the last payment" is not an unconditional acceptance; and the words being ambiguous, evidence of the conversation between the parties at the time it was signed is admissible to aid in its construction. *Proctor v. Hartigan*, 9 East. Rep. (Mass.) 844.

Where one writes, offering to sell another a horse for a certain price, and the other replies that he might purchase the horse if it would suit him, which he is certain it will, this is not enough to show a contract. *Stagg v. Compton*, 81 Ind. 171.

In case of an offer by a person in one State to sell land in another State at a certain cash price, an acceptance, directing the deed to be sent to a bank in the latter State, to be delivered on payment of the price, will not create a binding contract, as the terms of the offer entitle the vendor to payment in his own State. *Gilbert v. Baxter*, 32 N. W. Rep. (Iowa) 364.

A telegraphed to B to know the terms on which he would sell a large quantity of coal. B named a price. A said it was too much. B then by telegraph named a lower price, and went somewhat into details. A telegraphed back: "You can consider the coal sold. Will be in Cleveland and arrange particulars next week." *Held*, not a completed contract. *Martin v. Northwestern Fuel Co.*, 22 Fed. Rep. 596.

A nagreement by one creditor to postpone his claim if "the other creditors would grant the extension desired," does not become binding because of an extension granted by one of the other creditors. *Heyer v. Bromberg*, 74 Ala. 524.

B, a resident of California, by letter addressed to A, at his place of residence in Iowa, offered to sell certain real estate to A for \$5000. A telegraphed that he would take the property at that price, and added: "Money at your order at First National Bank here. Telegraph immediately when to expect deed."

Held, that B was entitled under his offer to have the money paid to him at his place of residence, and to deliver the deed there; and that as A's acceptance was not an acceptance of the offer as it did not bind B, and specific performance could not be enforced. *v. Brossart*, 67 Iowa, 678.

A was a judgment creditor of C; B to A a letter in the following terms: "If C leaves in your hands the 250 8 per cent preference shares. will obtain, within one month his date, with the sanction of C., for him of £1000 upon said order, pay that sum to you against the delivery of said order." C left the order in A's hands, and sanctioned the proposal contained in the letter. A then wrote to B as follows: "C brought me your letter on the 27th, and he has given me his written sanction to your obtaining the loan of £1000 for him referred to in that letter, and we shall be glad to hear that everything is in order." Held, that assuming A's letter to B to be a final acceptance of the offer contained in B's letter to A, there was consideration moving from A to support B's promise, such consideration being the implied undertaking on A's part when he received the order to keep it till required for the purpose of being handed over to the person who would advance the £1000 on its security. But held also, that A's letter to B was not an acceptance of the offer contained in B's letter to A, and that the two letters, therefore, did not constitute a contract. *Harston v. Harvey*, 1 A. & E. 404.

A freight agent of the defendant's railroad, in answer to inquiries from plaintiff, gave him certain rates from a certain point on the road to New Orleans. Ten days afterward plaintiff shipped goods from a different point for New Orleans, and obtained a bill of lading from one who had no authority to bind defendant. Held, that there was no contract with de-

fendant. *Robinson v. St. Louis, etc., R. Co.*, 75 Mo. 494.

If A, who is lending his credit and aid to B, and who holds security from B for liabilities to be incurred, examines with B certain rags, the property of C, and offers therefor 6½ cents per pound, which is refused, and B subsequently, without his knowledge, purchases the rags for 7 cents per pound, pays in cash ¾ ct. of that price, and having charged to A the balance of 6½ cents, there is no contract binding on A, nor is he liable to C on a note given by him in payment of the balance while in ignorance of the circumstances of the sale. *Patton v. Taft*, 9 N. E. Rep. (Mass.) 517; 3 New Eng. Rep. 693.

Under partnership articles providing for dissolution on an offer in writing to buy or sell, one partner had sold the other an interest which was not wholly paid for, and subsequently offered to buy out that partner's share at the estimated value of its proportion to the whole business, which offer was accepted. Held, that as the offeror must have intended to have a deduction for the unpaid business, and the other party did not so understand it, the minds of the parties had never met, and the agreement would not be enforced. *Braeutigam v. Edwards*, 38 N. J. Eq. 542.

"Acceptance upon terms varying from those offered is a rejection of the offer." *Bank v. Hall*, 101 U. S. 43, 50; *Baker v. Johnson Co.*, 37 Iowa, 186, 189; *Cartmell v. Newton*, 79 Ind. 1, 8; *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 378. And puts an end to it so that a subsequent acceptance upon the terms offered does not make a contract. *Ortman v. Weaver* (C. C. U. S. E. D. Mich.), 11 Fed. Rep. 358; *Fox v. Turner*, 1 Bradw. (Ill.) 153; *Hyde v. Wrench*, 3 Beav. 334; *Sheffield Canal Co. v. Sheffield, etc., R. Co.*, 3 Rwy. & Canal Cases, 121.

An offer to sell 2000 to 5000 tons of rails at a certain rate and within a certain time, in reply to a request to quote price for 2000 to 5000 tons, is not accepted by an order for 1200 tons; and when such order is rejected, a subsequent order within the contract time for 2000 tons does not operate to revive the offer and to make a sale. *Minneapolis, etc., R. Co. v. Columbus Rolling-Mill Co.*, 119 U. S. 149.

For collected English authorities, see *Fry on Specific Performance*, c. 2; see also *Langdell's Select Cases on Contracts*, 155. In *Honeyman v. Marryat*, 6 H. L. C. 112, a proposal for sale was accepted "subject to the terms of a con-

It may happen that though the parties are in fact agreed upon the terms, yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing. In such case the stipulation is a term of the assent, and there is agreement independent of that stipulation.

tract being arranged" between the vendor's and purchaser's solicitors. *Held*, no contract. An acceptance of an offer to sell land "subject to the title being approved by our solicitors" is not a qualified acceptance: it expresses the conditions annexed by law to contracts of this class, that a good title shall be shown by the vendor. *Hussey v. Horne Payne*, 4 App. Cas. 311, 322. See *Crossley v. Maycock*, 18 Eq. 180; *Stanley v. Dowdeswill*, L. R. 10 C. P. 102. Compare *Smith v. Webster*, 3 Ch. D. 49. In *Appleby v. Johnson*, L. R. 9 C. P. 158, the plaintiff wrote to the defendant, a calico-printer, and offered his services as salesman on certain terms, among which was this: "A list of the merchants to be regularly called on by me to be made." The defendant wrote in answer: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer it might prevent mistakes; but I think we are quite agreed on all. We shall therefore expect you on Monday. (Signed) J. Appleby. P. S. I have made a list of customers which we can consider together." *Held*, that there was no complete contract. In *Addinell's Case*, 1 Eq. 255, and *Jackson v. Turquand*, L. R. 4 H. L. 305, a bank issued a circular offering new shares to existing shareholders, in proportion to their interests, and also asking them to say if, in the event of any shares remaining, they would wish to have any more. Certain shareholders wrote in answer, accepting their proportion of shares, and also desiring to have a certain number of additional shares if they could on the terms noted in the circular. In reply to this the directors sent them notices that the additional shares had been allotted to them, and the amount must be paid to the bank by a day named, or the shares would be forfeited. *Held*, that as to the first or proportional set of shares the shareholders' letter was an acceptance constituting a contract, but as to the extra shares it was only a proposal; and as the directors' answers introduced a material new term (as to forfeiture of the shares if not paid for within a certain time), there was no binding contract as to these. See also *Wynne's Case*, 8 Ch. 1002; *Beck's Case*, 9 Ch. 392; *Carr v. Duval*, 14 Pet. (U. S.)

77; *Slaymaker v. Irwin*, 4 Whart. (Pa.) 369; *Hyde v. Wrench*, 3 Beav. 336.

An acceptance may be complete though it expresses dissatisfaction at some of the terms if the dissatisfaction stops short of dissent, so that the whole thing may be described as a "grumbling assent." *Joyce v. Swann*, 17 C. B. N. S. 84; *per Lord St. Leonards*, 6 H. L. C. 277-8 (in a dissenting judgment). An acceptance is not made conditional by adding words that in truth make no difference, as where the addition is simply immaterial. *Oliver v. Beaumont*, 1 De G. & S. 397; *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Brisban v. Boyd*, 4 Paige (N. Y.), 17; *Fitzhugh v. Jones*, 6 Munf. (Va.) 83; *Matteson v. Scofield*, 27 Wis. 671; *Bruner v. Wheaton*, 46 Mo. 363. Or a mere formal memorandum is inclosed for signature but not shown to contain any new term. *Gibbons v. N. E. Metrop. Asylum District*, 11 Beav. 1. If the person answering an unambiguous proposal accepts it with the addition of ambiguous words, which are capable of being construed consistently with the rest of the document and so as to leave the acceptance absolute, they will, if possible, be so construed. *Eng. & For. Credit Co. v. Ardain*, L. R. 5 H. L. 64, *per Lord Westbury*, at p. 79. See also *Perrett's Case*, 15 Eq. 250; *Duke v. Andrews*, 2 Ex. 290. The unconditional acceptance of a proposal is not deprived of its effect by the existence of a misunderstanding between the parties in the construction of collateral terms which are not part of the agreement itself. *Baines v. Woodfall*, 6 C. B. N. S. 657; 28 L. J. C. P. 338.

1. *Chinnock v. Marchioness of Ely*, 4 D. J. S. 638, 646; *Water Comm'rs v. Brown*, 32 N. J. L. 504; *Eads v. Carondelet*, 42 Mo. 113; *Morrill v. Tehama Co.*, 10 Nev. 125; *Congdon v. Davey*, 46 Vt. 478; *Fredericks v. Fasnacht*, 30 La. Ann. pt. 1, 117; *Bourne v. Shapleigh*, 9 Mo. App. 764; *MacMakin v. Timmins* (S. C. Pa.), 50 Alb. L. J. 56; *Hough v. Brown*, 19 N. Y. 111. Whether such is the truth of the understanding is a question which depends on the circumstances of each particular case. *Rossiter v. Miller*, 3 App. Ca. 1124, 1152. "It is not to be supposed that because persons wish to have a formal agreement drawn



at therefore they cannot be bound previous agreement if it is clear that an agreement has been made."

*Cheney v. Hoke*, 14 Ohio St. 292; *Montague v. Weil*, 30 La. Ann. pt. 150; *Pratt v. Railroad Co.*, 21 N. Y. 305; *Bell v. Offutt*, 10 Bush (Ky.), 632; *Blight v. Ashley*, 1 Pet. (C. C.) 15; *Mackey v. Mackey*, 29 Gratt. (Va.) 158; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Cheney v. Eastern Transp. Line*, 59 Md. 557; *Paige v. Fullerton Woollen Co.*, 27 Vt. 485.

But the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.

*Ridgway v. Wharton*, 6 H. L. C. 238, 264, 268, *per Lord Cranworth*, C.; and *see, per Lord Wensleydale*, at pp. 305-6; *Lyman v. Robinson*, 14 Allen (Mass.), 254; *Brown v. Railroad Co.*, 4 N. Y. 86; *Methudy v. Ross*, 10 Mo. App. 106.

Still more is this the case if the first record of the terms agreed upon is in so many words expressed to be "subject to the preparation and approval of a formal contract." *Winn v. Bull*, 7 Ch. D. 29.

A and B signed a written document, whereby B agreed to buy and A to sell an estate therein described at a specified price, "subject to a formal contract being prepared and signed by both parties, as approved by their solicitors." A correspondence ensued, in the course of which B's solicitor stated that B was "quite firm in adhering to the agreement he entered into," to give a certain sum per acre for the property, which amounted to less than the specified price. A formal contract was prepared in draft, but was not, nor was any other formal contract, signed by the parties or approved by their solicitors. In an action by A for specific performance of the agreement as modified by the correspondence, *held*, that there was no concluded agreement between the parties which was capable of being specifically enforced. *Hawkesworth v. Chaffey*, 54 L. T. N. S. 72. See also *Bushell v. Pocock*, 53 L. T. N. S. 860.

A and B agreed to take C into partnership at a future date, the agreement required by both sides to be drawn up by solicitors. The parties had not considered, and could not afterwards agree upon, several terms of the intended partnership. *Held*, that there was no concluded agreement between the parties. *Connery v. Best*, 1 C. & E. 291.

A written offer to take a building, to be altered, at a certain rent, plans to be

agreed on, and an acceptance in writing of such offer, do not constitute a valid lease; and the owner having refused to give such lease before the plans were agreed upon, specific performance cannot be enforced. *Mayer v. McCreery*, 26 N. Y. W. Dig. 449.

But it is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. *James, L. J.*, in *Bonnewell v. Jenkins*, 8 Ch. D. 70, 73.

The intention of preparing a merely formal contract does not alone show that the parol contract is not regarded by the parties as complete. In *Cheney v. Eastern Transportation Line*, 59 Md. 557. A made B an oral offer for the purchase of the hull and masts of a vessel, which was to remain open until the next day. B on the next day wrote a letter to A substantially embodying the conditions orally mentioned, and saying that he accepted A's offer. A replied, acknowledging B's letter as an acceptance, saying what he understood B to mean by a certain expression, and that he understood the masts to go with the hull, and saying also that he would have a formal contract prepared. B answered this, asking for the old iron, making no objection to A's interpretation of the expression referred to, and saying that of course the masts go with the hull. Other letters followed about various matters. *Held*, that the first two letters made a contract between the parties. The court said: "The reference by Robert to the preparation of a formal contract cannot negative the idea that the parties had already bindingly agreed on the matter, and so fully understood. In *Bonnewell v. Jenkins* [L. R. 8 Ch. Div. 70] (already cited), the judge says that a long series of cases has established, that a reference to a future contract is not enough to negative a present one. Reference is there made to *Crowley v. Maycock*, L. R. 18 Eq. 180."

Where the parties dealt for some time on the terms of a draft agreement which had never been formally executed, it was held that there was an actual though informal consent to a contract upon those terms. *Brogden v. Metropolitan R. Co.*, 2 App. Ca. 666, Lord Cairns' opinion. Each case must depend upon its own circumstances. The question may be made clearer by putting it in this way—whether there is a final consent of the parties such that no new term or variation can be introduced in the formal document to be prepared. Lord Blackburn, 3 App. Ca. at p. 1151. See also

**32. Communication of Acceptance—Contracts by Post and Telegraph—Law of Place.**—The acceptance must be communicated to the proposer. An acceptance not communicated to the proposer does not make a contract.<sup>1</sup> When parties are communicating with each other by means of the public post or telegraph, all acceptance so despatched is complete as against the proposer from the time of its despatch out of the sender's control, notwithstanding any miscarriage or delay in its transmission happening after such despatch.<sup>2</sup>

*Lewis v. Brass* (C. A.), 3 Q. B. D. 667.

A written contract, although inartificially drawn, obscure, and capable of different interpretations in several particulars, yet its provisions embracing, although in very inadequate terms, every matter which the parties had definitely agreed to, and the circumstances surrounding its execution being consistent with no other conclusion, must be regarded as a completed agreement or contract, and not merely as an agreement to agree. *Bean v. Clark*, 30 Fed. Rep. 225.

1. *M'Iver v. Richardson*, 1 M. & S. 557; *Mozley v. Tinkler*, 1 C. M. & R. 692; *Russell v. Thornton*, 4 H. & N. 788, 798, 804; *Hebb's Ca.*, 4 Eq. 9; *Shupe v. Galbraith*, 32 Pa. St. 10; *Jennes v. Mt. Hope Iron Co.*, 53 Me. 20; *McCulloch v. Ins. Co.*, 1 Pick. (Mass.) 278; *Borland v. Guffey*, 1 Grant's Cas. (Pa.) 394; *Beckwith v. Cheever*, 21 N. H. 41; *Duncan v. Heller*, 13 S. Car. 94; *White v. Corlies*, 46 N. Y. 467; *Trounstone v. Sellers*, 13 Kan. 447. This rule, however, is subject to an important exception where the parties are in correspondence through the post-office.

2. *Adams v. Lindsell*, 1 B. & Ald. 681. Defendants wrote to plaintiffs, "We now offer you 800 tons of wether fleeces, etc., receiving your answer in course of post." This letter was misdirected, and so arrived late. On receiving it plaintiff wrote accepting the proposal, but the defendants not receiving an answer, when they should have received it if their proposal had not been delayed, had in the mean time (between the dispatch and the arrival of the reply) sold the wool to another buyer. The plaintiff sued for non-delivery of the wool. *Held*, that the defendants were bound by their offer. "The defendants must be considered in law as making, during every instant of time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter." In *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190, an acceptance and revocation were written at different times, but posted

and received at the same time; *held*, that the revocation was effectual. In *Thompson v. James*, 18 Dunlop, 1; *Langdell Sel. Ca. on Cont.* 125, it was held that a contract by letter is complete from the moment of posting the acceptance. *Potter v. Sanders*, 6 Ha. 1; *Dunlop v. Higgins*, 1 H. L. C. 381. A proposal to sell iron; the acceptance delayed by state of roads. *Held*, that the contract was concluded by posting the acceptance. *Duncan v. Topham*, 8 C. B. 225. As to applications for shares in companies made and answered by letter, see *Hebb's Ca.*, 4 Eq. 9; *Reidpath's Case*, 11 Eq. 86; *British & Amer. Tel. Co. v. Colson*, L. R. 6 Ex. 108; *Townsend's Ca.*, 13 Eq. 148; *Harris's Case*, 7 Ch. 587; *Wall's Case*, 15 Eq. 18. In *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216, an application for shares in the plaintiff company, whose office was in London, was handed by the defendant to a country agent for the company. A letter of allotment, duly addressed to the defendant, was posted from the London office, but never reached him. The company went into liquidation, and the liquidator sued for the amount due on the shares. *Held*, that the defendant must be taken to have authorized the sending by post of a letter of allotment, and that he was bound, although the letter wholly failed to reach its address. *Acc. Vassar v. Camp*, 11 N. Y. 441; *Howard v. Daly*, 61 N. Y. 362; *Washburn v. Fletcher*, 42 Wis. 152; *Haas v. Meyers* (S. C. Ill.), 20 C. L. J. 94. 95. The American cases hold similarly in regard to proposal and revocation, and almost uniformly state the rule as to the acceptance to be that it takes effect from the time when it is dispatched, whether by post or by telegraph.

In *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390, the insurance company's agent wrote to the plaintiff offering to insure his house on certain terms. The plaintiff wrote and posted a letter accepting these terms, which was duly received. The day after it was posted, but before it was delivered, the house was burnt. *Held*, that the contract of insurance was complete. *Trevor v. Wood*, 39

The contract dates from the acceptance.<sup>1</sup> A contract is governed by the laws of the place where it is executed ;<sup>2</sup> a contract made by correspondence should be referred to the place whence the acceptance is despatched.<sup>3</sup>

N. Y. 307; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dillon (U. S.), 431; *Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Hutchinson v. Blakeman*, 3 Met. (Ky.) 80; *Mactier's Adm'rs v. Frith*, 6 Wend. (N. Y.) 103; *Hamilton v. Ins. Co.*, 5 Pa. St. 339; *Stockham v. Stockham*, 32 Mo. 196, 208; *Bryant v. Booze*, 55 Ga. 438; *Abbott v. Shepherd*, 48 N. H. 14; *Moore v. Pierson*, 6 Clarke (Iowa), 279; *Ferrier v. Storer*, 63 Iowa, 484; *Levy v. Cohen*, 4 Ga. 1; *Hallock v. Ins. Co.*, 26 N. J. L. 268, 27 N. J. L. 645; *Ins. Co. v. Jenks*, 5 Ind. 96.

When a negotiation for the payment of a debt by the note of a third party is carried on by letter, the party to whom the offer has been made is held to have accepted it or rejected it from the time his answer is deposited in the mail. *Hunt v. Higman*, 30 N. W. Rep. (Iowa), 769.

A policy of life-insurance, upon due application, was issued under a contract with the local agent, whereby it was substantially agreed that the agent should pay the first quarter's premium and take the applicant's note for the same. The policy was mailed from the home office July 28, 1885, and received by the local agent Aug. 5, 1885, but was never actually delivered into the possession of the applicant, who was taken ill, Aug. 6, and died Sept. 9, 1885. *Held*, that as between the applicant and the company the policy became effective and binding when placed in the mail, July 28, 1885, and if not then, certainly when it reached the hands of the agent, Aug. 5, 1885. "As between the applicant and the company, this contract was complete. There was left no act for the applicant to perform, so far as the company was concerned." *Yonge v. Eq. Life Ass. Soc.*, 30 Fed. Rep. 902.

Where there was an agreement between the agent of an insurance company and the insured that if he desired additional insurance after night-time he should post a letter to the agent asking for such insurance, and that the insurance should take effect for the amount named in the letter from the time it was posted, *held*, that such a letter deposited in the post-office unstamped, is not posted so as to effect insurance unless the plaintiff notified the agent of the depositing of the letter and of its contents before the loss. *Blake v. Hamburg-Bremen Fire Ins. Co.*, 35 Alb. L. Jour. (Tex.) 82. See

also 7 Amer. L. Rev. 433, "Contract by Letter," where the American and French opinions are collected. Opposed to the current of authority is *McCullock v. Ins. Co.*, 1 Pick. (Mass.) 278, which holds that an acceptance by post has no effect until received by the proposer. See Wald's Ed. Pollock on Contrs. 36, note x. To be perfectly safe, a man who makes an offer of any importance by letter should expressly make it conditional on his actual receipt of an acceptance within some definite time. "The person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance." "If an offer is made by letter in which the person making the offer requests an answer by telegraph, 'Yes' or 'No,' and states that unless he receives the answer by a certain date he 'shall conclude "No,"' the offer is made dependent upon an actual receipt of the telegram on or before the date named." *Lewis v. Browning*, 130 Mass. 173.

The proposer of a contract by telegraph was held bound to deliver at the price named in the telegram, though an error therein was made by the telegraph company. "We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph." *Ayer v. West. U. Tel. Co.*, 10 Atl. Rep. (Me.) 497.

1. The contract does not relate back to the date of the proposal. *Felthouse v. Bindley*, 11 C. B. N. S. 869; 31 L. J. C. P. 204.

2. *Shoe & Leather Nat. Bank v. Wood*, 3 New Eng. Rep. (Mass.) 119; *Brown v. Am. Finance Co.*, 31 Fed. Rep. 516.

Where a contract for the loan of money was made in Massachusetts upon the condition that the note to be given therefor should be signed and returned to the lender in that State, the note, although signed in New Hampshire, became operative as evidence of the contract on being delivered to the lender, and such contract is governed by the laws of Massachusetts. *Hill v. Chase*, 3 New Eng. Rep. (Mass.) 207.

3. *Newcomb v. De Roos*, 2 E. & E. 270; 29 L. J. Q. B. 4; *Levy v. Cohen*, 4 Ga.



**33. Proposal or Acceptance by Conduct.**—The proposal or acceptance of an agreement need not necessarily be written or spoken, but may be acted wholly or in part.<sup>1</sup>

1; Insurance Co. v. Tuttle, 40 N. J. L. 476; Shattuck v. Ins. Co., 4 Cliff. (U. S. C.) 598. Compare Milliken v. Pratt, 125 Mass. 374; Bell v. Packard, 69 Me. 105. If a person residing in one State orders goods of one residing in another State, who there delivers the goods ordered to a carrier for the purchaser, the contract is made there, and its validity depends upon the law of the State of the settler's residence. Frank v. Hoey, 128 Mass. 263; Milliken v. Pratt, 125 Mass. 374; Kline v. Baker, 99 Mass. 253; Finch v. Mansfield, 97 Mass. 89; Tuttle v. Holland, 43 Vt. 542; Webber v. Donnelly, 33 Mich. 469; Garbracht v. Commonwealth, 96 Pa. St. 449; Boothby v. Plaisted, 51 N. H. 436; Fuller v. Leet, 59 N. H. 163; Tegler v. Shipman, 33 Iowa, 194; State v. Hughes, 22 W. Va. 743; Pilgreen v. State, 71 Ala. 368. Contra to last case, in which goods were ordered to be delivered C.O.D. at the buyer's place of residence, is United States v. Shriver, 23 Fed. Rep. 134, which latter is believed to be the better decision.

1. One may be bound by a contract accepted and acted under by him, although only the other party thereto has signed it. Fairbanks v. Meyers, 98 Ind. 92.

For an example of an agreement inferred from conduct, see San Joaquin Val. Bank v. Bours, 65 Cal. 247.

If the trains of a defendant railroad company are accustomed to stop at the platform at which plaintiff desired to alight, although it was neither constructed nor owned by the company, an implied contract that passengers might stop there may be raised. L. & N. R. Co. v. Johnston, 79 Ala. 436.

One may be bound by a contract though he does not sign the written memorandum if he participates in the negotiation which leads to its being signed, is present at the signing, knows its terms, and intends to allow the parties who did sign to adjust the whole matter. So held under the circumstances, in Bean v. Clark, 30 Fed. Rep. 225.

Waiver of time limited in a parol contract may be proved not only by an express agreement, but by the conduct of the parties. Frost v. Thompson, 18 Ill. App. 410.

A written agreement made with a trustee of an intended company was held incapable of confirmation, having been en-

tered into before the company was in existence, and the acts of the company done under the erroneous belief that the agreement was binding on them were held not evidence of a fresh agreement having been entered into on the same terms as the written agreement. In re Northumberland Ave. Hotel Co., 33 Ch. D. 16.

If A, of his own motion sends goods to B on approval, this is an offer which B accepts by dealing with the goods as owner. Sending an order for goods to a merchant is in effect an offer to purchase, and sending the goods is an acceptance of the offer and creates a contract of sale. Hart v. Mills, 15 M. & W. 87; Cresswell, J., in Harvey v. Johnston, 6 C. B. 304; Levy v. Green, 8 E. & B. 575; Gt. Northn. R. Co. v. Witham, L. R. 9 C. P. 16. The conduct must be unambiguous and unconditional. Warner v. Willington, 3 Drew, 523, 533.

Where the proposal is not express, it must be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention. Questions of this kind have arisen where public companies entering into contract for the carriage or custody of goods have sought to limit their liability by special conditions printed on a ticket delivered to the passenger or depositor at the time of making the contract. It is a question of fact in each case whether the notice given by the depositor was reasonably sufficient to inform the depositor at the time of making the contract that the depositor intended to contract only on special terms. Henderson v. Stevenson, L. R. 2 Sc. & D. 470 (1875); Harris v. G. W. G. Co., 1 Q. B. D. 575; Parker v. S. E. R. Co.; Gabell v. Same, 2 C. P. D. 416. Compare Burke v. S. E. R. Co., 5 C. P. D. 1; Watkins v. Rymile, 10 Q. B. D. 178, where the former cases are fully reviewed by Stephen, J.

W. bought from a railroad company a ticket from E. to B. and return, at a reduced rate. There was a condition in the ticket that it was good only on the trains advertised to stop at stations named therein. A train not advertised to stop at B. was signalled at that point by W., but failed to stop for him. Held, that W.'s rights on the ticket were limited by the conditions thereof, and he could not take advantage of the reduction in the

**34. Rules do not Apply to Contracts by Deed.**—The ordinary rules of proposal and acceptance do not apply to promises made by deed.<sup>1</sup>

rate and reject the conditions on which the reduction was made. Hence it was no breach of the special contract when the train refused to stop at B. on W.'s signal. *Wilson v. N. O. & N. E. R. Co.*, 63 Miss. 352.

It must be shown that the depositor knew and assented to the special terms, or at any rate that he knew there were some special terms, and was content to accept them without examination. *Railroad Co. v. Campbell*, 36 Ohio St. 647; *Malone v. Railroad Co.*, 12 Gray (Mass.), 388; *Brown v. Railroad Co.*, 11 Cush. (Mass.) 97; *Madan v. Sherard*, 73 N. Y. 329; *Blossom v. Dodd*, 43 N. Y. 264; *Rawson v. Railroad Co.*, 48 N. Y. 212; *Wilson v. Railroad Co.*, 21 Gratt. (Va.) 654; *Railroad Co. v. Cox*, 29 Ind. 360. *Compare Steers v. Steamship Co.*, 57 N. Y. 1. The ticket is a mere token or voucher that the holder has paid his fare. *Railroad Co. v. Campbell*, 36 Ohio St. 647, 658; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Rawson v. Railroad Co.*, 48 N. Y. 212; *Elmore v. Sands*, 54 N. Y. 512, 515; *Burnham v. Railroad Co.*, 63 Me. 298; *Wilson v. Railroad Co.*, 21 Gratt. (Va.) 654. It is well settled that a mere notice is not enough to relieve the carrier from his common-law liability without proof of its having been not only actually seen but also assented to by the other party. When goods are delivered to a common carrier under a notice, if any implication is to be indulged in "it is as strong that the owner intended to insist upon his rights as it is that he assented to their qualification." *New Jersey Steam Nav. Co. v. Bank*, 6 How. (U. S.) 344, 383; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Judson v. Railroad Co.*, 6 Allen (Mass.), 486, 491; *Jones v. Voorhees*, 10 Ohio, 145; *Railroad Co. v. Barrett*, 36 Ohio St. 448, 453; *Railroad Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318; *Moses v. Railroad Co.*, 32 N. H. 523; *Same v. Same*, 32 N. H. 523; *Brown v. Express Co.*, 15 W. Va. 812. When, concurrently with his delivery of the goods to the carrier, a bill of lading containing restrictive conditions is given to the shipper and retained by him, it is held in some States that he is estopped to deny that he assented to its terms, and that evidence to show that he never read it is inadmissible. *Ins. Co. v. Railroad Co.*, 72 N. Y. 90; *Hill v. Railroad Co.*, 73 N.

Y. 351; *Grace v. Adams*, 100 Mass. 505; *McMillan v. Railroad Co.*, 16 Mich. 80; *Railroad Co. v. Brownlee*, 14 Bush (Ky.), 590; *O'Bryan v. Kinney*, 74 Mo. 125; *Wertheimer v. Railroad Co.*, 17 Blatchf. (U. S. C. C.) 421. See *Lawson Contracts of Carriers*, § 102. On the other hand, *compare Transportation Co. v. Dater*, 91 Ill. 195; *Railroad Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318; *Express Co. v. Moon*, 39 Miss. 822; *Express Co. v. Haynes*, 42 Ill. 89; *Express Co. v. Stettaners*, 61 Ill. 184. Where goods are delivered to a carrier under a verbal contract not limiting the carrier's liability, and afterwards a bill of lading containing restrictive conditions is given to the shipper, it requires for the release of the carrier from his common-law liability not only the express assent of the shipper, —*Railway Co. v. Jurey*, 111 U. S. 594; *Gott v. Dinmore*, 111 Mass. 45; *Gaines v. Transportation Co.*, 28 Ohio St. 418; *Bostwick v. Railroad Co.*, 45 N. Y. 712; *Railroad Co. v. Boyd*, 91 Ill. 268,—but also, it would seem, a new consideration. *Railroad Co. v. Reynolds*, 17 Kan. 251. See 5 C. L. J. 134.

1. *Doe d. Garnous v. Knight*, 5 B. & C. 671 (a mortgage); *Exton v. Scott*, 6 Sim. 31 (the like); *Hall v. Palmer*, 13 L. J. Ch. 352 (bond to secure annuity after obligor's death); *Fletcher v. Fletcher*, 14 L. J. Ch. 66 (covenant for settlement to be made by executors); *Xenos v. Wickham*, L. R. 2 N. H. 296. "If A make an obligation to B and deliver it to C to the use of B, this is the deed of A presently; but if C offers it to B, then B may refuse it *in pais*" (i.e., without formality), "and thereby the obligation will lose its force." *Butler & Baker's Ca.*, 3 Co. Rep. 26, quoted by *Blackburn, J.*, L. R. 2 H. L. 312; *Acc. Merrills v. Swift*, 18 Conn. 257 (a mortgage); *Ensworth v. King*, 50 Mo. 477 (the like). *Contra*, *Bell v. Bank*, 11 Bush (Ky.), 34 (the like); *Welch v. Sackett*, 12 Wis. 270 (the like). *Compare Sargeant v. Solberg*, 22 Wis. 132. As to delivery of deeds, see 3 Washburn Real Prop. 288 *seq.*; *Martindale Law of Conveyancing*, §§ 208, 212. That a promissory note also differs from a simple contract in this respect, namely, that if delivered a payee may recover upon it, though not aware of its existence until after the maker's death, see *Dean v. Caruth*, 108 Mass. 242; *Worth v. Case*, 42 N. Y. 362; 2 Ames Cas. on Bills and

**35. Implied Promises—Promises Implied in Law—Implied from Conduct—Work, etc., Done at Request—Presumption may be Rebutted—No Promise Implied between Parent and Child.**—In certain cases the law will compel a man to perform a duty by implying a promise on his part to perform it.<sup>1</sup> In these cases there is no real contract, but the duty is enforced by means of a contractual action.<sup>2</sup> In other cases the conduct of the parties is of such a character that the law will presume that they were dealing on the basis of contract, and if no express promise has been made, the law will imply one.<sup>3</sup> Whenever work is done, services rendered,

Notes, 878, *s. v.* Specialty, § 18. As to indorsee, see *Lysaght v. Bryant*, 9 C. B. 46; *Williams v. Galt*, 95 Ill. 172.

1. The following summary statements of the circumstances upon which the debt is implied were, and in some places still are, used under the common-law system of pleading: Debts for money paid by a person for the use of another; debts for money received by a person for the use of another; debts for money found to be due upon accounts stated between two persons. To which may be added debts due upon foreign judgments and other debts due under foreign law. See Leake on Contracts, 76. Cases under these heads will be found collected in the article on ASSUMPSIT.

2. "If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt founded in the equity of the plaintiff's case, as it were, upon a contract—*quasis ex contractu*, as the Roman law expresses it." *Per* Lord Mansfield in *Moses v. Macfarlan*, 2 Burr. 1008. See *per* Tindal, C. J., in *Smith v. Jones*, 11 L. J. C. P. 100; *per* Maule, J., in *Lewis v. Campbell*, 8 C. B. 545; *Bixby v. Moore*, 51 N. H. 402.

There are many cases in which there is no true contract, but in which it is just and expedient that an obligation analogous to contract should be imposed upon the person receiving the benefit. *People v. Speir*, 77 N. Y. 144, 150.

In an action for money had and received there need be no privity of contract alleged or proved other than such as arises out of the fact that the defendant has received the plaintiff's money, which in equity and good conscience he ought not to retain. *Walker v. Conant*, 31 N. W. Rep. (Mich.) 786.

An action for money had and received is an equitable action, and lies whenever one person has money which *ex æquo et bono* belongs to another. *Barnett v. Warren*, 2 South. Rep. (Ala.) 457.

As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled

to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and, in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor; and the right to indemnity exists although there may be no agreement to indemnify, and in that sense no privity between the owner of the goods and the debtor. *Edmunds v. Wallingford*, 14 Q. B. D. 811. See *Inhab. of Milford v. Com.*, 3 New Eng. Rep. (Mass.) 781.

Where a surety signs a bond, an implied contract of indemnity takes effect immediately, and becomes a vested right. The constitutional prohibition against violating the obligation of a contract applies to a contract implied by the law. *Berry v. Ewing*, 8 West. Rep. (Mo.) 594. See ASSUMPSIT.

3. Whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted. *Ex parte Ford*, 16 Q. B. D. 307.

**Implied Contracts from Conduct.**—When a physician is called in generally and without limitation to his services, there is an implied engagement that he shall attend the patient through that illness, or until his services are dispensed with. *Dale v. Donald Lum. Co.*, 48 Ark. 188.

Where a consulting physician renders medical and surgical services to a patient with his consent, and without objection or notice that such services are to be paid for by the attending physician, the law raises an implied promise on the part of the patient to pay him what the services are reasonably worth; and to overcome such promise it must be satisfactorily proved that the physician knew of and assented to a different arrangement. *Garrey v. Stadler*, 30 N. W. Rep. (Wis.) 787.

A., in 1879, undertook to acquire the right to operate telephone exchanges in

goods delivered, or money paid by one person at the request of another, provided such request be not made and acceded to as a gratuitous favor, a contract is implied to pay the value.<sup>1</sup> The presumption that the service for which the plaintiff seeks to recover was done under an implied promise that he should be paid for it may be rebutted by evidence that the relation between the parties was such as to exclude the inference that they were dealing on the footing of contract.<sup>2</sup> Between parent and child there can be no recovery for board or wages in the absence of an express agreement.<sup>3</sup>

K. C. and St. L. He was to secure the rights of the K. C. Telephone Exchange and the Am. Dist. Telegraph Co. of St. L. Accordingly A. organized the Bell Telephone Co., taking in four friends as stockholders. Before their stock was delivered an arrangement was effected for the consolidation of the Am. Dist. Tel. Co. with the Bell Telephone Co., the former receiving 250 shares of the latter. These 250 shares were deducted from shares of stock previously allowed to A., who had charge of and directed all these transactions. A. sued Bell Telephone Co. on an implied contract for the reasonable worth of the 250 shares. *Held*, no contract; the allotting of the 250 shares to the Am. Dist. Tel. Co. being simply a new arrangement in the creation of defendant and distribution of its stock, and not a contract between A. and defendant for 250 shares of stock. *Eldred v. Bell Telephone Co. of Mo.*, 7 Sup. Ct. Rep. 296; s. c., 119 U. S. 513. See, *ante*, PROPOSAL AND ACCEPTANCE BY CONDUCT.

1. *Jewry v. Busk*, 5 Taunt. 302; *Kidder v. The Boom Co.*, 24 Pa. St. 193.

"If a man does work on the order of another, under such circumstances that it must be presumed that he looks to be paid as a matter of right, then a contract will be implied by that person." *Addison on Contracts*, 23.

If A with B's knowledge, but without any express request, does work for B such as people as a rule expect to be paid for, if B accepts the work or its result, and if there are no special circumstances to show that A meant to do the work for nothing or that B honestly believed that such was his intention, there is no difficulty in inferring a promise by B to pay what A's labor is worth. The doing of the work with B's knowledge is the proposal of a contract, and B's conduct is the acceptance. *Day v. Caton*, 119 Mass. 513; *Holmes v. Board of Trade (S. C. Mo.)*, 18 C. L. J. 235. Services intended to be gratuitous at the time when they are rendered can-

not subsequently be used to raise an implied promise to pay for them,—*Potter v. Carpenter*, 76 N. Y. 157; *Osier v. Hobbs*, 33 Ark. 215; *Taylor v. Lincumfelter*, 1 Lea (Tenn.), 83;—even though the person rendering them was moved to do so by reason of a state of facts mistakenly supposed to exist. *St. Joseph's Orphan Asylum v. Wolpert*, 80 Ky. 86. The like inference cannot be made if the work is done without B's knowledge. *Compare dicta* of *Pollock*, C. B. 25 L. J. Ex. p. 332; *Davis v. School Dist. No. 2*, 24 Me. 349, 351; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Holmes v. Board of Trade (S. C. Mo.)*, 18 C. L. J. 235; *Hart v. Norton*, 1 McCord. (S. Car.), 22.

When one pays money under a legal obligation assumed by him at the request of another and for his benefit, the law implies a promise to repay on the part of the person at whose request and for whose benefit the obligation is assumed. *Wheeler v. Young*, 3 New Eng. Rep. (Mass.) 316.

2. *Potter v. Carpenter*, 76 N. Y. 157.

3. *Udpike v. Titus*, 2 Beas. (N. J.) 151; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Candor's Appeal*, 5 W. & S. (Pa.) 13; *Leidig v. Coover*, 41 Pa. St. 534.

The rule does not apply as one of law to more distant relatives; the question whether the relation is that of guest or servant is one of fact, depending on the intention of the parties as deduced from all the circumstances. *Neal v. Gilmore*, 79 Pa. St. 421, 427. See *Swain v. Ettling*, 32 Pa. St. 486.

In services interchanged between friends and neighbors as a matter of mutual accommodation, a promise will not be implied. *Potter v. Carpenter*, 76 N. Y. 157.

Where a grandfather takes his granddaughter into his family and treats her in all respects as one of his own children, a presumption arises against a promise on the part of the grandfather to pay the grandchild for services performed. *Dod-*

**36. Capacity of Parties.**—In several ways persons may be incapacitated wholly or partially from entering into binding contracts. These will be found fully discussed under the various heads to which they properly belong. Among such classes of persons may be enumerated—

**37. Infants**, whose contracts are voidable at their option,<sup>1</sup> subject to certain exceptions, for a discussion of which see INFANCY.

**38. Married Women.** See MARRIAGE.

**39. Lunatics and Drunkards**, whose contracts are voidable so far as they are incapable of understanding the terms thereof, and as their state is known by the other contracting party.<sup>2</sup> See DRUNKENNESS AND LUNACY.

**40. Agents and Corporations.**—For contracts by agents, see AGENCY; and for those entered into by corporations, see CORPORATIONS.

son *v.* McAdams, 2S. E. Rep. (N. Car.) 453.

The performance and receipt of services generally raises an implied promise by him who receives to compensate him who performs; but this implication may be rebutted. When the parties are parent and child, or members of the same family, the relationship excludes the implication of a promise. Except in cases of parent and child, there must be evidence beyond the relationship that the creation of no debt was intended. *Curry v. Curry*, 7 Atl. Rep. (Pa.) 61; s.c., 11 East. Rep. 153.

Where services are rendered to one standing *in loco parentis*, there is no implied promise to pay for them. *Fross's Appeal*, 105 Pa. St. 258.

Though such presumption may be overcome by the facts and circumstances of the case. *Mills v. Joiner*, 20 Fla. 479.

There can be no recovery without proving a contract. *Sawyer v. Hebard*, 58 Vt. 375; *Moyer's Appeal*, 112 Pa. St. 290; *Traver v. Shiner*, 65 Iowa, 57; *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558.

Where a daughter agreed to board and take care of her father for \$30, and "to ask nothing more," the contract must be construed as fixing the price under the existing circumstances; and when by reason of the change in the condition of the testator, the care of him became more burdensome, she was held to be entitled to have the assistance of a servant, and to have the cost of his hire allowed against her father's estate upon his decease. *Hopper v. Oldis*, 7 Atl. Rep. (N. J.) 349.

1. Among the later cases on this point are *Gray v. Turley*, 8 West. Rep. (Ind.) 874; *Shuford v. Alexander*, 74 Ga. 293;

*Rice v. Boyer*, 9 N. E. Rep. (Ind.) 420; *Harner v. Dipple*, 31 Ohio St. 72; *Petrow v. Wiseman*, 40 Ind. 148; *Cole v. Pennoyer*, 14 Ill. 158; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Skinner v. Maxwell*, 66 N. Car. 45, 47; *Baker v. Kennett*, 54 Mo. 82, 88.

2. Where a contract is honestly made with a person of unsound mind not judicially so declared, in ignorance of such mental incapacity, and a fair consideration has been paid to him and used for his benefit, there can be no rescission without an offer to restore the same; but where no such beneficial consideration has been received, there is no necessity for any tender in a suit by the heirs of such insane person to have the contract rescinded. *Physio-Medical College v. Wilkinson*, 9 N. E. Rep. (Ind.) 167.

A contract made by one so destitute of reason as not to know the consequences of his act, though his incompetency be produced by purely voluntary intoxication, is voidable. *Bush v. Breinig*, 9 East. Rep. (Pa.) 778. See also *Bussinger v. Bank*, 23 Reporter (Wis.), 51.

A drunkard is not incompetent, like an idiot or one generally insane, but only on proof that, at the time of making the contract, his understanding was clouded, or reason dethroned by actual intoxication. *Wright v. Fisher*, 32 N. W. Rep. (Mich.) 605.

Though all express contracts by the insane are prohibited by statute, their estates may be held liable when the law implies a contract for services and necessities furnished in good faith, and under circumstances justifying them. *Reando v. Mosplay*, 2 S. W. Rep. (Mo.) 405.

A contract with a slave is null and void. *Woodland v. Newhall's Adm'r*, 31 Fed. Rep. 434.



**41. Persons Affected by Contract—Parties and Assignees—Third Persons.**—As a general rule, the parties to a contract are the only persons affected by it.<sup>1</sup> Persons not parties to a contract may subsequently acquire rights under it by novation,<sup>2</sup> and by assignment.<sup>3</sup> But as a general rule, strangers cannot sue on a contract.<sup>4</sup> Exceptions to this rule, however, exist in certain cases, as where the principal object of the contract between the promisor and the promisee is a benefit to a third person, he may sue upon it; so where property is put into the hands of one who promises to deliver it or pay out of it to a third person, and similar cases referred to in the note.<sup>5</sup>

1. A stranger may be liable in tort for procuring the breach of a contract. *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333; *Walker v. Cronin*, 107 Mass. 555; *Rice v. Manly*, 66 N. Y. 82; *Benton v. Pratt*, 2 Wend. (N. Y.) 385; *Jones v. Blocker*, 43 Ga. 331; *Haskins v. Royster*, 70 N. Car. 601; *Jones v. Stanley*, 76 N. Car. 355; *Dickson v. Dickson*, 33 La. Ann. 1261. Compare *Burgers v. Carpenter*, 2 S. Car.

7. As to when an agent is bound by a contract made for his principal, see AGENCY.

2. See NOVATION, *supra*; DISCHARGE OF CONTRACTS.

3. See ASSIGNMENT; COVENANTS RUNNING WITH LAND.

4. A stranger to a contract, who has suffered damage by the non-performance of it, cannot sue the defaulting party for the damage. *Playford v. U. K. Electric Tel. Co.*, L. R. 4 Q. B. 706; *Dickson v. Reuter's Tel. Co.*, 2 C. P. D. 62; 3 C. P. D. 1. See *Alton v. Midland Railway Co.*, 19 C. B. N. S. 213. In America a contrary opinion prevails in the cases of telegraphic dispatches. *Bigelow, L. C.*, on Law of Torts, 619 *sqq.*; *Gray* on Communication by Telegraph, ch. vii.

A entered into an executory contract with B for the purchase of land owned by the latter, and, before performance of the conditions on either side, contracted to sell the same land to C, and thereafter neglected or refused to complete his contract with B so as to acquire the title. *Held*, that the contracts were independent, and that an action could not be maintained by C against A and B to compel specific performance of the first-named contract by A, to the end that B's title might be acquired and transferred to C. *McCarthy v. Couch*, 33 N. W. Rep. (Minn.) 777.

5. "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing

rule in this country." *Hendricks v. Lindsay*, 93 U. S. 143, 149; *Bank v. Grand Lodge*, 98 U. S. 123; *Morrill v. Lane*, 135 Mass. 93; *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59; *Austin v. Sligman*, 18 Fed. Rep. 519; *Anderson v. Fitzgerald*, 21 Fed. Rep. 294. *Contra*, in England, *Tweddle v. Atkinson*, 1 B. & S. 393. In *Felton v. Dickinson*, 10 Mass. 287, the promisee placed his son in the service of the promisor upon an agreement that at the end of the term of service the promisor would pay to the son a certain sum of money; *held*, that the son might recover the amount. See *Lawrence v. Fox*, 20 N. Y. 268; *Hind v. Holdship*, 2 Watts (Pa.), 104; *Vincent v. Watson*, 18 Pa. St. 96; *Edmundson v. Penny*, 1 Pa. St. 334; *Wynn v. Wood*, 97 Pa. St. 216; *Beers v. Robinson*, 9 Pa. St. 229; *Esling v. Zantzinger*, 13 Pa. St. 50; *Comm. Bank v. Wood*, 7 W. B. (Pa.) 89; *Guthrie v. Kerr*, 85 Pa. St. 303; *Kountz v. Holthouse*, 85 Pa. St. 235; *Roth v. Barner*, 12 W. N. C. (Pa.) 523; *D. & H. Canal Co. v. Bank*, 4 Denio (N. Y.), 97; *Simson v. Brown*, 68 N. Y. 355; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432; 9 Cow. (N. Y.) 639; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 254; *Barker v. Bucklin*, 2 Denio (N. Y.), 45; *Frost v. Gage*, 1 Allen (Mass.), 262; *Carnegie v. Morrison*, 2 Met. (Mass.) 381; *Hincey v. Fowler*, 15 Me. 285; *Motley v. Ins. Co.*, 29 Me. 337; *Bohanan v. Pope*, 42 Me. 93; *Railroad Co. v. Cole*, 24 Vt. 33; *Crocker v. Higgins*, 7 Conn. 347; *Steene v. Aylesworth*, 18 Conn. 244; *Clapp v. Lawton*, 31 Conn. 95; *Thompson v. Thompson*, 4 Ohio St. 353; *Putney v. Farnham*, 27 Wis. 187; *Kollock v. Parcher*, 52 Wis. 393; *Davis v. Calloway*, 30 Ind. 112; *Carter v. Eads*, 65 Ala. 190; *Lucas v. Chamberlain*, 8 B. Mon. (Ky.) 276; *Bett v. McLaughlin*, 13 Nev. 427; *Green v. Richardson*, 4 Col. 584. In some States it is held that to entitle the third person to recover, his interest must be exclusive. *Blymire v. Baistle*, 6

Watts (Pa.), 182; Cummings v. Klapp, 5 W. & S. (Pa.) 511; Ramsdale v. Horton, 3 Pa. St. 330; Finney v. Finney, 16 Pa. St. 380; Campbell v. Lacock, 40 Pa. St. 448; Morrison v. Beckey, 6 Watts (Pa.), 349; Robertson v. Reed, 47 Pa. St. 115; Torrens v. Campbell, 74 Pa. St. 470; Guthrie v. Kerr, 85 Pa. St. 303; Miss. C. Railroad Co. v. Southern Railroad Ass'n, 8 Phila. (Pa.) 107. See also National Bank v. Grand Lodge, 98 U. S. 123; Sacramento Co. v. Wagner, 67 Cal. 293; Schneider v. White, 12 Or. 503; Zell's Appeal, 111 Pa. St. 532; Gregory v. Williams, 3 Mer. 582.

A person for whose benefit a promise to another, upon a sufficient consideration, is made, may maintain an action on the contract in his own name against the promisor; but the rule is not so far extended as to give a third person, who is only indirectly and incidentally benefited by the contract, a right to sue upon it. Burton v. Larkin, 13 Pac. Rep. (Kan.) 398.

Where by an agreement with B, C acquires all the rights and assumes all the obligations of B arising under a contract made between A and B, A or his assigns may hold C responsible for the breach of any of the obligations thus assumed. Jones v. Foster, 67 Wis. 296.

In case of action for breach of a contract according to its terms, a third person may maintain an action on a promise made to another, but an action cannot be maintained on a conditional contract, according to the terms of which the defendant is not liable to any person. Grim v. Thomas Iron Co., 8 Atl. Rep. (Pa.) 595.

In order that a promise made by one person to another for the benefit of a third person shall constitute the first the debtor of the third, and entitle the third person to sue the first on such promise, it must appear that there was a clear intent upon the part of both the first and second that the first person shall become such debtor. The mere fact that the third might be benefited is not sufficient. Wright v. Terry, 2 South Rep. (Fla.) 6. Compare cases cited *supra*.

A provision in a contract between a municipality and a contractor that the municipality may retain money until the contractor shall have paid his laborers, does not give the laborers a right of action against the municipality in case the contractor is paid in full. Old Domin. Granite Co. v. Dist. of Col., 20 Ct. of Cl. 127.

Before the maturity of a note originally payable to B, but by him transferred to C, A, for a valuable consideration

from B, promised B to pay it. The note was not made, and went to protest. B obtained the note and sued A on it, and on the contract. *Held*, that B had a cause of action, because (1) B's obligation to C as indorser of the note established C's privity to the contract, so that C would have been entitled to sue on the contract, to which right B succeeded; (2) B was promisee in the contract, and had become entitled to all the rights under it. Litchfield v. Flint, 11 N. E. Rep. (N. Y.) 59; s. c., 10 East. Rep. 469.

A and B, two railroad companies operating competing lines, entered into an agreement by which A was, for a specified compensation, to give to B a right of way over a portion of its tracks, and also the right to use the station at W.; further, A was to look after the freight and baggage of B and sell tickets for B at that point. C was the ticket-agent of A at W. When he left that employment he brought suit against B, claiming compensation for selling its tickets while serving A. *Held*, that without distinct proof of an actual promise by B to pay, and satisfactory proof of the consent of A that C should receive such payment, there could be no recovery. P. R. Co. v. Flanigan, 8 East. Rep. (Pa.) 197.

The following contract was entered into: "It is also agreed and understood that the said party of the first part (B) shall furnish said party of the second part (C) such sums of money as may be necessary to pay the current expenses of said second party, it being understood that said second party shall render a monthly account of expenses to said first party." These sums of money were to be furnished by B to C as loans to C, and not to purchase anything or to pay for anything for B's benefit. *Held*, that this contract does not authorize a third person to sue B for goods furnished by such third person to C, nor does such contract constitute C the agent of B to purchase goods, making B liable as principal debtor. Burton v. Larkin, 13 Pac. Rep. (Cal.) 398.

To entitle a third person not named as party to a contract to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract. Gandy v. Gandy, 30 Ch. D. 57.

A provision in an act of Parliament may enable an outsider to sue. There is in such cases a statutory obligation of which the person named can take the benefit, but an agreement between A and B that B shall pay C gives C no

right of action against B. Rotherham Alum and Chem. Co.; *in re*, 25 Ch. D. 111; 50 L. T. N. S. 219. Compare these cases with the American cases cited *supra*.

G. agreed with D. to erect buildings, and to pay for materials and labor, so that there should be no liens, and W. agreed with D. that G. should perform his contract. *Held*, that materialmen could not sue W. *Weller v. Goble*, 66 Iowa, 113.

An execution plaintiff deposited the execution with A as collateral. A collected it, but no entry of settlement was on it. After it came back to the hands of its original owner, he sold it to B. *Held*, that there was no privity whereby B could sue A. *Grenade v. Hardaway*, 73 Ga. 526.

Where A puts into the hands of B property which B promises either to deliver in specie to C, or to use as a fund out of which to pay something to C, C may sue. *Beers v. Robinson*, 9 Pa. St. 229; *Blymire v. Boistle*, 6 Watts (Pa.), 182; *Allen v. Thomas*, 3 Met. (Ky.) 198; Del., etc., *Canal Co. v. Bank*, 4 Denio (N. Y.), 97; *Miller v. Billingsley*, 41 Ind. 489; *Johnso n v. Collins*, 14 Iowa, 63; *Brown v. O'Brien*, 1 Rich. L. (S. Car.) 268; *Justice v. Tallman*, 86 Nor. (Pa.) 147; *Warren v. Batchelder*, 16 N. H. 580; *Perry v. Swasey*, 12 Cush. (Mass.) 36; *Mellen v. Whipple*, 1 Gray (Mass.), 317, 322; *Crocker v. Higgins*, 7 Conn. 342; *Barker v. Bradley*, 42 N. Y. 316; *Thompson v. Gordon*, 3 Strobb. (S. Car.) 196. See *Morrill v. Lane*, 136 Mass. 93. This is true *a fortiori*, where the promisor becomes a trustee for the third person. *Justice v. Tallman*, 5 Norris (Pa.), 147; *Fitch v. Chandler*, 4 Cush. (Mass.) 254; *Putnam v. Field*, 103 Mass. 556; *Sailly v. Cleveland*, 10 Wend. (N. Y.) 156; *Ætna Bank v. Fourth National Bank*, 46 N. Y. 82; *Draughan v. Bunting*, 9 Ired. (N. Car.) 10; *Cross v. Truesdale*, 28 Ind. 44; *Donkersley v. Levy*, 38 Mich. 55; See *Bigelow v. Davis*, 16 Barb. (N. Y.) 561.

Where property is transferred to A by B, and as part of the consideration therefor A promises B to pay a debt which the latter owes to C, it is held that C has a right of action against A for the debt. *Barker v. Bucklin*, 2 Denio (N. Y.), 45; *Lawrence v. Fox*, 20 N. Y. 268; *Dingeldein v. Railroad Co.*, 37 N. Y. 575; *Eddy v. Roberts*, 17 Ill. 505; *Beasley v. Webster*, 64 Ill. 458; *Snell v. Ives*, 85 Ill. 279; *Shober, etc., Lith. Co. v. Kerting*, 107 Ill. 344; *Sanders v. Classon*, 13 Minn. 379; *Jordan v. White*, 20 Minn. 91; *Follansbee v. Johnson*, 28 Minn. 311; *Hind v.*

*Holdship*, 2 Watts (Pa.), 104; *Mason v. Hall*, 30 Ala. 599; *McDowell v. Law*, 35 Wis. 171; *Johnson v. Knapp*, 36 Iowa, 616; *Meyer v. Lowell*, 44 Mo. 328; *Rogers v. Gosnell*, 58 Mo. 589; *Joslin v. N. J. Car Spring Mfg. Co.*, 36 N. J. L. 141; *Cross v. Truesdale*, 28 Ind. 44; *Carter v. Zublin*, 68 Ind. 436; *Alcalda v. Morales*, 3 Nev. 132; *Morgan v. Overman*, 37 Cal. 534; *Merriman v. Social Mfg. Co.*, 12 R. I. 175; *Huckabee v. May*, 14 Ala. 263; *Allen v. Bucknam*, 75 Me. 352. The view generally taken is to regard the promisor as trustee, and the debt assumed by him as part of the purchase-money. *Ellwood v. Monk*, 5 Wend. (N. Y.) 235; *Welsh v. R. Co.*, 25 Minn. 314; *Bassett v. Hughes*, 43 Wis. 319; *Johnson v. Collins*, 14 Iowa, 63.

A creditor may maintain an action against one who has agreed for a consideration to assume and pay the debts of the debtor. *Redelsheimer v. Miller*, 107 Ind. 485; *Wood v. Moriarty*, 9 Atl. Rep. (R. I.) 427. See *Wheat v. Rice*, 97 N. Y. 296; *Fairchild v. Feltman*, 32 Hun (N. Y.), 398.

And this right passes as an incident on an assignment of the debt by C. *Barlow v. Mayers*, 68 N. Y. 41.

If a contract between A and B be rescinded before C assents to or acts upon it, C no longer has a right of action against A. *Trimble v. Strother*, 25 Ohio St. 378; *Davis v. Calloway*, 30 Ind. 112; *Durham v. Bischoff*, 47 Ind. 211; *Brewer v. Maurer*, 38 Ohio St. 543; *Gilbert v. Sanderson*, 56 Iowa, 349; *Jones v. Higgins*, 80 Ky. 409; *Talburt v. Ins. Co.*, 80 Ind. 434. Compare *Pruitt v. Pruitt*, 91 Ind. 595; *Bay v. Williams*, 24 A. L. Reg. 486.

But a rescission after C has acted upon the contract cannot affect his right of action against A. *Bassett v. Hughes*, 43 Wis. 319; *Hartley v. Harrison*, 24 N. Y. 170; *Rogers v. Gosnell*, 58 Mo. 589; *Dodge's Admr. v. Moss*, 21 C. L. J. 73. Compare *Young v. Trustees*, 31 N. J. Eq. 290; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Willard v. Worsham*, 76 Va. 392; *O'Neill v. Clark*, 33 N. J. Eq. 444; *Laing v. Byrne*, 34 N. J. Eq. 52.

The legal right of a party to assert that the performance of a contract made between two others for his benefit cannot be revoked or modified without his consent, rests in the fact of an express promise on the part of the person whom he seeks to charge, and thus arises a privity of contract. *Frank v. N. Y., etc., R. Co.*, 7 N. Y. St. Repr. 815.

A contract held not alterable by parties who made it, without the consent of



the persons who were to receive a benefit thereunder. *Knowles v. Erwin*, 43 Hun (N. Y.), 150.

Where the owner of property, upon which there is a mortgage to secure a debt for the payment of which he is liable, conveys the property to another, who assumes the payment of the mortgage debt, the grantee is held liable to the original mortgagee for the amount of the debt. *Halsey v. Reed*, 9 Paige (N. Y.), 446; *Burr v. Burr*, 24 N. Y. 178; *Ricard v. Sanderson*, 41 N. Y. 179; *Campbell v. Smith*, 71 N. Y. 26; *Bowen v. Buck*, 94 N. Y. 86; *Kappworth v. Dressler*, 2 Beasley (N. J.), 62; *Helms v. Kearns*, 40 Ind. 124; *Josselyn v. Edwards*, 57 Ind. 212, 218; *Carnahan v. Tousey*, 93 Ind. 561; *Thompson v. Thompson*, 4 Ohio St. 333; *Anthony v. Herrman*, 14 Kan. 494; *Thompson v. Bertram*, 14 Iowa 476; *Urquhart v. Brayton*, 12 R. I. 169; *Bank v. Goff*, 14 R. I. 516; *Cooper v. Foss*, 15 Neb. 515; *Crawford v. Edwards*, 33 Mich. 354; *Unger v. Smith*, 44 Mich. 22; *Dean v. Walker*, 107 Ill. 540; *Twichell v. Mears*, 8 Biss. (U. S. C. C.) 211; *Hayden v. Snow*, 9 Biss. (U. S. C. C.) 511; *Fitzgerald v. Barker*, 70 Mo. 685. *Contra*, *Miller v. Whipple*, 1 Gray (Mass.), 317; *Pettee v. Pippard*, 120 Mass. 522; *Coffin v. Adams*, 131 Mass. 133; *Meech v. Ensign*, 49 Conn. 191; *Bay v. Williams*, 24 A. L. Reg. 486.

The grantee becomes primarily liable for the debt, the grantor occupying the position of surety; and if the mortgagee gives time to the grantee who has assumed the debt, he thereby discharges the grantor. *Murray v. Marshall*, 94 N. Y. 611; *Spencer v. Spencer*, 95 N. Y. 353; *Calvo v. Davies*, 73 N. Y. 211; *Paine v. Jones*, 76 N. Y. 274; *George v. Andrews*, 60 Md. 26. *Contra*, *Boardman v. Larrabee*, 51 Conn. 39.

Failure of consideration of the promise of assumption (*e.g.*, eviction by paramount title) releases the grantee from liability. *Dunning v. Leavitt*, 85 N. Y. 30; *Crowe v. Levin*, 95 N. Y. 423; *Osborne v. Cabell*, 77 Va. 462.

When the instrument, though absolute in form, is in fact only a mortgage, the grantee does not become liable. *Root v. Wright*, 84 N. Y. 72; *Pardee v. Treat*, 82 N. Y. 385; *Garnsey v. Rogers*, 47 N. Y. 233; *Arnaud v. Grigg*, 29 N. J. Eq. 482.

Where the vendor is not personally liable to the mortgagee, the latter cannot sue the vendee, who as between himself and his vendor assumes the payment of an existing mortgage debt. *Carte v. Holahan*, 92 N. Y. 498; *Vrooman v.*

*Turner*, 69 N. Y. 280; *Trotter v. Hughes*, 12 N. Y. 74; *King v. Whitely*, 10 Paige (N. Y.), 465; *Norwood v. De Hart*, 30 N. J. Eq. 412. But see *Merriman v. Moore*, 90 Pa. St. 78; *Brewer v. Manrer*, 38 Ohio St. 443, 452; *Dean v. Walker*, 107 Ill. 540. Though if the vendor be a married woman whose separate estate is liable for the debt, that is sufficient to enable the mortgagee to hold her vendee who has assumed its payment. *Cashman v. Henry*, 75 N. Y. 103; *Brewer v. Maurer*, 38 Ohio St. 543; *Huyler v. Atwood*, 26 N. J. Eq. 504; 28 N. J. Eq. 275. See, as to assumption of mortgages, *Jones on Mortgages*, §§ 740, 770.

If on a dissolution of a partnership one partner has given a bond with sureties to the other for the payment by the former of the firm's debts, it has been held that the creditors may sue the obligor in the bond. *Deval v. McIntosh*, 23 Ind. 529; *Claplin v. Ostrom*, 54 N. Y. 581; *Kimball v. Noyes*, 17 Wis. 695. *Compare* *Merrill v. Green*, 55 N. Y. 270; *Robb v. Mudge*, 14 Gray (Mass.), 534. See, *contra*, *Shoemaker v. King*, 40 Pa. St. 107; *Torrens v. Campbell*, 24 Sm. (Pa.) 470; *Manny v. Frasier*, 27 Mo. 419. See also *Wynn v. Wood*, 97 Pa. St. 216; *Lehow v. Simonton*, 3 Col. 346.

When an incoming partner agrees with an outgoing partner to pay one half of the debts of the old firm, on a consideration moving between them, a creditor of the old firm cannot maintain an action against the incoming partner. *Edick v. Green*, 38 Hun (N. Y.), 202.

A creditor of a firm cannot maintain an action upon an agreement made with the firm by one not a member to pay a portion of its indebtedness; as no one creditor can show from the contract that it was intended for his benefit or covers any part of his debt. *Wheat v. Rice*, 97 N. Y. 296.

That the right of one not a party to a contract to sue upon it does not extend to the case of a contract under seal, see *Robb v. Mudge*, 14 Gray (Mass.), 534. *Northampton v. Elwell*, 4 Gray (Mass.), 81; *How v. How*, 1 N. H. 49; *Moore v. House*, 64 Ill. 162; *Fairchild v. Ins. Co.*, 51 Vt. 613; *Flynn v. Ins. Co.*, 115 Mass. 449. *Contra*, *Coster v. Mayor*, 43 N. Y. 399; *McDowell v. Law*, 35 Wis. 171; *Houghton v. Milburn*, 54 Wis. 554, 561; *Bassett v. Hughes*, 43 Wis. 319; *Rogers v. Gosnell*, 51 Mo. 466; *Garvin v. Mobley*, 1 Bush (Ky.), 48; *Huckabee v. May*, 14 Ala. 263; *Emmitt v. Brophy*, 31 Alb. L. J. 197.

Creditors who are not actual parties to a bond made for payment to them may

**42. Construction.**—The construction of a contract is for the court, who are to be governed therein by certain well-defined rules of construction. A rule of construction is a rule for determining the inference to be drawn from a fact of a particular class, when duly brought under the notice of the court according to the rules of evidence—the fact, namely, that persons have used words or combinations of words such as come within the general proposition affirmed by the rule.<sup>1</sup> These rules depend necessarily to a great extent on the rules of evidence. (See also EVIDENCE.<sup>2</sup>)

be equitably entitled to the benefit of the contract. *Pulver, etc., v. Skinner, etc.*, 4 N. Y. St. Repr. 816; *Emmitt v. Brophy*, 42 Ohio St. 82.

Where partners create by agreement penalties to be paid by any partner who breaks a particular stipulation, they may empower one partner alone to sue for the penalty. *Radenburst v. Bates*, 3 Bing. 463, 470; *Cross v. Jackson*, 5 Hill (N. Y.), 478; *Carr v. Bartlett*, 72 Me. 120. The penalty must be made payable not to the whole firm, but to the members of the firm *minus* the offending partner. *Warren v. Stearns*, 19 Pick. (Mass.) 73.

1. Poll. on Con. 456. "The name 'rule of construction' is confined by general usage to rules for the interpretation of written documents, in matters on which, in the absence of a rule prescribed by authority, there might exist a reasonable doubt." Pollock on Cont.

2. "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court either absolutely, if there be no words to be construed, as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error. But a misconstruction by the jury cannot be set right at all effectually." *Per Parke, B.*, in *Nielson v. Harford*, 8 M. & W. 806. In *Hutcheson v. Bowker*, 5 M. & W. 535, an offer had been made by letter to sell a quantity of "good barley." The letter in reply, after stating the offer contained the following: "of which offer we accept, expecting you to give us *fine* barley and good weight." *Held*, that although the jury might find the mercantile

meaning of "good" and "fine" as applied to barley, yet they could not go further, and find that the parties did not understand each other. The question whether there was a sufficient acceptance was a question to be determined by the court upon a proper construction of the letters. And *Parke, B.*, said, "The law I take to be this—that it is the duty of the court to construe all written instruments: if there are peculiar expressions used in it which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word 'fine' in the corn market; and the jury having found what it was, the question whether there was a complete acceptance by the written document was a question for the judge." See *Perth Amboy Man. Co. v. Condit*, 1 N. J. L. 659; *Rogers v. Colt*, 21 N. J. L. 704; *Brown v. Hatton*, 9 Ired. L. (N. Car.) 319; *Mason v. Rowe*, 16 Vt. 525; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Hitchen v. Groom*, 5 C. B. 515; *Morrell v. Firth*, 3 M. & W. 402; *Brown v. Orland*, 36 Me. 376; *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Rapp v. Rapp*, 6 Pa. St. 45. The case of *Lloyd v. Maund*, 2 T. R. 760, seems *contra*, but that case was overruled in *Morrell v. Firth*, 3 M. & W. 402.

The construction of a contract is for the court. *Barton v. Gray*, 57 Mich. 623; *Arnold v. Bailey*, 24 S. Car. 494; *State v. Fort*, 24 S. Car. 511; *Folsom v. Cook*, 7 Cent. Rep. (Pa.) 585; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Brady v. Cassidy*, 104 N. Y. 147; *Wallingford v. Col. & G. R. Co.*, 2 S. E. Rep. (S. Car.) 19.

The construction of a written contract is exclusively for the court. But when the making of such contract is in dispute, it is for the jury to say whether it is established. *Folsom v. Cook*, 9 Atl. Rep. (Pa.) 93; s. c., 8 Pittsb. Leg. Journ. 1.

Error in submitting the construction to

a jury may be cured by a verdict in accordance with the construction that the court should have declared in the charge. *Jones v. Kroll*, 7 Cent. Rep. (Pa.) 877.

A contract written in clear and common language should be construed according to the ordinary acceptation of the words. Such construction is for the court, and not for a referee. *Gove v. Downer*, 3 New Eng. Rep. (Vt.) 463; s. c., 9 East. Rep. 65.

Where the evidence of a contract consists in part of written evidence and in part of oral communications or other unwritten evidence, it is left to the jury to determine upon the whole evidence what the contract is. *Edwards v. Goldsmith*, 16 Pa. St. 43; *Bomeisler v. Dobson*, 5 Whart. (Pa.) 398; *Morrell v. Frith*, 3 M. & W. 404.

The construction of a contract, unless there is something peculiar to the words by reason of the custom of the trade to which the contract relates, is for the court. *Per Lord Cairns in Bowes v. Shand*, 2 App. Cas. 455.

"When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be to instruct the jury what will be the legal effect of the contract or instrument as they shall find the meaning of the word modified and explained by the usage. But where no new word is used, or where an old word having an established place in the language is not apparently used in any technical or peculiar sense, it is the province of the court to put a construction upon the written contracts and agreements of parties according to the established use of language as applied to the subject-matter and modified by the whole instrument or by existing circumstances." *Per Shaw, C.J., in Eaton v. Smith*, 20 Pick. (Mass.) 150; *Brown v. Orland*, 36 Me. 376; *Burnham v. Allen*, 1 Gray (Mass.), 496.

When the terms and language of a contract are ascertained, in the absence of technical phrases whose meaning is obscure, the construction is for the court. *Brady v. Cassidy*, 6 Cent. Rep. (N.Y.) 76.

Contracts will always be construed reasonably, and in accordance with what the evidence shows the subject-matter to be, and the consequent object of the parties to it. *Chamberlain v. Baltimore & O. R. Co.*, 6 Cen. Rep. (Md.) 471;

*Hildebrand v. Bloodsworth*, 12 Or. 75; *Mobile & Mont. R. Co. v. Jurey*, 111 U. S. 584.

Construction of written contract should make whole consistent, giving all parts their due weight. *Railroad Co. v. Railway Co.*, 44 Ohio St. 287. And see *Bent v. Alexander*, 15 Mo. App. 181. In construing a contract all its parts should be considered; and the point to be ascertained is the meaning and understanding of the parties as shown by the language used, applied to the subject-matter. One part of the agreement may be resorted to to explain the meaning of the language or expressions of another part. *Pensacola Gas Co. v. Lotzes*, 2 South. Rep. (Fla.) 609.

The intention and meaning of parties to a written contract must be ascertained from the terms of the writing, the nature of the transaction, and the surrounding circumstances. *Kyle v. Bellenger*, 79 Ala. 516.

A contract will have a retroactive effect where, by express words or necessary implication, it appears to be the intention of the parties to embrace past transactions. *People v. Lee*, 7 Cent. Rep. (N. Y.) 35.

Several agreements or instruments of writing executed on the same day, each as the consideration for the execution of the other, constitute parts of one and the same transaction, and form one and the same contract, and are to be so construed. *Carr v. Hays*, 25 Cent. L. Jour. (Ind.) 32; *Herbst v. Lowe*, 65 Wis. 316. And see *St. Louis, Iron M., etc., R. Co. v. Beider*, 45 Ark. 17.

In the construction of an instrument partly written and partly printed, greater weight is to be attached to the written than to the printed parts, but they must if possible be reconciled. *Bolman v. Lohman*, 79 Ala. 63.

A prior verbal contract will be merged in a subsequent written one. *Carr v. Hays*, 9 West. Rep. (Ind.) 183; s. c., 11 N. E. Rep. 25.

Where a written agreement has been signed, the fact that one party has put a wrong construction upon it, and insisted that it included what it did not include, does not prevent there being a contract, nor prevent that party from waiving the question of construction and obtaining specific performance. *Preston v. Luck*, 27 Ch. D. 497.

The acts of the parties performed under a written contract will be given effect to by the court as placing a construction upon the contract. *Lyles v. Lesber*, 7 West. Rep. (Ind.) 51.

**43. Unlawful Agreements—Agreement Contrary to Positive Law.—**

If the subject-matter of an agreement be such that the performance of it would either consist in doing a forbidden act, or be so connected therewith as to be in substance part of the same transaction, the law cannot command the parties to perform that agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offence though the complete execution of the object of the agreement is; but at all events it will give no sort of assistance to such a transaction. "If one bind himself to kill a man, burn a house, maintain a suit, or the like, it is void."<sup>1</sup> So a contract may

Where language used in a contract is unmeaning and contradictory, it should not be construed so as to negative clearly expressed provisions of the contract. *Findley v. Armstrong*, 23 W. Va. 113.

Where the language of a contract is ambiguous, the practical interpretation of it by the parties is entitled to great (if not controlling) influence. *Topliff v. Topliff*, 122 U. S. 121; citing *Chicago v. Sheldon*, 9 Wall. U. S. 50, 54; *Coleman v. Grubb*, 23 Pa. St. 393, 409; *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121; *Jackson v. Perrine*, 35 N. J. L. 137; *Stone v. Clarke*, 1 Met. (Mass.) 378; *Nickerson v. R. Co.*, 3 McCrary (U. S.), 155; *Gronstadt v. Withoff*, 21 Fed. Rep. 253; *Forbes v. Watt*, L. R. 2 Sc. & D. 214; *Butler v. Moses*, 43 Ohio St. 166. The error of the parties, however, cannot control the effect of the instrument where its meaning is clear. *Railroad Co. v. Trimble*, 10 Wall. (U. S.) 367; *Ins. Co. v. Doll*, 35 Md. 89. And this is true of a possible remote intent of the parties. *McConnell v. New Orleans*, 35 La. Ann. 373. But if both parties act on a mutual mistake as to the construction, it may amount to a modification of the contract by mutual assent. *Midl., etc., R. v. Johnson*, 6 H. L. C. 812-3.

A contract susceptible of two constructions will not by preference be given the construction which will make it illegal. *Standard Oil Co. v. Scofield*, 16 Abb. N. Cas. (N. Y.) 372.

To explain an equivocal and obscure expression resort may be had to the well-defined and known usages of trade as an aid in reaching a true interpretation of the contract. *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254.

An obscure and ambiguous oral contract may be interpreted in the light of the conversations of the parties making it. *Jennings v. Whitehead & Atherton Machine Co.*, 138 Mass. 594.

1. *Shepp. Touchst.* 370; Lord Kenyon once said that he would not sit to take an

account between two robbers on Hounslow Heath. See *Jessel, M. R., Sykes v. Beadon*, 11 Ch. D. 195. See *Everet v. Williams*, 2 Pothier on Obl. by Evans, p. 3, n. (a), for a curious case where a bill for an account between two highwaymen was actually brought. See also *Spalding v. Preston*, 21 Vt. 9.

As to bills for partnership account of profits realized from an illegal business, see, on the one hand, *Brooks v. Martin*, 2 Wall. (U. S.) 70; *Pfeuffer v. Maltby*, 54 Tex. 454; *Cook v. Sherman* (C. C. U. S. D. Ia.), 20 Fed. Rep. 167; compare *Wann v. Kelly* (C. C. U. S. D. Minn.), 5 Fed. Rep. 584; and on the other, *Watson v. Fletcher*, 7 Gratt. (Va.) 1; *Watson v. Murray*, 23 N. J. Eq. 257; *Todd v. Rafferty's Admr.*, 30 N. J. Eq. 254; *King v. Winants*, 71 N. C. 469; *Snell v. Dwight*, 120 Mass. 9; *Craft v. McConoughy*, 79 Ill. 346; *Northup v. Phillips*, 99 Ill. 449; *Gould v. Kendall*, 15 Neb. 549; *Read v. Smith*, 60 Tex. 379; *Sykes v. Beadon*, 11 Ch. D. 170. And see *Patterson's App.* (S. C. Pa.), 13 W. N. C. 154.

For a case of unlawful agreement see *Mayor of Norwich v. Norfolk R. Co.*, 4 E. & B. 397, 441. "Where a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted." *Lorillard v. Clyde*, 86 N. Y. 384; *Ormes v. Dauchy*, 82 N. Y. 443; *Curtis v. Gokey*, 68 N. Y. 300; *Guernsey v. Cook*, 120 Mass. 501; *Hunt v. Elliott*, 80 Ind. 245; *Town of Hamden v. Merwin*, 3 New Eng. Rep. (Conn.) 534.

A contract valid where it is made is valid and may be enforced anywhere, except when the contract is against good morals or when its enforcement would violate the law of the place of suit. *Brown v. Browning*, 3 New Eng. Rep. (R. I.) 384.

To the enforcement of a contract tainted with illegality the court will not lend its sanction. *Morton v. Timken*, 48 N. J. L. 87.

be illegal because an offence is contemplated as its ulterior result or because it invites to the commission of crime.<sup>1</sup>

**44. Injury to Third Persons.**—An agreement will generally be illegal though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy if it contemplates any civil injury to third persons. An agreement to divide the profits of a fraudulent scheme, or to carry out some object in itself not unlawful, by means of an apparent trespass, breach of contract, or breach of trust, is unlawful and void.<sup>2</sup>

**45. Fraud upon Creditors.**—Where there is an arrangement between a debtor and the general body of his creditors, but in order to procure the consent of some particular creditor or for some other reason the debtor or any person on his behalf secretly promises that creditor some advantage over the rest, all such secret agreements are void.<sup>3</sup> Securities given in pursuance of them may be set aside and money paid under them ordered to be repaid.<sup>4</sup> The other creditors who know nothing of the fraud, and enter into the arrangement on the assumption "that they are contracting on terms of equality to each and all," are under such circumstances not bound by any release they give.<sup>5</sup>

A bill in equity will not be maintained to cancel a contract on the ground of illegality, unless it offers to pay what is justly due. *Dean v. Robertson*, 1 South. Rep. (Miss.) 159.

1. An agreement to pay money to A.'s executors if A. commits suicide would be void. *Per Bramwell, L. R.*, 5 C. P. D. 307. No right of action can arise for work done in printing a criminal libel. *Poplett v. Stockdale*, 1 R. & M. 337. So an agreement to reprint a literary work in violation of a copyright secured to a third person is void. *Nichols v. Ruggles*, 3 Day (Conn.), 145.

2. *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Rice v. Wood*, 113 Mass. 133; *Spinks v. Davis*, 32 Miss. 152; *Glenn v. Matthews*, 44 Tex. 400; *Jackson v. Ludeling*, 21 Wall. (U. S.) 616; *Oscanyon v. Arms Co.*, 103 U. S. 261; *Foote v. Emerson*, 10 Vt. 338; *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kan. 265; *Woodruff v. Wentworth*, 133 Mass. 309; *Forbes v. McDonald*, 54 Cal. 98. *Compare Barnes v. Brown*, 80 N. Y. 527.

An agreement to commit a civil injury is a conspiracy in many cases; an agreement to commit a trespass likely to lead to a breach of the peace.—*Reg. v. Rowlands*, 17 Q. B. 671, 686,—or to commit a civil wrong by fraud and false pretences,—*Reg. v. Warburton*, L. R. 1 C. C. R. 274; *compare Reg. v. Aspinall*, 2 Q. B. D. 57,—is a conspiracy; an agreement to

commit a simple breach of contract is not a conspiracy.

3. *Clarke v. White*, 12 Pet. (U. S.) 178, 199; *Bliss v. Matteson*, 45 N. Y. 22; *Lawrence v. Clark*, 36 N. Y. 128; *Trumbull v. Tilton*, 21 N. H. 128; *Winn v. Thomas*, 55 N. H. 294; *O'Shea v. Collier, etc., Co.*, 42 Mo. 397; *Case v. Gerrish*, 15 Pick. (Mass.) 49; *Lothrop v. King*, 8 Cush. (Mass.) 382; *Sternberg v. Bowman*, 103 Mass. 325; *Harvey v. Hunt*, 119 Mass. 279; *Patterson v. Boehm*, 4 Pa. St. 507; *Stuart v. Blum*, 28 Pa. St. 225; *Lee v. Sellers*, 81\* Pa. St. 473; *Smith v. Owens*, 21 Cal. 11; *Feldman v. Gamble*, 26 N. J. Eq. 494; *Huckins v. Hunt*, 138 Mass. 366. Where a composition agreement was made, by the terms of which the debtor was to give his notes for a percentage of his indebtedness, and he afterwards voluntarily gave to one of his debtors, party to the composition agreement, notes for the balance of his claim, which by their terms would mature before the composition notes, the notes last given were held void. *Way v. Langley*, 15 Ohio St. 392.

4. *McKuvan v. Sanderson*, 15 Eq. 234; *Crossley v. Moore*, 40 N. J. L. 27; *Bean v. Brookmire*, 2 Dill. (U. S. C. C.) 108; *Bean v. Amsinck*, 10 Blatchf. (U. S. C. C.) 361. (not affected as to the general rule by the reversal in 22 Wall. 395).

5. *Daughlish v. Tennent*, L. R. 2 Q. B. 49, 54. They may sue for and recover the full amount of their original claims.



**46. Deals by Agent against Duty.**—Where a man is employed as agent for another the law will not permit him to act for himself in the same matter.<sup>1</sup>

less the amount received under the composition agreement. *Partridge v. Messer*, 14 Gray (Mass.), 180; *Kahn v. Gumberts*, 9 Ind. 430; *Woodruff v. Saul*, 70 Ga. 271. And it is not essential to the right of action that the creditor should first return the money he has received under the composition agreement. *Cobb v. Tirrell*, 137 Mass. 143; *Hester v. Cohn*, 73 Ill. 296; *Stuart v. Blum*, 28 Pa. St. 225; *Bank v. Hoeber*, 8 Mo. App. 171. In *Bartlett v. Blaine*, 83 Ill. 25, it was held that "where a party induced a creditor to sign a composition agreement, whereby he accepted one half of his claim in full upon the representations of his debtor that no person had received any other thing, etc., the fact that the debtor had given his note for \$500 to induce another creditor to sign the same agreement, which note upon suit thereon was adjudged void, is not sufficient to avoid the contract of composition, as it worked no injury to the creditor."

Where the preferred creditor becomes surety for the payment of the composition, and the real consideration for this is the debtor's promise to pay his own debt in full, the agreement is void. *Wood v. Barker*, 1 Eq. 139; *Baldwin v. Roseman*, 49 Conn. 105. But where one creditor is induced to become surety for an installment of the composition by an agreement of the principal debtor to indemnify him, and a pledge of part of the assets for that purpose, this is valid; for a compounding debtor is master of the assets, and may apply them as he will. *Ex parte Burrell*, 1 Ch. D. 537. The principle of these rules was stated by Erle, J., in *Mallalieu v. Hodgson*, 16 Q. B. 689: "Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void: not only can he take no advantage from it, but he is also to lose the benefit of the composition. *Howden v. Haigh*, 11 A. & E. 1033; *Doughty v. Savage*, 28 Conn. 146; *Huntington v. Clark*, 39 Conn. 540, 554. The requirement of good faith among the creditors and the preventing of gain by agreements for preferences have been uniformly maintained by a series of cases, from *Leicester v. Rose*, 4

*East*, 372, to *Howden v. Haigh*, 11 A. & E. 1033, and *Bradshaw v. Bradshaw*, 9 M. & W. 29." A composition agreement which one creditor is induced to sign by the promise made by a third person, without the knowledge of the debtor or the other creditors, to pay him an additional sum, is void. *Bank v. Hoeber*, 11 Mo. App. 475. A compromised with his creditors. B, a creditor, signed the compromise agreement at C's request, and because of C's promise to pay the balance of B's claim. *Held*, a fraudulent arrangement, which precluded B from recovering against C. *Clement's Appeal*, 52 Conn. 464. A debtor who has given a fraudulent preference can claim no benefit under the composition, even as against the creditor to whom the preference has been given. *Higgins v. Pitt*, 4 Ex. 312. *Contra*, *Huckins v. Hunt*, 138 Mass. 366. A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge or to a composition is void. *Bankruptcy Act 1867*, R. S. U. S. § 5191; *Marble v. Grant*, 73 Me. 423; *Austin v. Markham*, 44 Ga. 161; *Wiggin v. Bush*, 12 Johns. (N. Y.) 305; *Payne v. Eden*, 3 Caines (N. Y.), 213; *Yeomans v. Chatterton*, 9 Johns. (N. Y.) 295; *Tuxbury v. Miller*, 19 Johns. (N. Y.) 311; *Bruce v. Lee*, 4 Johns. (N. Y.) 410; *Rice v. Maxwell*, 13 S. & M. (Miss.) 289; *Blasdell v. Fowle*, 120 Mass. 447; *Sharp v. Teese*, 4 Halst. (N. J.) 352. And it does not matter whether it is made with the debtor himself or with a stranger. *Higgins v. Pitt*, 4 Ex. 312; *Bell v. Leggett*, 7 N. Y. 176. Nor whether the consideration offered to the creditor for such withdrawal is to come out of the debtor's assets or not. *Hall v. Dyson*, 17 Q. B. 785. And this even if it is part of the agreement that the creditor shall not prove against the estate at all. *McKewan v. Sanderson*, 20 Eq. 65. If a debtor executes an assignment of his estate and effects for the benefit of all his creditors upon a secret agreement with the trustees that part of the assets is to be returned to him, this agreement is void. *Blacklock v. Dobie*, 1 C. P. D. 265.

1. On this subject see article on Agency. *Pollock*, 243, *β*, to 247. An agreement between a director of a corporation and a third party, whereby the former is to use his vote and influence to the disadvantage of the corporation, will not be enforced. *Attaway v. Third Nat. Bank*, 5 S. W. Rep. (Mo.) 16; s. c., 10 West. Rep. 412.

**47. Fraud on Marital Rights.**—Where parties who are about to be married clandestinely convey away their property so as to defeat the marital rights and secure to themselves the separate use of it, it is a fraud, and the injured party is entitled to relief.<sup>1</sup>

**48. Prohibited Marriages.**—Marriage within the prohibited degrees of kindred and affinity are contracts contrary to positive law.<sup>2</sup>

**49. Contrary to Statute.**—Where a transaction is forbidden by statute, it is void; the grounds of the proposition are immaterial.<sup>3</sup> The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition.<sup>4</sup>

1. See article on Marriage, Pollock, 247, *γ.* to 249.

2. See article on Marriage, Pollock, 249 (4), to 251 (5).

3. Bank v. Owens, 2 Pet. (U. S.) 527, 530; Holt v. Green, 73 Pa. St. 198; White v. Buss, 3 Cush. (Mass.) 448; Greenough v. Balch, 7 Me. 461; Rossman v. McFarland, 9 Ohio St. 369, 379; Downing v. Ringer, 7 Mo. 585; Hill v. Spear, 50 N. H. 253, 277; Melchoir v. McCarty, 31 Wis. 252; Penn v. Bornman, 102 Ill. 523, 530; Marshall v. Cowles, 48 Ark. 362; Lilley v. Rankin, 56 L. J. R. (Q. B. D.) 248; Mellis v. Shirley Local Board, 16 Q. B. D. 446; Smith v. State, 2 South. Rep. (Ala.) 629.

One who makes a sale without complying with the provisions of an act cannot recover in an action on a note given for the price of the goods. Campbell v. Segars, 1 South. Rep. Ala. 714.

A contract between manufacturers of bitters containing intoxicating liquor and a licensed liquor-dealer, whereby the latter is supplied with the bitters, which he sells with a warranty that they may be sold without license, is void as contrary to public policy, the license act prohibiting the sale of such liquors without a license. O'Bryan v. Fitzpatrick, 3 S. W. Rep. (Ark.) 527.

A. subscribed for stock in a corporation, on which he paid nothing in money, but, being assessed on the subscription, gave his note for the amount, and thereupon a certificate of stock was issued to him, to be held by the company until he paid the note. Held, the note was not void as against public policy, under a constitutional provision that no corporation shall issue stock except for money paid, etc.; for if it be conceded that the certificate was improperly issued before actual payment of any money, still that fact does not render the note void. Pac. Trust Co. v. Dorsey, 13 Pac. Rep. (Cal.) 148.

See also, in general, McGregor v. Donnelly, 67 Cal. 149; Turnbull v. Farns-

worth, 1 Wash. Ter. 444; Macintosh v. Renton, 2 Wash. C. C. 121; Comley v. Sims, 71 Ga. 161.

4. Bloom v. Richards, 2 Ohio St. 387, 395; Pennsylvania Co. v. Wentz, 37 Ohio St. 333, 338; Cowington v. Threadgill, 88 N. Car. 186; Roby v. West, 4 N. H. 285; Brackett v. Hoyt, 29 N. H. 264; Elkins v. Parkhurst, 17 Vt. 105; Bancroft v. Dumas, 21 Vt. 456; Clarke v. Insurance Co., 1 Story (U. S.), 109, 122; Dillon v. Allen, 46 Iowa, 299; Gregory v. Wilson, 36 N. J. L. 315; Woods v. Armstrong, 54 Ala. 150; Durgin v. Dyer, 68 Me. 143; Funk v. Gallivan, 49 Conn. 127; Swann v. Swann, 21 Fed. Rep. 299; McConnell v. Kitchens, 20 S. Car. 430; Bensley v. Bignold, 5 B. & Ald. 335; Cope v. Rowlands, 2 M. & W. 149, 157. Compare Chambers v. Manchester & Milford R. Co., 5 B. & S. 588; Re Cork & Loughal R. Co., 4 Ch. 748, 758; Ex parte Neilson, 3 D. M. G. 556, 566; Bank v. Stegall, 41 Miss. 142, 183. The absence of a penalty will not prevent the court from giving effect to a substantive prohibition. Sussex Peerage Co., 11 Cl. & F. 148-9; Melchoir v. McCarty, 31 Wis. 252. What the law forbids to be done directly cannot be made lawful by being done indirectly. Booth v. Bank of England, 7 Cl. & F. 509, 540; Bank of England v. Anderson, 2 Keen, 328; 3 Bing. N. C. 589; Bank of U. S. v. Owens, 2 Pet. (U. S.) 527; Clarke v. Lincoln Lumber Co., 59 Wis. 655; Workingmen's Bkg. Assn. v. Rautenberg, 103 Ill. 460. When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety, or the protection of the persons dealing with those on whom the condition is imposed. Miller v. Post, 1 Allen (Mass.), 434; Smith v. Arnold, 106 Mass. 269; Prescott v.

**50. Wagering Contracts.**—In this country generally all wagering contracts are held to be illegal and void, as against public policy.<sup>1</sup>

Battersby, 119 Mass. 285; Woods v. Armstrong, 54 Ala. 150; Buxton v. Hamblen, 32 Me. 448; Dolson v. Hope, 7 Kan. 161; Lewis v. Welch, 14 N. H. 294; Solomon v. Dreschler, 4 Minn. 278; Griffith v. Wells, 3 Denio (N. Y.), 226; Johnson v. Hulings, 103 Pa. St. 498; McConnell v. Kitchens, 20 S. C. 430; Ritchie v. Smith, 6 C. B. 462; Hamilton v. Grainger, 5 H. & N. 40; Taylor v. Crowland Gas Co., 10 Ex. 293. *Compare* Leman v. Houseley, L. R. 10 Q. B. 66; Ferguson v. Norman, 5 Bing. N. C. 76; Stevens v. Gourley, 7 C. B. N. S. 99; Benton v. Piggott, L. R. 10 Q. B. 86. Are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g., the convenient collection of the revenue. Larned v. Andrews, 106 Mass. 435; Corning v. Abbott, 54 N. H. 469; Aiken v. Blaisdell, 41 Vt. 655; Pangborn v. Westlake, 36 Iowa, 546; Ruckman v. Bergholz, 37 N. J. L. 437; Strong v. Darling, 9 Ohio, 201; Favor v. Philbrick, 7 N. H. 326, 340; Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245; Mandelbaum v. Gregovitch, 17 Nev. 87; Niemeyer v. Wright, 75 Va. 239. *Contra*, Holt v. Green, 73 Pa. St. 198. *Compare* Rahter v. Bank, 92 Pa. St. 393. "We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. Harris v. Runnels, 12 How. (U. S.) 79, 84; Pratt v. Short, 79 N. Y. 437; Bailey v. Harris, 12 Q. B. 905; Smith v. Mawhood, 14 M. & W. 452; Smith v. Lindo, 4 C. B. N. S. 395. Where a statute forbids an agreement, but says that if made it shall not be void, then if made it is a contract which the court must enforce. McMahon v. Borden, 39 Conn. 316; Vining v. Bricker, 14 Ohio St. 331; Pangborn v. Westlake, 36 Iowa, 546; Lewis v. Bright, 4 E. & B. 917. Where no penalty is imposed and the intention of the legislature appears to be simply that the agreement is not to be enforced there, neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose. Chapman v. County of Douglass, 107 U. S. 348, 356; Johnson v. Meeker, 1 Wis. 436.

A contract to ship goods from one port of the United States to another in a foreign bottom being illegal, does not, as between the parties, become legal because the United States has remitted the forfeiture. Petrel Guano Co. v. Jarnette, 25 Fed. Rep. 675.

1. Irwin v. Williar, 110 U. S. 499, 510; Rice v. Gist, 1 Strobb. L. (S. Car.) 82; Winchester v. Nutter, 52 N. H. 507; Edgell v. McLaughlin, 6 Whart. (Pa.) 176; Collamer v. Day, 2 Vt. 144; Love v. Harvey, 114 Mass. 80. See article on WAGERS AND GAMING.

If money is lent with the mere knowledge or belief on the part of the lender that it is to be used for gambling purposes, and without any participation on his part in the illegal act, an action can be maintained for its recovery; and even if the lender participates in the purposes of the borrower, he may recover the money of the borrower, if demanded before it has been actually used. Tyler v. Carlisle, 9 Atl. Rep. (Me.) 356; s. c., 11 East. Rep. 242; 35 Alb. L. Jour. 504.

An agreement in form of an executory contract for the purchase and sale of property, but upon an understanding between the parties when the contract is made that the property is not to be delivered, but that one will pay and the other receive the difference between the contract price and the market price at the date of performance, is a mere wager, and void. Irwin v. Williar, 110 U. S. 499; Sawyer v. Taggart, 14 Bush (Ky.), 727; Gregory v. Wendell, 39 Mich. 337; North v. Phillips, 89 Pa. St. 250; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Bruce's App., 55 Pa. St. 294; Thompson's Estate, 15 Phila. (Pa.) 532; Pickering v. Case, 79 Ill. 328; Lyon v. Culbertson, 83 Ill. 33, 38; Cobb v. Prell (C. C. U. S. D. Kan.) 15 Fed. Rep. 774; *Ex parte* Young, 6 Biss. (U. S. C. C.) 53; *In re* Green, 7 Biss. (U. S. C. C.) 338; Rudolph v. Winters, 7 Neb. 125; Bigelow v. Benedict, 70 N. Y. 202; Rumsey v. Berry, 65 Me. 570; Barnard v. Backhaus, 52 Wis. 593; Lowry v. Dillman, 59 Wis. 197; Flagg v. Baldwin, 38 N. J. Eq. 219; Hawley v. Bibb, 69 Ala. 52; Lowe v. Young, 59 Iowa, 364; Lyons Bank v. O. Packing Co., 66 Iowa, 41; Melchert v. Telegraph Co., 3 McCrary (U. S.), 521; Cunningham v. Bank, 71 Ga. 400; Seeligson v. Lewis, 65 Tex. 215; s. c., 57 Am. Rep. 593; Mut. Life Ins. Co. of N. Y. v. Watson, 2 Railway & Corp. L.



Future illicit cohabitation is an unlawful consideration, and an agreement founded on it is void.<sup>1</sup> No enforceable right can be

J. (U. S. C. Ct. of Ga.) 6; *Beadles v. McElrath*, 3 S. W. Rep. (Ky.) 152; *Heiman v. Hardie & Co.*, 12 C. of Sess. Cas. (Sc.) 406; *Crawford v. Spencer*, 4 S. W. Rep. (Mo.) 713; *Crawford v. Harlow*, 10 West. Rep. (Mo.) 78; *Cockrell v. Thompson*, 85 Mo. 510.

A bond given for differences in stock-gambling transactions is not "utterly void and of no effect" even in the hands of an innocent holder for value, but the consideration is void. *Griffiths v. Sears*, 112 Pa. St. 523.

Under a statute giving a right to recover money paid upon gambling and wagering contracts, a recovery may be had for money paid in the settlement of dealings in "grain futures." *Dunn v. Bell*, 24 Repr. (Tenn.) 20; s. c., 4 S. W. Rep. 41; *McGrew v. City Prod. Ex.*, 4 S. W. Rep. (Tenn.) 38.

If either party intends *bona fide* to perform the agreement the intention of the other to settle by a payment of differences will not make it void as a wager. *Sawyer v. Taggart*, 14 Bush (Ky.), 727; *Pixley v. Boynton*, 79 Ill. 351; *Gregory v. Wendell*, 40 Mich. 432; *Lehmann v. Strassburger*, 2 Wood (U. S.), 554; *Clarke v. Foss*, 7 Biss. (U. S.) 540; *Williams v. Carr*, 80 N. Car. 294; *Murray v. Ochiltree*, 59 Iowa, 435; *Williams v. Tiedeman*, 6 Mo. App. 269; *Wall v. Schneider*, 59 Wis. 352; *Bartlett v. Smith*, 4 McCrary (U. S.), 388. A stockbroker agreed to buy and sell stocks for A. as ordered without a margin, and that A. should be liable for differences only. *Held*, not a wagering contract, and that A. was liable on a note for the differences. *Earl v. Howell*, 14 Abb. N. Cas. (N. Y.) 474.

Under the *Illinois* statutes, a simple option, reserved by the seller to himself, as to time of delivery of property with certain limits, and the settlement of differences upon such a contract, does not render the contract void as a gambling transaction. *Ward v. Vosburgh*, 31 Fed. Rep. 12. An agreement to share in the profits and losses resulting from the sale of stock owned by one of the parties and bought by him through a broker on a margin, *held*, not a wager contract nor an illegal stock-jobbing contract. *Bullard v. Smith*, 139 Mass. 492.

A contract for the sale of property which the vendor does not possess, to be delivered in future, is not illegal unless both parties understood it to be a mere speculation in the future price with no

intention of delivering or accepting, and the burden of proof is on the party alleging the illegality. *Conner v. Robertson*, 37 La. Ann. 814; s. c., 55 Am. Rep. 521. In an action on a promissory note, defendant pleaded that the note was given for a stock-gambling debt, and was void. It appeared that he ordered the purchase and sale of stocks through a Chicago broker; that he did not intend an actual purchase or sale, but only to speculate on a future rise or fall. It did not appear, however, that a purchase and sale were not in effect made by the broker. The court, upon this evidence, peremptorily instructed the jury to find for plaintiff, as it appeared that there was a gambling intent on one side only, and it is well settled that where such intent exists only on one side, and the other party intends an actual purchase or sale, then the transaction is valid; and from the intent and belief of one party, it is not fair to presume a like intent or belief as to the other. *Bangs v. Hornick*, 30 Fed. Rep. 97.

1. *Walker v. Gregory*, 36 Ala. 180; *Wallace v. Rappleye*, 103 Ill. 229, 249; *Wilson v. Ensworth*, 85 Ind. 399. A promise of marriage made in consideration of the promisee's surrendering her person to the promisor is void. *Baldy v. Stratton*, 11 Pa. St. 316; *Hanks v. Naglee*, 54 Cal. 57; *Boigneres v. Boulon*, 54 Cal. 146; *Goodall v. Thurman*, 1 Head (Tenn), 209.

An agreement in consideration of past cohabitation is binding if under seal. *Gray v. Mathias*, 5 Ves. 286; *Brown v. Kinsey*, 81 N. Car. 245. If not under seal it is without consideration. *Beaumont v. Reeve*, 8 Q. B. 483; *Singleton v. Bremar*, *Harper* (S. Car.), 201; *Drennan v. Douglas*, 102 Ill. 341. *Contra*, *Shenk v. Mingle*, 13 S. & R. (Pa.), 29; *Benyon v. Nettleford*, 3 Mac. & G. 94, 100; *Kaye v. Moore*, 1 Sim. & St. 64; *Walker v. Perkins*, 3 Burr. 1568; *Smyth v. Griffin*, 13 Sim. 245; *Simpson v. Lord Howden*, 3 My. & Cr. 97, 102; *Ayerst v. Jenkins*, 16 Eq. 275, 282; *Batty v. Chester*, 5 Beav. 103, 109.

Where a security is given on account of past cohabitation, and the illicit connection is afterwards resumed and is never broken off, the court will not presume from that fact alone that the real consideration was future as well as past, nor therefore treat the deed as invalid. *Gray v. Mathias*, 5 Ves. 286; *Hall v.*

acquired by a blasphemous, seditious, or indecent publication; whether in words or writing, or by any contract in relation thereto.<sup>1</sup> The sale of slaves can be made valid only by positive law, and no right of action arising from it can subsist after the determination of that law.<sup>2</sup>

**51. Contracts against Public Policy.**—Certain contracts are held to be void, as against public policy.<sup>3</sup> Trading with an enemy without

Palmer, 3 Ha. 532; Vallance *v.* Blagden, 26 Ch. D. 353; Brown *v.* Kinsey, 81 N. C. 245. Compare *Trovinger v. McBurney*, 5 Cow. (N. Y.) 253. It was thought that in some cases the legal personal representative of a party to an immoral agreement might have it set aside though no relief would have been given to the party himself in his lifetime; but this has been pronounced "erroneous and contrary to law." *Ayerst v. Jenkins*, 16 Eq. 275, 281, 284; *Marksbury v. Taylor*, 10 Bush (Ky.), 519; *Denton v. English*, 2 Nott & McC. (S. Car.) 581; *Fletcher v. Watson*, 7 Gratt. (Va.) 1, 16; *White v. Hunter*, 23 N. H. 128; *Bivans v. Jarnigan*, 59 Tenn. 282; *Gisuf v. Neval*, 81 Pa. St. 354; *Hill v. Freeman*, 73 Ala. 200. The doctrine of immoral consideration applies to executory agreements only. A completed gift cannot be set aside although made on an immoral consideration. (See cases last cited.) Where parties who have been living together in illicit cohabitation separate, and the man covenants to pay an annuity to the woman, with a proviso that the annuity shall cease or the deed shall be void if the parties live together again, the covenant is valid but the proviso is void. *Ex parte Naden*, 9 Ch. 670. When the parties are really married such a proviso is usual but superfluous, for the deed is in any case avoided by the parties afterwards living together. *Westmeath v. Westmeath*, 1 Dow. & Cl. 519; *Shethar v. Gregory*, 2 Wend. (N. Y.) 422; *Wells v. Stout*, 9 Cal. 479, 498; *Chapman v. Gray*, 8 Ga. 341, 349; *Carson v. Murray*, 3 Paige (N. Y.), 483. But not if the agreement for separation itself provides to the contrary. *Walker v. Walker*, 9 Wall. (U. S.) 743; *Walker v. Beal*, 3 Cliff. (U. S. C. C.) 155; *Hitner's App.*, 54 Pa. St. 110. As to agreement for separation, see articles on HUSBAND AND WIFE; MARRIAGE.

1. The question in these cases is not simply whether the publication be immoral, but whether the criminal law would punish it as immoral. *Stockdale v. Onwhyn*, 5 B. & C. 173.

A trade mark intended to deceive the public will not be protected by a court of equity. *Manhattan Medicine Co. v.*

*Wood*, 108 U. S. 218; *Buckland v. Rice*, 40 Ohio St. 526; *Connell v. Reed*, 128 Mass. 477; *Siegert v. Abbott*, 61 Md. 276; *Laird v. Wilder*, 9 Bush (Ky.), 131; *Palmer v. Harris*, 60 Pa. St. 156; *Seabury v. Grosvenor*, 14 Blatchf. (U. S. C. C.) 362.

Under an agreement between A and B, a publisher, for a royalty on sales of a book to which A was to contribute facts, the publication of a book which was a fraud on the public will not prevent a recovery for the royalty reserved by the contract. *James v. Chambers*, 18 Mo. App. 331.

2. 1 Story on Conts. (5th Ed.) 647; *Wainwright v. Bridges*, 19 La. Ann. 234; *Rodriguez v. Bienvenu*, 22 La. Ann. 300; *Osborn v. Nicholson*, 1 Dill. (U. S. C. C.) 219; *Buckner v. Street*, 1 Dill. (U. S. C. C.) 248; *Shorter v. Cobb*, 39 Ga. 285.

Where the highest court of a State so decides, on general principles of public policy or morality the supreme court of the United States has no power of review. *Palmer v. Marston*, 14 Wall. (U. S.) 10. But it has the power where the decision of the State court is based upon a constitution or legislative enactment passed after the contract was made. *Delmas v. Ins. Co.*, 14 Wall. (U. S.) 661. The supreme court of Louisiana held that contracts for the sale of persons, though made in the State while slavery was lawful, must be treated as void; but the supreme court of the United States refused to adopt this view. *Boyce v. Tabb*, 18 Wall. (U. S.) 546; *White v. Hart*, 13 Wall. (U. S.) 646; *Osborn v. Nicholson*, 13 Wall. (U. S.) 654; *Roundtree v. Baker*, 52 Ill. 241; *Calhoun v. Calhoun*, 2 S. Car. 283; *Taylor v. Mayhew*, 11 Heisk. (Tenn.) 596; *Bradford v. Jenkins*, 41 Miss. 328.

3 On meaning of public policy see *Egerton v. Earl Brownlow*, 4 H. L. C. 1-250. "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent under-

a license is illegal.<sup>1</sup> An agreement to contravene the laws of a

standing shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.” Sir G. Jessel, M. R., in *Printing & Numerical Registering Co. v. Sampson*, 19 Eq. 462, 465.

An agreement is void as against public policy which provides that one who is bound to give his best judgment upon a question in which parties adversely interested are concerned, and who does not purport to be the agent of either, shall be paid for his services in proportion to the amount recovered by one from the other. *Thomas v. Caulkett*, 57 Mich. 392.

Contracts made during the lifetime of a testator, and fairly obtained, by persons living in expectation of receiving benefits under his will, to divide among them any such benefits after his death, if amounting to agreements to use undue influence upon the testator, are bad; but they are good if amounting to agreements to abstain disinterestedly from interfering with the testator, and will be upheld where there is mutuality of consideration. *Higgins v. Hill*, 56 L. I. N. S. 426.

The liability of railroad companies for injuries caused to their servants by the carelessness of other employees who are placed in authority and control over them is founded upon considerations of public policy, and it is not competent for such companies to stipulate with their employees at the time, and as part of their contract of employment, that such liability shall not attach to them. *Railway Co. v. Spangler*, 44 Ohio St. 471.

An agreement to build houses on a disused, unconsecrated burial-ground, necessitating the removal of some thousands of corpses, which removal would, of necessity, involve an outrage on public decency, and amount to an indictable offence, is illegal. *Gibbons v. Chambers*, 1 C. & E. 577.

A contract whereby a person binds himself expressly for a valuable consideration to dispose of his property by will in a particular manner, is not repugnant to public policy, and will be enforced after promisor's decease. *Bolman v. Overall*, 2 South. Rep. (Ala.) 624.

A promise by A to pay B for services to be rendered in procuring a wife for A

is void. *Johnson v. Hunt*, 81 Ky. 321.

A contract for the sale of domestic sardines, to be put up with labels representing the sardines as foreign sardines, is against public policy. *Materne v. Horwitz*, 101 N. Y. 469.

Contract founded on illegal transaction, or one contrary to public policy, *held* void in *Hinnen v. Newman*, 12 Pac. Rep. (Kan.) 144.

A, in consideration of a fixed sum paid to him by B, agreed to deliver to B certain deeds for real estate, and also to satisfy certain judgments, one in favor of C, a savings-bank, and another in favor of D. *Held*, in an action brought by B against A to recover for usury paid by A to C on the judgment of C. that the court would not look for usury back of the contract between A and B. *Held*, also, that as no fraud had been practised upon B, he could not retain the benefits gained by the contract and at the same time recover the money paid or any part of it, as to do this he must restore to A what he received from him. *Guilinger v. Zahniser*, 11 East. Rep. (Pa.) 376. See, as to usurious contracts, *Ormund v. Hobart*, 31 N. W. Rep. (Minn.) 213. See USURY.

1. *Esposito v. Bowden*, 7 E. & B. 763, 779.

“The law of nations as judicially declared prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and this includes any act of voluntary submission to the enemy or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods or orders for the delivery of either between the two countries, whether directly or indirectly, or through the intervention of third persons or partnerships, or by insurances upon trade with or by the enemy.” *Kershaw v. Kelsey*, 100 Mass. 561, 572-3; *Montgomery v. U. S.*, 15 Wall. (U. S.) 395; *Scholfield v. Eichelberger*, 7 Pet. (U. S.) 586; *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72; *Cappell v. Hall*, 7 Wall. (U. S.) 542, 554; *The Rapid*, 8 Cr. (U. S.) 155; *Perkins v. Rogers*, 35 Ind. 124; *Shaklett v. Polk*, 51 Miss. 378, 391; *Rhodes v. Summerhill*, 4 Heisk. (Tenn.) 204; *Hill v. Baker*, 32 Iowa, 302; *Henner v. Gilman*, 20 La. Ann. 241; *Phillips v. Hatch*, 1 Dill. (U. S.) 571; *Habricht v. Alexander's Ex'rs*, 1 Woods

foreign country is in general unlawful.<sup>1</sup> An agreement whose object is to induce any officer of the state to act partially or corruptly is void.<sup>2</sup> The sale of offices is void, as being against

(U. S.), 413, 1 Kent, 66. The particular contracts relating to real estate in *Kershaw v. Kelsey*, 100 Mass. 561, and *Brown v. Gardner*, 4 Lea (Tenn.), 145, were held to be lawful.

Contracts made during the late civil war in one of the Confederate States payable in Confederate money, if not made for the purpose of giving it currency or otherwise aiding the rebellion, are not because thus payable invalid. *Thorington v. Smith*, 8 Wall. (U. S.) 1; *The Confederate Note Case*, 19 Wall. (U. S.) 548, 556; *Railroad Co. v. King*, 91 U. S. 3; *Rodes v. Patitto*, 5 Bush (Ky.), 271; *Rivers v. Moss' Assignee*, 6 Bush (Ky.), 600; *Rodgers v. Bass*, 46 Tex. 505; *Naff v. Crawford*, 1 Heisk. (Tenn.) 111; *Sherfy v. Argenbright*, 1 Heisk. (Tenn.) 128; *Forchheimer v. Holly*, 14 Fla. 239; *Whitfield v. Riddle*, 52 Ala. 467; *Green v. Sizer*, 40 Miss. 530; *Young v. Mitchell*, 33 Ark. 222. *Contra*, *Denny v. Johnson*, 26 La. Ann. 55. As to revisory power of the supreme court of the United States over the decision of a State court on this question, see *Delmas v. Ins. Co.*, 14 Wall. (U. S.) 661; *Dugger v. Bockock*, 104 U. S. 596. But bonds issued for the purpose of supporting the war levied by the Confederate States do not constitute a lawful consideration for a promissory note, although they were used as a circulating medium in the common and ordinary business transactions of the people. *Hanauer v. Woodruff*, 15 Wall. (U. S.) 439. An agreement even at the present time to buy and sell such bonds is void. *Branch v. Haas*, 16 Fed. Rep. 53.

Where a bill was drawn on England by an English prisoner in a hostile country it was held to be a lawful contract, and by the necessity of the case an indorsement to an alien enemy was held good, so that he might sue on it after the return of peace. *Antoine v. Morshead*, 6 Taunt. 237. But a bill drawn by an alien enemy on a domiciled British subject residing in the enemy's country was held to give no right of action even after the end of the war, for this is a direct trading with the enemy on the part of the acceptor. *Willison v. Patteson*, 7 Taunt. 439; *Bilgery v. Branch*, 19 Gratt. (Va.) 393, 418; *Moon v. Foster*, 19 Gratt. (Va.) 433, *n.*; *Woods v. Wilder*, 43 N. Y. 164; *Tarleton v. Bank*, 41 Ala. 722; *Williams v. Bank*, 2 Woods (U. S. C. C.), 501; *Lacy v. Sugarman*, 12 Heisk. (Tenn.)

354. *Compare* *U. S. v. Barker*, 1 Paine C. C. 156; *Haggard v. Conkwright*, 7 Bush (Ky.), 16. A bill drawn by an alien enemy upon the subject or citizen of the adverse country, in favor of a neutral, will, if no illegal use of it be intended, be good in favor of the neutral against the drawer, and against the drawee if he become acceptor. Story on Bills, § 104.

During a war, foreign or civil, an action cannot be prosecuted by an enemy residing in the enemy's territory, but must be stayed until the return of peace. *Kershaw v. Kelsey*, 100 Mass. 561, 563; *Perkins v. Rogers*, 35 Ind. 124; *Bell v. Chapman*, 10 Johns. (N. Y.) 183; *Whelan v. Cook*, 29 Md. 1; *Norris v. Doniphan*, 4 Met. (Ky.) 385; *Sanderson v. Morgan*, 39 N. Y. 231; *Lamar v. Micon*, 112 U. S. 452, 464. But if sued he may defend in the form in which he is assailed. *McVeigh v. U. S.*, 11 Wall. (U. S.) 259; *Windsor v. McVeigh*, 93 U. S. 274, 277; *Buford v. Speed*, 11 Bush (Ky.), 338; *Seymour v. Bailey*, 66 Ill. 288; *Haymond v. Camden*, 22 W. Va. 180.

1. It is said that revenue laws are excepted, and that "no country ever takes notice of the revenue laws of another." Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341. See *Kohn v. Renaissance*, 5 La. Ann. 25; *Ivey v. Lalland*, 42 Miss. 444. This proposition is disapproved by most modern writers as being contrary to reason and justice. 3 Kent Comm. 263-266; Wharton, *Conflict of Laws*, §§ 484-5; Westlake *Private International Law* (1880), 231, 238. Where an alien and an American citizen were engaged in a joint enterprise by which merchandise was introduced into the United States in violation of the revenue laws, the former was held not entitled to recover his share of the proceeds from the latter. *Cambioso v. Maffitt*, 2 Wash. (C. C.) 98.

2. An agreement which has a tendency that way is void. *Lucas v. Allen*, 80 Ky. 681; *Womack v. Loran* (Ct. App. Ky.), 8 C. L. J. 332; *O'Hara v. Carpenter*, 23 Mich. 410; *Caton v. Stewart*, 76 N. Car. 357. An agreement to pay for services in soliciting and procuring the discharge of one drafted into the army,—*Bowman v. Coffroth*, 59 Pa. St. 19. *Compare* *O'Hara v. Carpenter*, 23 Mich. 410,—or a pardon for a convict, is unlawful and void. *Hatzfield v. Gulden*, 7 Watts (Pa.), 152; *Willey v. Collier*, 7 Md. 273; *Kribben v. Haycraft*, 26 Mo. 396; *State v.*

Johnson, 52 Ind. 197, 205; Haines v. Lewis, 54 Iowa, 301. *Contra*, Chadwick v. Knox, 31 N. H. 226; Formby v. Pryor, 15 Ga. 258; Bird v. Breedlove, 24 Ga. 623; Thompson v. Wharton, 7 Bush (Ky.), 563; this last case being put on the ground that the conviction was by a court unauthorized by law. A contract by a city to pay an attorney one third the revenue of a ferry for fifteen years (the annual rental of the ferry being about \$10,000), in consideration of his protecting the city's title to some river lots, worth at the date of the contract about \$150, is void for unreasonableness in the amount of compensation, and as evidencing an utter disregard on the part of the municipal board of their duty to the public. *Waterbury v. City of Laredo*, 5 S. W. Rep. (Tex.) 81.

An agreement for compensation for procuring by personal influence a contract from the government, our own or that of another country, is against public policy, and void. *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Oscanyon v. Arms Co.*, 103 U. S. 261; *Ashburner v. Parrish*, 81 Pa. St. 52; *Dist. Winpenny v. French*, 18 Ohio St. 469. *Contra*, *Lyon v. Mitchell*, 36 N. Y. 235; *Cummins v. Barkalow*, 1 Abb. App. Dec. 479; *Elkhart Co. Lodge v. Cray*, 98 Ind. 238; s. c., 49 Am. Rep. 746.

The plaintiff, who, by reason of having purchased, enclosed, and cultivated a tract of land within the limits of the Hot Springs reservation, had an equitable claim to a patent likely to be recognized by the United States, executed a deed of conveyance of a subtract to the defendant, who had occupied and built on it with the plaintiff's permission; the defendant at the same time executing an agreement to reconvey an undivided half of the subtract to the plaintiff within thirty days after the title should be acquired by the United States. The deed and agreement were executed in settlement of certain controversies between the parties, and it was agreed that the plaintiff should furnish the evidence necessary to enable the defendant to obtain the title from the United States. This the plaintiff did. *Held*, in a suit to compel specific performance of agreement to reconvey, that there was neither want nor illegality of consideration, and that plaintiff was entitled to a decree. *Gaines v. Molen*, 30 Fed. Rep. 27.

An agreement which contemplates the use of underhand means to influence legislation is void. *Marshall v. B. & O. R. Co.*, 16 How. (U. S.) 314; *Mills v. Mills*, 40 N. Y. 543; *Frost v. Belmont*,

6 Allen (Mass.), 152; *Bryan v. Reynolds*, 5 Wis. 200; *Usher v. McBratney*, 3 Dill. (U. S.) 385; *Gil v. Davis*, 12 La. Ann. 219; *Clippenger v. Hepbaugh*, 15 W. & S. (Pa.) 315; *Powers v. Skinner*, 34 Vt. 274; *Wood v. McCann*, 6 Dana (Ky.), 366; *McBratney v. Chandler*, 22 Kan. 692. An agreement among parties petitioning for the improvement of a street by which a few individuals desirous of causing the improvement to be made procure the signatures of others to the petition by promising to pay a consideration therefor, is contrary to public policy. *Maguire v. Smock*, 42 Ind. 1; *Howard v. F. I. Church of Balto.*, 18 Md. 451. *Compare* *Makemson v. Kauffman*, 35 Ohio St. 444, 455. An agreement to prosecute a claim before Congress by means of personal influence and solicitations of the kind known as "lobby service" has been held void. *Trist v. Child*, 21 Wall. (U. S.) 441.

"A promise to pay money to one through whose land a road has been laid out for withdrawing his opposition to opening it is a valid consideration, on which an action may be sustained." *Weeks v. Lippencott*, 42 Pa. St. 474. *Contra*, *Smith v. Applegate*, 3 Zab. (N. J.) 352. And see *Pingry v. Washburn*, 1 Aiken (Vt.), 264. A contract by which the directors of a railroad company agree not to establish a station or freight depot within a certain distance of a point on its line is against public policy and unlawful. *Williamson v. Railroad Co.*, 53 Iowa, 126; *Railroad Co. v. Ryan*, 11 Kan. 602; *Railroad Co. v. Mathers*, 71 Ill. 592; s. c., 104 Ill. 257; *Marsh v. Railway Co.*, 64 Ill. 414; *Railroad Co. v. Taylor*, 6 Col. 1. And so also is an agreement in consideration of money or property paid or given to a shareholder or director to procure the establishment of a station at a particular place. *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Bestor v. Wathen*, 60 Ill. 138. *Compare* *Railroad Co. v. Seeley*, 45 Mo. 212. A contract by a railroad company to locate and maintain a depot at a certain point is not against public policy, if the company does not restrict itself from locating a depot elsewhere. *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55; s. c., 55 Am. Rep. 719. And a promise by the railway company for a benefit conferred upon it to build its line to or through a particular point is not *per se* unlawful. *Band v. Hendrie*, 49 Iowa, 402; *Berryman v. Trustees*, 14 Bush (Ky.), 755; *Railroad Co. v. Ralston* (S. C. Com. Ohio), 13 Weekly Law Bull. 496. *Compare* *Holladay v. Patterson*, 5 Oreg. 177.

public policy.<sup>1</sup> Agreements for the purpose of "stifling criminal prosecution" are void, as tending to obstruct the course of public justice.<sup>2</sup> Agreements relating to proceedings in civil courts

1. *Hanington v. Du Chastel*, 2 Swanst. 159, n.; *Hopkins v. Prescott*, 4 C. B. 578; *Ferris v. Adams*, 23 Vt. 136; *Eddy v. Capron*, 4 R. I. 394; *Meredith v. Ladd*, 2 N. H. 517; *Carleton v. Whitcher*, 5 N. H. 196; *Outen v. Rodes*, 3 A. K. Marsh. (Ky.) 432; *Lewis v. Knox*, 2 Bibb (Ky.), 453; *Filson's Trustees v. Himes*, 5 Pa. St. 452; *Bowers v. Bowers*, 26 Pa. St. 74; *Stroud v. Smith*, 4 Houst. (Del.) 448; *Robertson v. Robinson*, 65 Ala. 610; *Groton v. Waldborough*, 11 Me. 306. An agreement by which a candidate for office receives from another money to aid in securing his election, and in consideration thereof promises to share with him a portion of the emoluments of the office, is against public policy, and void. *Martin v. Wade*, 37 Cal. 168; *Gaston v. Drake*, 14 Nev. 175; *Meguiar v. Corwine*, 101 U. S. 108. So also is an agreement between two candidates for the same office, that one shall withdraw, and the other, if successful in the attempt to obtain the office, shall divide the fees with him. *Gray v. Hook*, 4 N. Y. 449; *Hunter v. Nolf*, 71 Pa. St. 282. Where a candidate for public office pledged himself if elected to perform the duties of the office for a sum less than half the fees allowed by law, whereby voters were induced to vote for him and he received a majority of the votes cast, his election was declared invalid, as against public policy. *State v. Collier*, 72 Mo. 13; *State v. Purdy*, 36 Wis. 213; *Corrothers v. Russell*, 53 Iowa, 346; *State v. Elting*, 29 Kan. 397, 399. A note executed in consideration of the payee's agreement to resign a public office in favor of the maker, and use his influence to secure the latter's appointment as his successor, is void. *Meacham v. Dow*, 32 Vt. 721. A promise of reward for using influence to procure the promisor's election or appointment to public office is void. *Nichols v. Mudgett*, 32 Vt. 546; *Fawill v. Morin's Syndics*, 4 Mart. (La.) 39. A promise to pay for services rendered by another as a canvasser at a primary election to secure the promisor's nomination for an office is unlawful and void. *Keating v. Hyde*, 23 Mo. App. 555. A claim for "money borrowed at the instance of the defendant, and used for him in paying travelling expenses to elections and for men to leave their work and go to the primary election for defendant, who was a candidate for office," is illegal, and will

not be enforced. *Howard v. Jacoby*, 3 Pac. Co. Ct. Rep. 436. A promise by a shareholder or director of a corporation for a pecuniary consideration to procure one to be appointed an officer of the corporation,—*Guernsey v. Cook*, 120 Mass. 501; *Noll v. Drake*, 28 Kan. 265,—or to vote for a particular person as manager,—*Woodruff v. Wentworth*, 133 Mass. 309,—or a promise to pay a director to resign,—*Forbes v. McDonald*, 54 Cal. 98,—is void. But see *Barnes v. Brown*, 80 N. Y. 527. A secret agreement to hand over to another person the profits of a contract made for the public service, such as a post-office contract for the conveyance of mails, is void. *Osborne v. Williams*, 18 Ves. 379; *Ashburner v. Parrish*, 81 Pa. St. 52. Compare *Gordon v. Dalby*, 30 Iowa, 223. The assignment by a public officer of a portion of his salary not yet due is void. *Bliss v. Lawrence*, 58 N. Y. 442; *Beal v. McVicker*, 8 Mo. App. 202; *Bangs v. Dunn*, 18 Rep. 572; *Billings v. O'Brien*, 14 Abb. Pr. N. S. (N. Y.) 238. And see *Field v. Chipley*, 79 Ky. 260. *Contra*, *State v. Hastings*, 15 Wis. 83.

2. *Gorham v. Keyes*, 137 Mass. 583; *Kimbrough v. Lane*, 11 Bush (Ky.), 556; *Lindsay v. Smith*, 78 N. Car. 328; *Baker v. Farris*, 61 Mo. 389; *Shaw v. Reed*, 30 Me. 105; *Shaw v. Spooner*, 9 N. H. 197; *Badger v. Williams*, 1 D. Chip. (Vt.) 137; *Chandler v. Johnson*, 39 Ga. 85; *Goodwin v. Crowell*, 56 Ga. 566; *Snider v. Willey*, 33 Mich. 483; *Sumner v. Sumner*, 54 Mo. 340; *Wright v. Rindskopf*, 43 Wis. 344; *Roll v. Raguet*, 4 Ohio, 400; *Raguet v. Roll*, 7 Ohio (pt. 1), 76; *Vanover v. Thompson*, 4 Jones L. (N. Car.) 485; *Halthaus v. Kuntz*, 17 Ill. App. 434; *Henderson v. Palmer*, 71 Ill. 579; *Ricketts v. Harvey*, 106 Ind. 564; *Taylor v. Jaques*, 106 Mass. 291; *Peed v. McKee*, 42 Iowa, 689; *McMahon v. Smith*, 47 Conn. 221; *Ex parte Wolverhampton Banking Co.*, 14 Q. B. D. 32.

A contract to waive all damages for injuries resulting from criminal negligence is void as against public policy. *Cook v. West & Atl. R. Co.*, 72 Ga. 48.

Where a prosecutrix agreed, in compromise and settlement of criminal and civil proceedings for fornication and bastardy, to deliver her child to a third person, to discontinue both actions, and to release the defendant from all claims and demands, in consideration of which he



agreed to pay the costs in those cases, "to relieve her from any cost or expense in the support and maintenance of said child, and to see that it was well taken care of;" it was held that this latter agreement was not illegal, but that the contract was a continuing one, binding on the defendant's executors as far as not performed by testator in his lifetime. *Stumpf's Appeal*, 8 Atl. Rep. (Pa.) 866.

A contract between the putative father of a bastard child, and the town where it had a settlement, by which the former made a certain agreement as to the support of the child in consideration that neither the town nor the parents of the mother of the child would "institute any legal proceedings against him of any kind or nature on account of the" mother "being pregnant with an illegitimate child," or for the support of the child or nursing of the mother, was held not to refer to criminal proceedings, and not to be void on that ground. *Town of Hamden v. Merwin*, 8 Atl. Rep. (Conn.) 670.

A mortgage, the consideration of which is the stifling of a criminal prosecution, is void. *Pearce v. Wilson*, 111 Pa. St. 14; s. c., 56 Am. Rep. 243; *Wheaton v. Ansley*, 71 Ga. 35. A promise to pay one for using his influence to have criminal proceedings dismissed is void. *Ormerod v. Dearman*, 100 Pa. St. 561; *Rhodes v. Neal*, 64 Ga. 704; *Averbeck v. Hall*, 14 Bush (Ky.), 505; *Barron v. Tucker*, 53 Vt. 338; *Ricketts v. Harvey*, 78 Ind. 152. So is an agreement to indemnify another for becoming bail for one arrested for a crime, so as to enable the latter to flee from justice. *Baehr v. Wolff*, 59 Ill. 470; *Dunkin v. Hodge*, 46 Ala. 523; *Herman v. Jenchner*, 15 Q. B. D. 561. Or an agreement by a fugitive from justice about to be surrendered for extradition to pay money in consideration of forbearance to prosecute the proceedings against him. *Dixon v. Olmstead*, 9 Vt. 310; *Fay v. Oatley*, 6 Wis. 42. Or a promise to pay money in consideration of not searching the house of a thief for stolen goods until the next day. *Merrill v. Carr*, 60 N. H. 114. Or in consideration of a promise to sign a petition to the judge for clemency in the sentence of a prisoner. *Buck v. Bank*, 27 Mich. 293.

"A contract conditioned for the execution and deposit of certain promissory notes by one under sentence for the commission of a crime, to be delivered to the prosecuting witness upon certain conditions, one of which was that the maker should receive a pardon, or be acquitted on a new trial, is illegal and void, as

against public policy." *Haines v. Lewis*, 54 Iowa, 301; and see *Comms. of Guilford Co. v. Marsh*, 89 N. Car. 268.

A promise to pay one wanted as a witness in a criminal proceeding for keeping out of the jurisdiction of the court, so as to evade service of process upon him, is void. *Bierbauer v. Wirth*, 10 Biss. (U. S. C. C.) 60.

"We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action." *Collins v. Blantern*, 1 Sm. L. C. (8th Am. Ed.) 715, 718; *Fisher & Co. v. Apollinaris Co.*, 10 Ch. 297; *Price v. Summers*, 2 South. (N. J.) 578; *Geier v. Shade* (S. C. Pa.), 21 C. L. J. 115-6; *Fay v. Oatley*, 6 Wis. 42, 59. See, *contra*, *Jones v. Rice*, 18 Pick. (Mass.) 440; *Lindsay v. Smith*, 78 N. Car. 328; *Gray v. Seigler*, 2 Strobb. (S. Car.) 117; *Corley v. Williams*, 1 Bailey (S. Car.), 588; *Vincent v. Groom*, 1 Yerg. (Tenn.) 430; *Bowen v. Buck*, 28 Vt. 308.

While an agreement made in consideration of stifling a prosecution for a felony is void, yet certain misdemeanors which chiefly affect the individuals aggrieved, and not the public interests, do not come within that rule, and may be settled by private agreement. *Geier v. Shade*, 109 Pa. St. 180.

That one may adopt and ratify his forged signature, see *Bank v. Crafts*, 4 Allen (Mass.), 477; *Willington v. Jackson*, 121 Mass. 157; *Bank v. Keene*, 53 Me. 103; *Fitzpatrick v. School Commrs.*, 7 Humph. (Tenn.) 224; *Bank v. Middlebrook*, 33 Conn. 95. See *Forsythe v. Bonta*, 5 Bush (Ky.), 547. *Contra*, that ratification of a forged signature is against public policy. *Shisler v. Vandike*, 92 Pa. St. 447; *McHugh v. Co. of Schuylkill*, 67 Pa. St. 391; *Workman v. Wright*, 33 Ohio St. 405; *Brook v. Hook*, L. R. 6 Ex. 89.

An agreement for the collusive conduct of a divorce suit is void. *Hope v. Hope*, 8 D. M. G. 731; *Stoutenburgh v. Lybrand*, 13 Ohio St. 228; *Kilborn v. Field*, 78 Pa. St. 194; *Viser v. Bertrand*, 14 Ark. 267; *Sayles v. Sayles*, 21 N. H. 312; *Cross v. Cross*, 58 N. H. 373; *Goodwin v. Goodwin*, 4 Day (Conn.), 343; *Stilson v. Stilson*, 46 Conn. 15; *Belden v. Munger*, 5 Minn. 211; *Adams v. Adams*, 25 Minn. 72; *Everhart v. Puckett*, 73 Ind. 409; *Phillips v. Thorp*, 10 Oreg. 494; *Beard v. Beard* (S. C. Cal.), 19 C. L. J. 78. Where a divorce has been fraudulently obtained, a subsequent

involving anything inconsistent with the full and impartial course of justice therein, though not open to the charge of actual corruption, are void.<sup>1</sup> An action may be maintained for the breach of an agreement to refer disputes to arbitration, but such an agreement cannot be set up as a bar to an action brought to determine the dispute which it was agreed to refer.<sup>2</sup> Certain agreements

agreement between the parties that it shall not be disturbed, is against public policy and void. *Comstock v. Adams*, 23 Kan. 513. So also is an agreement between the overseers of the poor and a husband whose wife is supported as a town charge that they will refrain from making opposition to a libel for divorce filed by the husband against the wife. *Weeks v. Hill*, 38 N. H. 199. But a promise made in consideration of a wife's dismissing a suit for divorce begun by her is lawful. *Adams v. Adams*, 91 N. Y. 381; *Phillips v. Meyers*, 82 Ill. 67. Compare *Copeland v. Boaz*, 9 Baxt. (Tenn.) 223. "An action may be maintained by a woman upon a promissory note given to her by her former husband after she has obtained a divorce from him, in pursuance of a written agreement made before the divorce, and conditioned upon the divorce being decreed, and which was called to the attention of the court granting the divorce, by the terms of which agreement, which were carried out by each party, she was to convey her land to him, and give a release of all her rights of dower and homestead, and he was to give her a sum of money and the note in suit, which were to be accepted instead of alimony." *Chapin v. Chapin*, 135 Mass. 393. But as to analogous agreements made before divorce obtained, and not called to the attention of the court, see *Speck v. Dausman*, 7 Mo. App. 165; *Hamilton v. Hamilton*, 89 Ill. 349. An agreement not to expose immoral conduct has been held void, as against public policy. *Brown v. Brine*, 1 Ex. D. 5.

1. An agreement to pay a witness who could not be required by subpoena to attend a trial, a certain sum to be present at the trial, which was to be reduced one half if the party promising lost the case, is void. *Dawkins v. Gill*, 10 Ala. 206. See *Thomas v. Caulkett* (S. C. Mich.), 32 Alb. L. J. 82. An agreement to procure witnesses to swear to a certain state of facts is against public policy. *Patterson v. Donner*, 48 Cal. 369.

A contract whereby a justice of the peace agrees to charge smaller fees in suits to be brought before him by a certain corporation than prescribed by statute, and that such fees shall not be col-

lected unless they have been paid over by the defendants to the corporation, is contrary to public policy, and void. *Hawkeye Ins. Co. v. Brainard*, 33 N. W. Rep. (Iowa) 603.

A contract to abandon the prosecution of proceedings for the establishment of a public highway for a money consideration is void. *Jacobs v. Tobiason*, 65 Iowa, 245; s. c., 54 Am. Rep. 9. See *Gray v. McReynolds*, 65 Iowa, 461; s. c., 54 Am. Rep. 16.

2. *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Vass v. Wales*, 129 Mass. 38; *White v. Railroad Co.*, 135 Mass. 216; *Hill v. More*, 40 Me. 515, 523; *Gray v. Wilson*, 4 Watts (Pa.), 39; *Randal v. C. & D. Canal Co.*, 1 Harr. (Del.) 233, 275; *Stone v. Dennis*, 3 Porter (Ala.), 231; *Haggart v. Morgan*, 5 N. Y. 422; *Hurst v. Litchfield*, 39 N. Y. 377; *McGunn v. Hanlin*, 29 Mich. 476; *March v. Railroad Co.*, 40 N. H. 548, 571. On this principle it was held that an agreement by a foreign insurance company, in pursuance of a State statute exacting the promise as a condition of the right to do business in the State, that if sued in a State court it would not remove the suit into the Federal court, was void. *Ins. Co. v. Morse*, 20 Wall. (U. S.) 445. See also *Nute v. Ins. Co.*, 6 Gray (Mass.), 174; *Hobbs v. Ins. Co.*, 56 Me. 417; *Railroad Co. v. Cary*, 28 Ohio St. 208; *Quimby v. Ins. Co.*, 58 N. H. 494. *Rea's App.* (S. C. Pa.), 13 W. N. C. 546, 16 Rep. 761. Nor could such an agreement be specifically enforced or used as a bar to a suit in equity. *Cooke v. Cooke*, 4 Eq. 77, 86-7; *Street v. Rigby*, 6 Ves. 815, 818; *Tobey v. County of Bristol*, 3 Story (U. S. C. C.) 800; *King v. Howard*, 27 Mo. 21; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, 104; *Greason v. Keteltas*, 17 N. Y. 497, 496; *Smith v. Railroad Co.*, 36 N. H. 458.

An agreement to submit to arbitration will not be held valid, either in law or equity, when its effect is to oust the court of jurisdiction. *Chamberlain v. Conn. Cent. R. Co.*, 9 Atl. Rep. (Conn.) 244; *Dugan v. Thomas*, 9 Atl. Rep. (Me.) 354; s. c., 11 East. Rep. 349.

Parties may make arbitration a condition precedent to any right existing at all, as where the contract is to pay such



are void, as being in the nature of champerty or maintenance.<sup>1</sup> Agreements by which a father deprives himself of the right to the custody of his children, or of his discretion as to their education, cannot be enforced.<sup>2</sup> Some agreements in restraint of marriage are void.<sup>3</sup>

**52. Restraint of Trade.**—Contracts in total restraint of trade are void; but where the restraint is partial, reasonable, and founded upon a good consideration, it is valid, and will be enforced.<sup>4</sup>

an amount as shall be determined by arbitration, or found due by the certificate of a particular person. *Scott v. Avery*, 5 H. L. C. 811; *Fox v. Railroad Co.*, 3 Wall. Jr. (U. S. C. C.) 243; *Smith v. Railroad Co.*, 36 N. H. 458, 487; *Del. & H. Canal Co. v. Penn. Coal Co.*, 50 N. Y. 250; *Perkins v. Electric Light Co.*, 16 Fed. Rep. 513; *Haley v. Bellamy*, 137 Mass. 357; *Mentz v. Ins. Co.*, 79 Pa. St. 478; *Trott v. Ins. Co.*, 1 Cliff. (U. S. C. C.) 439; *Stephenson v. Ins. Co.*, 54 Me. 55; *Rowe v. Williams*, 97 Mass. 163; *Gauche v. Ins. Co.*, 10 Fed. Rep. 347. See article on ARBITRATION.

1. See articles on CHAMPERTY; MAINTENANCE.

2. *Re Andrews*, L. R. 8 Q. B. 153; *In re Besant*, 11 Ch. D. 508, 519; *Johnson v. Terry*, 34 Conn. 259, 263; *Albert v. Perry*, 1 McCart. (N. J.) 540; *Gates v. Renfroe*, 7 La. Ann. 569; *Chapsky v. Wood*, 26 Kan. 650; *Matter of Scarritt*, 76 Mo. 565. See article on PARENT AND CHILD.

3. See HUSBAND AND WIFE; MARRIAGE.

4. *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 Sm. L. C. (8th Am. Ed.) 756; *Whitney v. Slayton*, 40 Me. 224; *Perkins v. Clay*, 54 N. H. 518; *Clark v. Crosby*, 37 Vt. 188; *Hedge v. Lowe*, 47 Iowa, 137; *Arnold v. Kreutzer*, 67 Iowa, 214; *Laubenheimer v. Mann*, 17 Wis. 542; *Fairbank v. Leary*, 40 Wis. 637; *Keeler v. Taylor*, 53 Pa. St. 467; *McClurg's App.*, 58 Pa. St. 51; *Koehler v. Fearbacher*, 2 Mo. App. 11; *Wiggins Ferry Co. v. C. & A. Railroad Co.*, 73 Mo. 389; *Turner v. Johnson*, 7 Dana (Ky.) 435; *Stearns v. Barrett*, 1 Pick. (Mass.) 443; *Linn v. Sigsbee*, 67 Ill. 75; *Talcott v. Brackett*, 5 Bradw. (Ill.) 60; *Peop. Gasl. & Coke Co. v. Chic. G. & C. Co.*, 20 Ill. App. 473; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641; *Chappell v. Brockway*, 21 Wend. (N. Y.) 157; *Curtis v. Gokey*, 68 N. Y. 300; *Hoagland v. Segur*, 38 N. J. L. 230; *Jenkins v. Temples*, 39 Ga. 655; *Gireaud v. Daudelet*, 32 Md. 561; *Lange v. Werk*, 2 Ohio St. 519; *Thomas v. Mills*, 3 Ohio St. 274; *Hubbard v. Miller*, 27 Mich. 15; *Lightner v. Menzel*, 35 Cal.

468; *Boutelle v. Smith*, 116 Mass. 111. There are two principal grounds upon which the doctrine that a contract in restraint of trade is void as against public policy, is founded: one is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64. See also *Skrainka v. Scharinghausen*, 8 Mo. App. 522. There must be a consideration even though the contract is under seal. *Gompers v. Rochester*, 56 Pa. St. 194. The party setting up the contract must show that it is founded on a good consideration. *Weller v. Hersee*, 10 Hun (N. Y.) 431. The courts will not inquire into the adequacy of the consideration. *Gireraud v. Daudelet*, 32 Md. 561; *Perkins v. Clay*, 54 N. H. 518; *McClurg's App.*, 58 Pa. St. 51; *Hall's App.*, 60 Pa. St. 458; *Linn v. Sigsbee*, 67 Ill. 75; *Pierce v. Fuller*, 8 Mass. 223. If the contract be reasonable when made, subsequent circumstances, such as the covenantee ceasing business, so as to no longer need its protection, do not affect its operation. *Cook v. Johnson*, 47 Conn. 175.

W. entered the service of C. as a shopman at weekly wages, and covenanted not to carry on business within one mile of the shop at any time thereafter. The business was afterwards moved to another shop close by, and sold by C. to J., together with the good-will and beneficial interest thereof. W. then left the shop and set up business within a mile of the old shop. *Held*, that the covenant was not unreasonable, and endured for the life of W., though the original covenantee should cease to carry on business altogether, and that the covenant was not affected by the removal of the business to another shop near at hand, though it might have been otherwise if the business had been removed to quite a different neighborhood, and also that the covenant passed to J. with the sale of the good-will and beneficial interest, and gave him

a right of action. *Jacoby v. Whitmore*, 49 L. J. N. S. 335; 32 W. R. 18. *Compare Mandeville v. Harman*, 7 Atl. Rep. (N. J.) 37.

What is a reasonable restraint must depend upon the circumstances of each case. The prohibition should not extend any further than will fully protect the party for whose benefit the contract is made in his occupation or business. *Long v. Towe*, 42 Mo. 545; *Pyke v. Thomas*, 4 Bibb (Ky.), 486; *Grundy v. Edwards*, 7 J. J. Mar. (Ky.) 368; *Turner v. Johnson*, 7 Dana (Ky.), 435. A covenant providing that the covenantor should desist from selling mattresses "in all the territory of the State of New York west of the city of Albany," was held void, as embracing too large a territory. *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641.

A contract not to exercise the trade of making printers' rollers and composition in New York City, or within 250 miles thereof, is void, as being in restraint of trade. *Bingham v. Maigne*, 52 N. Y. Super. Ct. 90.

A covenant not to be directly or indirectly interested in any voyage to the northwest coast of America, or in any traffic with the natives of that coast, for seven years, was held valid, because the trade in question had been lately discovered, and could be beneficial only to a small number of adventurers. *Perkins v. Lyman*, 9 Mass. 522.

An agreement by several commercial firms, by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of a majority of their number, was held unlawful in *India Bagging Assoc. v. Kock*, 14 La. Ann. 168. And see *Stanton v. Allen*, 5 Den. (N. Y.) 434; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston, etc.*, *Coal Co.*, 68 N. Y. 558; *Central Salt Co. v. Guthrie*, 35 Ohio St. 666.

"A contract between the lessor and lessee of a coal-mine, that the lessee shall exercise his influence over his employés to induce them and their families to purchase goods, wares, and merchandise only at the store of the lessor; that the lessee will not accept any order given upon him by any of his employés for goods, etc., purchased of any other person or firm, nor give to any employé an order on any other store, nor any note or other evidence of indebtedness to be transferred to any other store for goods, wares, and merchandise, is unlawful, being in restraint of trade, to the injury

of others, and tending to monopoly, extortion, and oppression. *Crawford v. Wick*, 18 Ohio St. 190.

A contract between a manufacturer and a storekeeper, that the former shall furnish the trade of his workmen to the latter, and that the latter shall pay 8 per cent on all sales, is not against public policy, nor in restraint of trade. *George v. E. Tenn. Coal Co.*, 15 Lea (Tenn.), 455; s. c., 54 Am. Rep. 425.

An agreement between several stockholders of a corporation not to sell their stock, nor to give powers to vote, is in restraint of trade and against public policy. *Fisher v. Bush*, 35 Hun (N. Y.), 641.

A and B were rival manufacturers of washing-machines. *Held*, that a contract under which A discontinued business and became B's partner for five years, a scale of selling prices being agreed on, was not void as in restraint of trade. *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. Rep. 553.

A covenant in restraint of trade is not necessarily invalid so far as the covenantee has in his own business an interest in enforcing it; and where the business is the selling of liquor, such a condition was held not opposed to public policy. *Watrous v. Allen*, 57 Mich. 362.

The limitation must not embrace the whole State, *a fortiori* the United States. *Peltz v. Eichell*, 62 Mo. 171; *Dean v. Emerson*, 102 Mass. 480; *More v. Bonnett*, 40 Cal. 251; *Wright v. Ryder*, 36 Cal. 242.

An agreement not to manufacture or sell friction-matches anywhere in the United States except in one State and Territory, is not void as in restraint of trade. *Diamond Match Co. v. Roeber*, 35 Hun (N. Y.), 421.

The restriction must not go beyond what is necessary for the protection of the other party. *Calt v. Tourle*, 4 Ch. 659; *Leather Cloth Co. v. Lorisont*, 9 Eq. 349; *Allsopp v. Wheatcroft*, 15 Eq. 61; *Grasselli v. Lowden*, 11 Ohio St. 349; *Chappell v. Brockway*, 21 Wend. (N. Y.) 157; *Gilman v. Dwight*, 13 Gray (Mass.), 356; *Cal. S. N. Co. v. Wright*, 6 Cal. 258; *Dunlop v. Gregory*, 10 N. Y. 241; *Long v. Towl*, 42 Mo. 545; *Hubbard v. Miller*, 27 Mich. 15; *Beard v. Dennis*, 6 Ind. 200. In the following cases the agreement was pronounced void as not being limited in space: *Alger v. Thacker*, 19 Pick. (Mass.) 51; *Albright v. Teas*, 37 N. J. Eq. 171; *Lange v. Werk*, 2 Ohio St. 520; *Bank v. King*, 44 N. Y. 87; *Callahan v. Donnolly*, 45 Cal. 152; *Taylor v. Beauchard*, 13 Allen (Mass.), 370;

*More v. Bonnett*, 40 Cal. 251; *Wright v. Ryder*, 36 Cal. 342. In the last three cases cited, the restriction extended over the State. In *Oregon S. N. Co. v. Winsor*, 20 Wall. (U. S.) 64, 67, the court say: "This country is substantially one country, especially in all matters of trade and business, and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State," and the agreement in that case was held valid, although the restriction extended over all of California and part of Washington Territory. And see *Stearns v. Barrett*, 1 Pick. (Mass.) 443.

A covenant in restraint of trade which is unlimited in regard to space except by the words "so far as the law allows," is not void either as being against public policy or as being too uncertain in its terms to be capable of being enforced. Such a covenant is to be construed as providing for a restraint to the full extent that the doctrine of law as interpreted by the courts will allow a person to contract himself out of the privilege of trading in a particular business, and will be enforced so as to secure to the covenantee the full benefit of that which he has purchased from the covenantor. *Davies Bros. & Co. v. Davies*, 56 L. J. R. (Ch.) 481; 35 W. R. 697.

An agreement not to carry on the business of a tailor within a circuit of ten miles from Charing Cross for the period of three years was held not unreasonable either in point of space or in point of time, and therefore valid. *Nicoll v. Beere*, 53 L. T. N. S. 659.

An agreement not to engage in a particular business in a particular town or city, so long as the person to whom the business was sold should prosecute it there, *held*, not in restraint of trade. *Gill v. Ferris*, 82 Mo. 156.

An agreement not to engage in a particular business in a certain town for five years, leaving the party at liberty to engage in any other business in that town, or in that business in any other town, is valid as only a partial or limited restraint upon trade. *Washburne v. Dorsch*, 32 N. W. Rep. (Wis.) 551.

A covenant not to carry on the business of a manufacturer for a period of five years under a particular name or style, is not void as being a covenant in restraint of trade, notwithstanding that it may be unlimited in point of space. *Vernon v. Hallam*, 35 W. R. 156; 56 L. J. R. (Ch.) 155, in which *Labouchere v. Dawson* (L.

R. 13 Eq. 322) is said to be no longer a binding authority.

A condition in a sale of a dry-goods business not to engage in that business for five years, with no limitation as to place, was held void. *Wiley v. Baumgardner*, 97 Ind. 66; s. c., 49 Am. Rep. 427.

A, a livery-stable keeper, sold for its value his stock partly to B and partly to C, agreeing not to engage in business in the same stable for five years; *held*, that the agreement was valid, although in restraint of trade, and was based on a good consideration, and that C having left the business and refusing to sue for the breach, B might sue alone and recover the whole sum named as liquidated damages. *Johnson v. Gwinn*, 100 Ind. 466. See *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64; *Beal v. Chase*, 31 Mich. 490. Where the stipulations in a contract are divisible, and a part impose reasonable and a part unreasonable restraints, the contract is regarded as severable, and effect is given to one part to the exclusion of the other. A contract not to engage in a particular trade for a specified time "in the city of St. Louis or at any other place" was held to be good as to the restriction imposed in St. Louis. *Peltz v. Eichell*, 62 Mo. 171. A covenant not to be interested in a certain business within a certain county, nor for five years in the United States, was held good as to the county. *Dean v. Emerson*, 102 Mass. 480. See also *Lange v. Werk*, 2 Ohio St. 20; *Beard v. Dennis*, 6 Md. 200. *Contra*, *More v. Bonnet*, 40 Cal. 251.

A contract restraining one of the parties from the exercise of a trade within a limited locality, when there is reasonable ground for the restriction, is valid. Where a county or city or borough is named as a limit, and an unreasonable extent of territory in addition is also named, the covenant is divisible, and may be valid as to the particular place which is a reasonable limit. *Smith v. Fell*, 9 East. Rep. (Pa.) 773.

A for a valuable consideration covenanted with B not to engage in the manufacture of ochre "in the county of Lehigh or elsewhere." He afterwards did engage in said business in said county. B having filed a bill for an injunction, *held*, that the contract was reasonable, that it was divisible as to place, and that an injunction was the proper remedy to enforce it. *Smith's Appeal*, 113 Pa. St. 579.

If the contract be good in other respects the mere fact that the restraint is indefinite in point of time does not invalidate

it. *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; *Goodman v. Henderson*, 58 Ga. 567; *Cook v. Johnson*, 47 Conn. 175.

In *New Jersey* the rule as to contracts in restraint of trade is that contracts imposing a restraint larger than the necessary protection of a party are void. Hence a covenant that a physician shall not "at any time hereafter" engage in practice at Newark is void, since it would prevent such physician from practising there though the other party to the covenant should die. *Mandeville v. Harman*, 7 Atl. Rep. (N. J.) 37.

If the contract is valid no evasions of it will be tolerated. *Whitney v. Slayton*, 40 Me. 224; *Treat v. Shoninger Melodeon Co.*, 35 Conn. 543; *Richardson v. Peacock*, 28 N. J. Eq. 151; *Duffy v. Shockey*, 11 Ind. 70; *Smith v. Martin*, 80 Ind. 260. Contracts in restraint of trade if valid at common law will be specifically enforced in equity, and a breach of them be restrained by injunction. *Butler v. Burleson*, 16 Vt. 176; *Angier v. Webber*, 14 Allen (Mass.), 211; *Cobbs v. Niblo*, 6 Brad. (Ill.) 60; *Cook v. Johnson*, 47 Conn. 175; *Baumgarten v. Broadway*, 77 N. Car. 8; *Beard v. Dennis*, 6 Ind. 200; *Baker v. Pottmeyer*, 75 Ind. 451; *Ewing v. Johnson*, 34 How. Pr. (N. Y.) 202; *Richardson v. Peacock*, 36 N. J. Eq. 40; *Ellis v. Jones*, 56 Ga. 504; *Hubbard v. Miller*, 27 Mich. 15; *Doty v. Martin*, 32 Mich. 462; *Hale's Appeal*, 44 Pa. St. 458; *Harkinson's Appeal*, 78 Pa. St. 196; *Keeler v. Taylor*, 53 Pa. St. 467. Agreements in restraint of trade may be assigned, with the business in aid of which the contract was entered into, by the parties thereto. *Hedge v. Lowe*, 47 Iowa, 137; *Gompers v. Rochester*, 56 Pa. St. 194; *Guerand v. Daudelet*, 32 Md. 561; *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258. Cases have arisen where physicians have sold their good-will and agreed not to practise medicine within certain distances of their former location. See *Butler v. Burleson*, 16 Vt. 176; *Linn v. Sigbee*, 67 Ill. 75; *Mell v. Mooney*, 30 Ga. 413; *Doty v. Martin*, 32 Mich. 462; *Dwight v. Hamilton*, 113 Mass. 175; *Haldeman v. Simonton*, 55 Iowa, 144; *Smith v. Smith*, 41 Wend. (N. Y.) 468; *Amedon v. Gannon*, 6 Hun (N. Y.), 384; *Spier v. Lambdin*, 45 Ga. 319.

Within ten miles of a village means within ten miles in every direction from the centre of the village. *Cook v. Johnson*, 47 Conn. 175.

One who agrees not to practise as a physician in a certain city "and vicinity," is properly enjoined from practising within ten miles of the city limits. *Tim-*

*merman v. Dever*, 52 Mich. 34; s. c., 50 Am. Rep. 240; 23 Am. L. Reg. 50.

The law as to restraint of trade has never been extended to a business protected by a patent. *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73. Nor to a business which is a secret and not known to the public, because the public has no rights in the secret. *Peabody v. Norfolk*, 98 Mass. 452; *Jarvis v. Peck*, 10 Paige Ch. (N. Y.) 118; *Hard v. Seeley*, 47 Barb. (N. Y.) 429; *Vickery v. Welch*, 19 Pick. (Mass.) 523.

An agreement between individuals who have formed themselves into a corporation for the purpose of manufacturing and selling a certain patented article, and by the terms of which a uniform price is fixed for the sale of the article by the members of the company, which price could only be charged by the company, but which puts no restraint upon the amount of production or sale of the article by the members of the company, is not void as being in restraint of trade or against public policy. *Cent. Roller Shade Co. v. Cushman*, 9 East. Rep. (Mass.) 560; s. c., 9 N. E. Rep. 629; 3 New Eng. Rep. 505; 143 Mass. 353.

Restrictions imposed in conveyances that the property conveyed shall not be used for certain purposes fall under the general principles governing contracts in restraint of trade. A restriction that a lot should not be used for a tavern was held valid. *Holmes v. Martin*, 10 Ga. 503; *Loubenheimer v. Mann*, 17 Wis. 542. In the following cases the agreements were held void as tending to create a monopoly: *Taylor v. Blanchard*, 13 Allen (Mass.), 370; *Craft v. McConoughy*, 79 Ill. 346; *Crawford v. Wick*, 18 Ohio St. 190; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston Coal Co.*, 68 N. Y. 558.

An agreement between a grocer and a baker, the tendency of which was to enhance the price of bread and create a monopoly, in consideration of a fixed money payment, was held in restraint of trade and invalid on the ground of unreasonableness. *Haywards v. Burnell*, 83 Law Times, 223.

An agreement made by a drummer with a purchaser not to sell a certain kind of goods to any one else in the same town is not contrary to public policy. *Keith v. Hirschberg Optical Co.*, 2 S. W. Rep. (Ark.) 777.

Contracts between railroad and telegraph companies vesting in the latter the exclusive right to use or occupy the right of way of the former for the erection of telegraph poles and other pur-

**53. General Rules Relating to Illegality.**—When the immediate object of an agreement is unlawful, the agreement is void. Where there are contained in the same instrument distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of

poses in connection with their business of transmitting messages, etc., by telegraph, are void, as in general restraint of trade, and tending to create monopolies. *W. U. Tel. Co. v. Amer. Union Tel. Co.*, 65 Ga. 160; *W. U. Tel. Co. v. B. & S. W. R. Co.*, 3 McCrary (U. S. C. C.), 130; *W. U. Tel. Co. v. A. U. Tel. Co.*, 9 Biss. (U. S. C. C.) 72; *W. U. Tel. Co. v. Balto., etc., Tel. Co.*, 23 Fed. Rep. 12; *W. U. Tel. Co. v. Nat. Tel. Co.*, 19 Fed. Rep. 660. And see *W. Va. Transp. Co. v. Pipe Line Co.*, 22 W. Va. 600; *W. U. Tel. Co. v. B. & O. Tel. Co.*, 23 Fed. Rep. 12; *B. & O. Tel. Co. v. W. U. Tel. Co.*, 24 Fed. Rep. 319. Contract not to run a steamboat on certain waters held void. *Oregon Steam Nav. Co. v. Hale*, 1 Wash. 283. See as to agreements to "corner" grain, *Raymond v. Leavitt*, 46 Mich. 447; and as to stock, *Dqs Passos on Stock Brokers and Stock Exchanges*, 454.

It is not unlawful for workmen to form themselves into a society and agree not to work for any person who shall employ any journeyman or other person not a member of such society after notice given him to discharge such workman. *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111. Nor is it illegal for "workmen to form and act as an association for the purpose of protecting themselves against the 'encroachments' of their employers, and to agree in furtherance of such object not to teach others their trade unless by consent of the society." *Snow v. Wheeler*, 113 Mass. 179. And see *Bowen v. Matheson*, 14 Allen (Mass.), 499; *Master Stevedores' Assoc. v. Walsh*, 2 Daly (N. Y.), 1. For instances of combinations by workmen held to be unlawful at common law, see *Carew v. Rutherford*, 106 Mass. 1; *State v. Donaldson*, 32 N. J. L. 151.

An agreement contained in the rules of a trade-protection society providing that no member should employ any traveller, carman, or outdoor employee who had left the service of another member without his consent in writing, until after the expiration of two years from his leaving such service, was held void as an unreasonable restraint on trade. *Mineral Water Bot. Ex. & Tr. Prot. Soc.*, 31 Solic. Journ. 626. A contract by which the

owners of several water-rights in a certain stream agree with each other, under a penalty of \$10,000, "agreed and liquidated damages," not to sell to certain parties now or hereafter endeavoring to obtain possession of such rights, and not to make any settlement or compromise with such parties, except by the written consent of the others, no limit of time being set, was held void as against public policy, being analogous to a contract in restraint of trade, and also as imposing a restraint and condition upon compromises or settlements of litigation and disputes, which are favored by law. *Ford v. Gregson*, 14 Pac. Rep. (Mont.) 659.

An agreement by several that one shall, on behalf of all, bid for a public contract or at a sale by auction, is not unlawful unless entered into for the purpose of stifling competition. *Kearney v. Taylor*, 15 How. (U. S.) 494, 519; *Huntington v. Bardwell*, 46 N. H. 492; *Bellows v. Russell*, 20 N. H. 427; *Bank v. Sprague*, 20 N. J. Eq. 159; *Smith v. Greenlee*, 2 Dev. L. (N. Car.) 126; *Goode v. Hawkins*, 2 Dev. Eq. (N. Car.) 393; *McMinn v. Phipps*, 3 Sneed (Tenn.), 196; *Small v. Jones*, 6 W. & S. (Pa.) 122; *James v. Fulcrod*, 5 Tex. 512; *Marie v. Garrison*, 83 N. Y. 14; *Marsh v. Russell*, 66 N. Y. 288; *Smith v. Ullman*, 58 Md. 183; *Switzer v. Skiles*, 8 Ill. 529; *Hunt v. Elliott*, 80 Ind. 245; *Phippen v. Stickney*, 3 Metc. (Mass.) 384; *Jenkins v. Frink*, 30 Cal. 586; *Breslin v. Brown*, 24 Ohio St. 565. Compare *Atcheson v. Mallon*, 43 N. Y. 147; *Woodruff v. Berry*, 40 Ark. 251. But an agreement not to bid if made for the purpose of stifling competition is unlawful. *Hannah v. Fife*, 27 Mich. 172; *Gibbs v. Smith*, 115 Mass. 592; *Swan v. Chorpensing*, 20 Cal. 182; *Wooten v. Hinkle*, 20 Mo. 290; *Gardiner v. Morse*, 25 Me. 140; *Ingram v. Ingram*, 4 Jones L. (N. Car.) 188; *King v. Winants*, 71 N. Car. 469; *Gulick v. Ward*, 5 Halst. (N. J.) 87; *Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29; *Brisbane v. Adams*, 3 N. Y. 129.

A contract to prevent competition in bidding for public work is contrary to public policy, and cannot be enforced. *Hunter v. Pfeiffer*, 9 N. E. Rep. (Ind.) 124.

those which are legal may be enforced, though the performance of those which are illegal cannot.<sup>1</sup> Where any part of an entire consideration is unlawful, all promises founded upon it are void.<sup>2</sup> Where the immediate object or consideration of an agreement is not unlawful, but the intention of both parties, at the time of the agreement, is unlawful, or one party's intention is unlawful to the knowledge of the other, the agreement is void. If the unlawful intention of one party is not known to the other at the date of the agreement there is a contract voidable at the option of the innocent party, if he discovers that intention at any time before the contract is executed.<sup>3</sup> An agreement may be made void by its

1. *Pigot's Case*, 11 Co. Rep. 27, *b.*; *Bank of Australasia v. Breillat*, 6 Moo. P. C. 152, 201; *Penna. Co. v. Wentz*, 37 Ohio St. 333, 339; *Ohio v. Board of Education*, 35 Ohio St. 519, 527; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 221; *Erie R. Co. v. Union L. & E. Co.*, 35 N. J. L. 240; *Presbury v. Fisher*, 18 Mo. 50; *Leavitt v. Palmer*, 3 N. Y. 19, 37; *W. U. Tel. Co. v. B. & S. W. R. Co.*, 3 McCrary (U. S. C. C.), 130. *Contra*, *Lindsay v. Smith*, 78 N. Car. 328.

In the case of an alternative promise, one branch of which is lawful and the other unlawful, the lawful branch can be enforced. *Hanauer v. Gray*, 25 Ark. 350.

"Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." *Willes, J.*, *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 250; *U. S. v. Bradley*, 10 Pet. (U. S.) 343, 360-363; *Hynds v. Hays*, 25 Ind. 31, 39; *State v. Findley*, 10 Ohio, 51.

2. *Waite v. Jones*, 1 Bing. (N. Car.) 656, 662; *Carleton v. Whitcher*, 5 N. H. 196; *Pettit's Adm'r v. Pettit's Distributees*, 32 Ala. 288; *Collins v. Murrell*, 2 Met. (Ky.) 163; *Kimbrough v. Lane*, 11 Bush (Ky.), 556; *Chandler v. Johnson*, 39 Ga. 85; *Filson's Trustees v. Himes*, 5 Pa. St. 452; *Bixby v. Moore*, 51 N. H. 402; *Bank v. King*, 44 N. Y. 87; *Foley v. Speir*, 100 N. Y. 552; *Perkins v. Cummings*, 2 Gray (Mass.), 258; *Woodruff v. Hinman*, 11 Vt. 592; *Snider v. Willey*, 33 Mich. 483; *Covington v. Threadgill*, 88 N. Car. 186; *Railroad Co. v. Taylor*, 6 Col. 1; *McQuade v. Rosecrans*, 36 Ohio St. 442; *James v. Jellison*, 94 Ind. 292.

When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would still lie for so much of the account as is made up of lawful items, the note itself is entirely void. That the plaintiff

cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful, see *Widoe v. Webb*, 20 Ohio St. 431; *Carleton v. Woods*, 28 N. H. 290; *Deering v. Chapman*, 22 Me. 488; *Cotton v. McKenzie*, 57 Miss. 418; *Pacific Guano Co. v. Mullen*, 66 Ala. 582. *Contra*, *Shaw v. Carpenter*, 54 Vt. 155; *Hynds v. Hays*, 25 Ind. 31. It is no defence to an action on a note given in part payment of an account that part of the account is for goods sold in violation of law if the items for goods lawfully sold exceed the amount of the note. *Warren v. Chapman*, 105 Mass. 87.

3. *Armstrong v. Toler*, 11 Wheat. (U. S.) 272; *Pearce v. Brooks*, L. R. 1 Ex. 213. An action will not lie for the price of goods sold which the seller knew were purchased for the purpose of being used in aid of the rebellion. "With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum* or of inferior criminality, he cannot do it without turpitude when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose." *Hanauer v. Doane*, 12 Wall. (U. S.) 342, 346; *Tatum v. Kelly*, 25 Ark. 209; *Oxford Iron Co. v. Quinchett*, 44 Ala. 487; *Milner v. Patton*, 49 Ala. 423; *Roquemore v. Alloway*, 33 Tex. 461; *Smitherman v. Sanders*, 64 N. Car. 522; *Lewis v. Latham*, 74 N. Car. 283. *Contra*, *Ruckman v. Lightner's Exrs.*, 24 Gratt. (Va.) 19; *Wallace v. Lark*, 12 S. Car. 576; *Tedder v. Odom*, 2 Heisk. (Tenn.) 68. The rule generally prevails in America that the bare knowledge of the vendor that the property sold is designed to be applied to a use unlawful, but not amounting to a felony or crime involving great moral turpitude, will not prevent a recovery based on the sale. *Tracy*



*v. Talmadge*, 14 N. Y. 162; *Bickell v. Sheets*, 24 Ind. 1; *Michael v. Bacon*, 49 Mo. 474; *Cheney v. Duke*, 10 G. & J. (Mod.) 11; *Steele v. Curle*, 4 Dana (Ky.), 381; *Bishop v. Honey*, 34 Tex. 252; *Armfield v. Tate*, 7 Ired. L. (N. Car.) 258; *Hubbard v. Moore*, 24 La. Ann. 591; *McKinney v. Andrews*, 41 Tex. 363; *Rose v. Mitchell*, 6 Col. 102. But see *Finch v. Mansfield*, 97 Mass. 89; *Suit v. Woodhall*, 113 Mass. 391; *Wilson v. Stratton*, 47 Me. 120; *Territt v. Bartlett*, 21 Vt. 184; *McConike v. McMann*, 27 Vt. 95. Compare *Spurgeon v. McElwain*, 6 Ohio, 442. In *Ely v. Webster*, 102 Mass. 304, and *Adams v. Couillard*, 102 Mass. 167, it was held that at all events mere reasonable cause of belief without actual knowledge on the part of the seller of the goods that the purchaser buys for an unlawful use does not prevent recovery of the price; and see *Brunswick v. Vallean*, 50 Iowa, 120. If goods are sold in a State where the sale is lawful, although the vendor knows that the purchaser buys them for the purpose of resale in another State where their sale is unlawful, he may recover their price in the latter State. *Hill v. Spear*, 50 N. H. 253; *Green v. Collins*, 3 Cliff. (U. S. C. C.) 494; *Sortwell v. Hughes*, 1 Curt. (U. S. C. C.) 244; *Tuttle v. Holland*, 43 Vt. 542; *Smith v. Godfrey*, 28 N. H. 379; *Webber v. Donnelly*, 33 Mich. 469; *Jameson v. Gregory's Exrx.*, 4 Met. (Ky.) 363; *McIntyre v. Parks*, 3 Met. (Mass.) 207. But if in any case the vendor does anything beyond making the sale to aid the unlawful purpose of the vendee he cannot recover. *Arnot v. Pittston, etc.*, Coal Co., 68 N. Y. 558; *Foster v. Thurston*, 11 Cush. (Mass.) 322; *Skiff v. Johnson*, 57 N. H. 475; *Aiken v. Blaisdell*, 41 Vt. 655; *Gaylord v. Soragen*, 32 Vt. 110; *Bancher v. Mansel*, 47 Me. 58.

Money lent to be used in an unlawful manner cannot be recovered. *Cannon v. Bryce*, 3 B. & Ald. 179; *White v. Buss*, 3 Cush. (Mass.) 448; *Plumer v. Smith*, 5 N. H. 553; *Cutler v. Welsh*, 43 N. H. 497; *Ruckman v. Bryan*, 3 Den. (N. Y.) 340; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Critchter v. Holloway*, 64 N. Car. 526. But that mere knowledge by the lender of the borrower's illegal purpose will not prevent a recovery, is held in *Jones v. Bank*, 9 Heisk. (Tenn.) 455; *McGavock v. Purycar*, 6 Coldw. (Tenn.) 34; *Henderson v. Waggoner*, 2 Lea (Tenn.), 133; *Lewis v. Alexander*, 51 Tex. 578; *Walker v. Jeffries*, 45 Miss. 160; *Howell v. Stewart*, 54 Mo. 400. If a building be let with an intent that it shall be used for an unlawful purpose the

lessor cannot recover the rent. *Ralston v. Brady*, 20 Ga. 449. See *Smith v. White*, 1 Eq. 626; *Riley v. Jordan*, 122 Mass. 231. That bare knowledge by the lessor of the lessee's intended unlawful use of the premises will not prevent his recovering rent. see *Udike v. Campbell*, 4 E. D. Smith (N. Y.), 570. Compare *Lyman v. Townsend*, 24 La. Ann. 625. An owner of property who has contracted to sell or let it may rescind the contract upon learning that the other party means to use it for an unlawful purpose. *Cowan v. Milbourn*, L. R. 2 Ex. 230; but see *O'Brien v. Brietenbach*, 1 Hilt. (N. Y.) 304. But a completely executed transfer of property, though made on an unlawful consideration, is valid, and cannot afterwards be set aside. *Ayerst v. Jenkins*, 16 Eq. 257; *Moore v. Adams*, 8 Ohio, 372; *Thomas v. Cronise*, 16 Ohio, 54; *Railroad Co. v. Mathers*, 71 Ill. 592, 598; *Levet v. His Creditors*, 22 La. Ann. 105; *Adams v. Barrett*, 5 Ga. 404, 414; *Setter v. Alvey*, 15 Kan. 157; *Dixon v. Olmstead*, 9 Vt. 310; *Worcester v. Eaton*, 11 Mass. 368; *Dumont v. Dufore*, 27 Ind. 263; *Ratcliffe v. Smith*, 13 Bush (Ky.), 173. In a series of cases in Ohio growing out of a note secured by mortgage of real estate given to compound a felony the decisions were as follows: In an action on the note the payee was held not entitled to recover, on account of the illegality of the consideration. *Roll v. Raguet*, 4 Ohio, 400. The same result was reached in a proceeding by *scire facias* on the mortgage. *Raguet v. Roll*, 7 Ohio, pt. 1, 76. The mortgagee then brought ejectment on the mortgage, the condition having been broken, and recovered a judgment for possession of the land. *Raguet v. Roll*, 7 Ohio, pt. 2, 70; *Acc. Williams v. Englebrecht*, 37 Ohio St. 383. Subsequently the mortgagor was allowed to redeem. 14 Ohio, 38. An insurance on a ship or goods is void if the voyage covered by the insurance is, to the knowledge of the owner, unlawful. *Wilson v. Rankin*, L. R. 1 Q. B. 163; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 585; 3 Kent Com. 262. And see *Kelly v. Ins. Co.*, 97 Mass. 288; *Johnson v. Ins. Co.*, 127 Mass. 555, cases of contract of insurance against fire. Compare further, on the general head of agreements made with an unlawful purpose, *Hanauer v. Doane*, 12 Wall. (U. S.) 342. In *Sprott v. U. S.*, 20 Wall. (U. S.) 459, it was held that a buyer of cotton from the Confederate Government, knowing that the purchase-money would be applied in support of the rebellion, would

connection with an unlawful purpose though subsequent to the execution of it. To have this effect it must be part and parcel of one unlawful scheme.<sup>1</sup> Any security for the payment of money under an unlawful agreement is itself void, even if the giving of the security was not part of the original agreement.<sup>2</sup> If the condition of a bond is unlawful, the whole bond is void.<sup>3</sup>

**54. Discharge of Contract—Meaning of Term.**—A contract is discharged when the legal relations which it created have ceased to exist.

**55. Discharge by Agreement—Express Rescission of Executory Contracts.**—An executory contract—that is, one which has not been acted upon—may be discharged by the simple agreement of the parties that it shall no longer bind either of them. The consideration for the promise of each party is the renunciation by the other of his rights under the contract. Each abandons his rights in consideration that the other will do the like. And it must be shown that the agreement was mutual, and not a mere waiver of his rights by one party.<sup>4</sup>

not be recognized by the United States courts as owner of the cotton. Field, J., dissented on the grounds that it was a question not of contract but of ownership, and that in deciding on title to personal property the *de facto* government existing at the time and place of the transaction must be regarded. See also *Walker's Exrs. v. U. S.*, 106 U. S. 413.

1. See *Armstrong v. Toler*, 11 Wheat. (U. S.) 258, 269; *McBlair v. Gibbes*, 17 How. (U. S.) 232; *Miltenberger v. Cooke*, 18 Wall. (U. S.) 421.

2. *Fisher v. Bridges*, 2 E. & B. 118; *Graeme v. Wroughton*, 11 Ex. 146; *Geere v. Mare*, 2 H. & C. 339; *Clay v. Ray*, 17 C. B. N. S. 188; *Edwards v. Skirving*, 1 Brev. (S. Car.) 548; *Coulter v. Robinson*, 14 S. & M. (Miss.) 18; *Lowe v. Young*, 59 Iowa, 364. But see *Bly v. Bank*, 79 Pa. St. 453; *Swan v. Scott*, 11 S. & R. (Pa.) 155.

3. *Co. Litt.* 206, *b.*; *Shep. Touchs.* 372; *Duvergier v. Fellows*, 10 B. & C. 826.

A subsequent agreement to vary the performance of a contract in a way that would make it unlawful is merely inoperative, and leaves the original contract in force. *City of Memphis v. Brown*, 20 Wall. (U. S.) 289.

"When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement." *Lord Howden v. Simpson*, 10 A. & E. 793, 818; *Sawyer v. Taggart*, 14 Bush (Ky.),

727, 734; *Wall v. Schneider*, 59 Wis. 352, 359; *Fraser v. Hill*, 1 McQu. 392; *Clarke v. Foss*, 7 Biss. (U. S. C. C.) 540, 558; *Lowe v. Young*, 59 Iowa, 364, 371; *Favor v. Philbrick*, 7 N. H. 326.

As to when money paid under an unlawful agreement can be recovered back, see article on ASSUMPSIT.

As to the law by which the legality of a contract is to be determined, see article on CONFLICT OF LAWS.

Extrinsic evidence is admissible to show that the object or consideration of an agreement is in fact illegal. See EVIDENCE.

4. *Blood v. Enos*, 12 Vermont, 625.

Thus, in an action for breach of promise of marriage, the defendant pleaded that before breach he had been exonerated and discharged by the plaintiff from the performance of his promise. It was objected that the plea was bad, in that it showed a mere waiver by the plaintiff, unsupported by any consideration. The court held that the form of the plea was allowable. "Yet we think," said Alderson, B., "that the defendant will not be able to succeed upon it . . . unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this, in effect, will be a rescission of the contract." *King v. Gillett*, 7 M. & W. 55.

Proof of the rescission by parol of a contract for the sale of land should be clear and convincing in order to entitle a court to act on it. *Davis v. Benedict*, 4 S. W. Rep. (Ky.) 339.

One who has explicitly abandoned his



**56. Rule as to Executed Contracts.**—But this rule applies to the contract only so long as it remains executory; for when it has become executed wholly or in part by the passage of a consideration, it cannot be discharged by a simple agreement, but only by performance of its terms, by a release under seal, or by an accord and satisfaction.<sup>1</sup>

**57. Negotiable Instruments.**—In England promissory notes and bills of exchange may be discharged by express waiver, without any consideration.<sup>2</sup> In America commercial instruments are treated as upon the same footing with ordinary simple contracts.<sup>3</sup>

**58. Change of Terms.**—As an executory contract may be altogether discharged by mutual agreement, so it may be changed.<sup>4</sup> Where, however, only one side of the agreement is changed, unless the

rights under a contract and accepted an alternative is bound by his decision. He cannot again claim under the contract. *Kimmerle v. Hass*, 53 Mich. 341.

Where two persons enter into a contract, the one to prospect for the discovery of mining claims and the other to furnish the necessary money, provisions, etc., and do the discovery work on claims found, attend to the surveys, sink shafts, etc., such a contract, having been partly performed on both sides, cannot be regarded as rescinded unless the circumstances show an absolute abandonment of the contract as to future enterprises. Proof of negotiations for an abandonment is insufficient to establish a rescission. The parties cannot treat the contract as binding and as rescinded at the same time. *Chadbourn v. Davis*, 13 Pac. Rep. (Col.) 721.

If one in his contract calls for an article of a particular quality or style of workmanship and elects to accept in lieu of it one of another kind, he discharges the other party from the obligation of furnishing an article which complies with the specifications of the contract, and he becomes bound by a new implied contract to pay for the article he has accepted what it is reasonably worth. *Presb. Ch. v. Hoopes Co.*, 8 Atl. Rep. (Md.) 752.

1. *Foster v. Dawber*, 6 Ex. 839.

To illustrate: If A, in consideration of certain services to be rendered by B, promises to build a house for B, before the work has begun the parties may release each other from all the obligations which they have incurred by simply agreeing to abandon the contract. But if A entered upon the work and built the house, an agreement to rescind the contract would be without consideration; A would surrender his claim to B's ser-

vices, but B would give nothing in return. So if the contract were broken one party would become entitled to a right of action against the other, and a mere waiver of the right without any consideration, or the formality of a seal, would not be binding.

2. The reason for this difference is, that bills of exchange are governed by the law merchant, which was imported into England from countries where a debt might be released by express words, unaccompanied by any satisfaction or solemn instrument; and promissory notes, having been put upon the same footing with bills of exchange by statute 3 and 4 Anne, c. 9, are governed by the same rule. Baron Parke in *Foster v. Dawber*, 6 Ex. 839.

3. *Crawford v. Millspaugh*, 13 Johns. (N. Y.) 87; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169; *Bender v. Sampson*, 11 Mass. 42; *Notes to Cumber v. Wane*, 1 Sm. L. C. (8th Am. Ed.) 667-8.

4. *McNish v. Reynolds*, 95 Pa. St. 483; *Brown v. Everhard*, 52 Wis. 205.

If they alter its terms it is equivalent to making a new contract, consisting of the new terms and what remains unchanged of the original contract. The old agreement being incorporated in the new, the latter must be construed with reference to it. *Carr v. Wallachian Petroleum Co.*, L. R. 1 C. P. 636.

The undertaking of each party to do something different from that which he first agreed to do, furnishes a consideration for the promise of the other. A subsequent agreement to vary the performance of a contract in a way that would make it unlawful is merely inoperative, and leaves the original contract in force. *City of Memphis v. Brown*, 20 Wall. (U. S.) 289.

old contract be rescinded the new agreement will be without consideration.<sup>1</sup>

**59. New and Inconsistent Contract.**—If a new agreement be made which is inconsistent with the former agreement so that they cannot subsist together, the old one is impliedly discharged by the new one.<sup>2</sup>

1. If A contract to do work for B for one thousand dollars, while the contract is still in force, a subsequent promise by B to pay him fifteen hundred dollars would be a mere gratuitous undertaking, for a promise to pay a man for doing that which he is already bound to do, is obviously as barren of consideration as a promise to pay a man for doing nothing. *Seybolt v. N. Y. L. E. & W. R. Co.*, 95 N. Y. 562.

A promise by a lessee to pay rent in advance, when the rights of the parties are already fixed by the lease and there is nothing either of detriment to the promisee or of benefit to the promisor beyond the obligations mutually established in such lease, is *nudum pactum*. *Hasbrouck v. Winkler*, 48 N. J. L. 431.

When the old contract has been rescinded the parties are discharged from all their obligations under it, and of course may make a new agreement upon whatever terms they please. *Lattimore v. Harsen*, 14 Johns. (N. Y.) 330; *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Magarity v. Shipman*, 2 Mackey (D. C.), 334.

The case of *Holmes v. Doane*, 9 Cushing (Mass.), 135, furnishes a good illustration of the practical application of this principle. There, A agreed to carry B in his vessel to California, if B, who was a carpenter, would work in preparing her for sea and during the voyage. Before the vessel was ready for sea A refused to carry B, unless he would sign the shipping papers, and pay twenty-five dollars. B assented to this arrangement, and signed the papers, but failing to pay the amount agreed upon was left on shore by A, against whom he subsequently brought suit. The court held that he could not recover. Dewey J., in delivering the judgment, said: "The defendant might show that, at a period prior to the sailing of the vessel, he gave notice to the plaintiff that he would not comply with his original agreement, and would hold himself responsible for all damages by reason of such breach of contract; and that the plaintiff thereupon elected not to avail himself of his right to recover damages therefor, but chose to make a new contract, giving the defendant more advantageous terms, . . . and such new

contract would be a valid contract between the parties."

If A agrees to sell to B goods at a certain price, and then repudiates his agreement, and demands more, and B agrees to pay and does pay more, he cannot maintain an action for breach of the agreement. *Rogers v. Rogers*, 139 Mass. 440.

A agreed to do certain work, and found the material on which he had to work was not as represented. He then threatened to rescind the contract, and B, the chief contractor, told him to go on, and that A would be compensated for the extra work. A did so. *Held*, he could recover the additional compensation, and that the promise was not made voluntarily and without consideration. *Osborne v. O'Reilly*, 10 N. J. Law Jour. (N. J.) 216; s. c., 9 Atl. Rep. 209. See also *Cooke v. Murphy*, 70 Ill. 96; *Coyner v. Lynde*, 10 Ind. 282; *Lawrence v. Davey*, 28 Vt. 264; *Bishop v. Busse*, 69 Ill. 403; *Stewart v. Keteltas*, 36 N. Y. 388, 392; *Rollins v. Marsh.*, 128 Mass. 116; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489. Compare *Endriss v. Belle Isle Ice Co.*, 49 Mich. 279. *Contra*, that they hold what one is legally bound to do a consideration for a promise. *Ayres v. Railroad Co.*, 52 Iowa, 478; *McCarty v. Hampton Bldg. Ass'n*, 61 Iowa, 287; *Festerman v. Parker*, 10 Ired. L. (N. Car.) 474; *Erb v. Brown*, 69 Pa. St. 216; *Vanderbilt v. Schreyer*, 91 N. Y. 392.

2. Where A made an agreement with B for the performance of various literary labors, and subsequently a new agreement was entered into between them by which A agreed to devote his whole time and attention to the editing of a certain newspaper, it was held that the second agreement rescinded the first on the ground of inconsistency. *Patmore v. Colburn*, 1 C. M. & R. 65. See also *Taylor v. Hilary*, 1 C. M. & R. 741; *Thornhill v. Neats*, 8 C. B. N. S. 831; *Bacon v. Cobb*, 45 Ill. 47; *Stow v. Russell*, 36 Ill. 18; *Chrisman v. Hodges*, 75 Mo. 413.

It results from the doctrine that a new and inconsistent agreement will discharge a former contract, that a surety will be:

**60. Change of Parties.**—A contract may be discharged by an agreement which, while leaving the manner of performance unchanged, substitutes new parties in place of those originally bound.<sup>1</sup>

**61. Form of New Agreement.—Contracts under Seal—Statute of Frauds.**—It is a maxim of the common law that every contract or agreement ought to be dissolved by matter of as high a nature as that which first made it obligatory—*Unumquodque dissolvitur eodem ligamine quo ligatur.*<sup>2</sup> Consequently, at the common law a contract under seal could not be discharged or varied by a subsequent parol agreement.<sup>3</sup> In America this doctrine has been somewhat modi-

discharged if the principals alter the original contract in any material point. As the surety is not a party to the new agreement he is not bound by it, and he is not liable under the original contract, for that has been discharged by the new agreement. *Whitcher v. Hall*, 5 B. & C. 276; *General Steam Navigation Co. v. Rolt*, 6 C. B. N. S. 550; *Polak v. Everett*, L. R. 1 Q. B. D. 669.

"The law requires that if there is any agreement between the principals with reference to a contract to the performance of which another is bound as surety, he ought to be consulted in regard to any proposed alteration, and if he is not, or does not consent to the alteration, he will be no longer bound, and the court will not inquire whether it is or not to his injury." *Paine v. Jones*, 76 N. Y. 274, 278-9; *Rowan v. Sharp's Rifle Mfg. Co.*, 33 Conn. 1, 23; *Bensinger v. Wren*, 100 Pa. St. 500. See title PRINCIPAL AND SURETY.

1. Inst. Lit., III. xxx, § iii; Mac-kelvey's Roman Law, § 538. Suppose A owes B one hundred dollars, and B owes C one hundred dollars, the three may meet and agree that, instead of A paying B, and B paying C, A shall pay the money directly to C; C accepts A as his debtor and discharges B, and B in his turn discharges A. The consideration for A's promise to pay C is the abandonment by B of his claim against A; for B's release of A, C's release of B; and for C's release of B, A's promise to pay him the one hundred dollars. Thus there is a consideration for the promise of each. *Tatlock v. Harris*, 3 Term. 180; 1 Pars. on Contrs. \*217.

Where H. sold a wagon to A., who afterward sold it to C., and C. agreed to pay H., who consented to accept him as his debtor instead of A., it was held that the debt due by A. to H. was extinguished. *Heaton v. Angier*, 7 N. H. 397.

The principle is frequently applied when a partnership is changed by the retirement of a partner, or the addition of new

members to the firm. When a partner retires from a firm and a new member is taken in to fill his place, the creditors of the old firm may agree to release the retiring partner, and look to the new firm for the payment of their claims. *Kountz v. Holthouse*, 85 Pa. St. 235; Story on Part., §§ 152, 153. As the new partner is not liable for the debts of the old firm, his assumption of liability is a sufficient consideration for the creditor's promise to release the retiring partner. "I apprehend the law to be now settled," said Parke, B., in *Hart v. Alexander*, 2 M. & W. 484, 493, "that if one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties,—the creditor, the old firm, and the new firm,—be transferred to the new firm."

2. Broom's Legal Maxims, \*877.

3. It was no answer to an action for a breach of covenant, that the defendant had abstained from performing at the request of the plaintiff, although if he had been prevented from performing by the immediate act of the plaintiff he would have been excused. In *West v. Blake-way*, 2 M. & G. 729, an action of covenant was brought by the executor of a lessor against the lessee, upon a covenant in the lease to yield up the demised premises at the expiration of the term, together with all erections and improvements which should be made during the term. The breach assigned was the removal of a greenhouse. The defendant pleaded, that it was agreed between the lessor and himself that if he would erect a greenhouse upon the demised premises he should be at liberty to pull it down and remove it at the expiration of the term, and that he, confiding in the agreement, did erect such a greenhouse. The court held that the plea was bad. The original contract being under seal, performance of it could not be dispensed with by an agreement not under seal. See also *Thompson v. Brown*, 7 Taunt. 656; *Spence v. Healey*, 8 Ex. 668; *Cordwent*

fied, and a parol dispensation of performance is generally held to be a good defence to an action on a sealed instrument, if it is supported by a sufficient consideration, or has caused the breach for which the party who gave it seeks to recover.<sup>1</sup> A simple contract may be discharged by a subsequent parol agreement, whether the original contract were reduced to writing, or consisted simply of spoken words. When, however, the original contract is required by the Statute of Frauds to be in writing, the better opinion is that it cannot be varied by a subsequent contract which is not in writing. As the new contract is rendered void by the Statute of Frauds, it ought not to affect the rights acquired under the former agreement.<sup>2</sup> There are cases, however, which decide the other way.<sup>3</sup> And in England it would seem that a contract which is required by the statute to be in writing may be absolutely discharged by an oral agreement, although it cannot be varied without a writing.<sup>4</sup>

**62. Provisions for Discharge.**—A contract may contain provisions which make it determinable under certain circumstances.

**63. Non-fulfilment of a Specified Term.**—The parties may introduce into their contract a provision that if one of them fail to fulfil a certain specified term, the other shall be entitled to treat the agreement as at an end.<sup>5</sup>

*v. Hunt*, 8 Taunt. 596; *Mayor of Berwick v. Oswald*, 1 E. & B. 295; *Woodruff v. Dobbins*, 7 Blackford (Ind.), 582; *Hogencamp v. Ackerman*, 4 Zab. (N. J.) 133.

1. *U. S. v. Howell*, 4 W. C. C. R. 620; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528; *Le Fevre v. Le Fevre*, 4 S. & R. (Pa.) 241; *Dearborn v. Cross*, 7 Cowen (N. Y.), 48; *Canal Co. v. Ray*, 101 U. S. 522; *Esmond v. Van Benschoten*, 12 Barb. (N. Y.) 366; *Notes to Cumber v. Wane*, 1 Sm. L. C. (8th Am. Ed.) 665, 666; 2 Am. L. C. (5th Ed.) 590-594. See also *Nash v. Armstrong*, 10 C. B. N. S. 259.

In an action upon a contract under seal, which is executory on both sides, the defendant may show, in defence, that before any part of the contract had been executed, and before a breach, the parties agreed to vary its terms, and that he offered to perform as thus varied, but it is necessary to show an assent to the change on the part of the plaintiff, upon a common understanding as to the change. *Holdsworth v. Tucker*, 3 New Eng. Rep. (Mass.) 499.

2. *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Noble v. Ward*, L. R. 2 Ex. 135; *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; s. c., L. R. 3 Q. B. 272; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200; *Swain v. Seamans*, 9 Wall. (U. S.) 272; *Hill v. Blake*, 97 N. Y. 216; *Notes to Cumber*

*v. Wane*, 1 Sm. L. C. (8th Am. Ed.) 669.

3. *Cummings v. Arnold*, 3 Met. (Mass.) 486; *Stearns v. Hall*, 9 Cushing (Mass.), 31.

4. *Willes, J.*, in *Noble v. Ward*, L. R. 2 Ex. 135; *Lord Denman, C. J.*, in *Goss v. Lord Nugent*, 5 B. & Ad. 58.

5. The difference between this mode of discharge and that by breach is this: When the parties have agreed that one of them shall have an option to dissolve the contract if certain of its terms are not observed, upon the non-fulfilment of the specified terms the party may exercise his option, and if he elects to treat the contract as at an end it will be discharged. But when a term of the contract is broken, and there is no agreement that the breach of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract; for if it is not, the contract will not be discharged. L. R. 7 Ex. 7.

The case of *Head v. Tattersall* furnishes an instance of a contract which contained a provision for its discharge. The plaintiff, on Monday, bought a horse of the defendant which was warranted to have been hunted with the Leicester hounds. By a condition of the contract he was to be at liberty, up to the Wed-

**64. Occurrence of Particular Event.**—The parties may introduce a provision that the contract shall be discharged upon the performance of a condition, or the occurrence of a particular event.<sup>1</sup>

**65. Option to Discharge—Domestic Service.**—A continuing contract may contain a provision which makes it determinable at the option of either party; and such a provision is sometimes incorporated into it by implication from known usage and custom.<sup>2</sup> A con-

nesday evening following the sale, to return the horse if it did not answer to its description. While it was in his possession, though not through any default or neglect on his part, it met with an accident which depreciated its value. The horse did not answer to the description, and the plaintiff returned it before the Wednesday evening, and brought an action for the price which he had paid. *Held*, that he was entitled to recover. *Cleasby, B.*, said: "As a time for returning the horse was expressly fixed by the contract, an accident occurring within the time, from a cause beyond the plaintiff's control, ought not to deprive him of his right. . . . The effect of the contract was to vest the property in the buyer, subject to a right of rescission in a particular event, when it would revert in the seller. I think, in such a case, that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value, caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is re-vested, and he must therefore bear the loss." See also *Elphick v. Barnes*, L. R. 5 C. P. D. 321.

1. Thus, a bond generally contains a condition that if the obligor does some act the obligation shall be void. So it is usual to insert in a charter-party a provision that the ship-owner shall be excused if the performance of the contract be prevented by the occurrence of certain specified events. In *Geipel v. Smith*, L. R. 7 Q. B. 404, the defendant engaged to load his vessel with a cargo of coals at a spout, as directed by the plaintiff, and, having loaded, to proceed to Hamburg, and there deliver the coals. The charter-party excepted certain risks, one of which was "the restraints of princes and rulers." Before anything had been done by either party in furtherance of the contract, war broke out between France and Germany, and the port of Hamburg was declared to be blockaded. The defendant threw up the charter-party, and refused even to go to the spout and load his cargo. The plaintiff sued him for a breach of contract, claim-

ing that he was bound to load his cargo, that part of the contract not coming within one of the excepted risks; but the court held that he could not recover. "It was an entire contract," said *Cockburn, C. J.*, "and there was an insuperable obstacle to the performance of it *in toto*; and the defendant was, therefore, justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it, was useless."

Where a contract for the sale of a quarry provided that the agreement to purchase should be null and void in case no profits were made, or the premises should be abandoned by reason of vendees "believing that the quarry could not be a paying one or a profitable one to them in their estimation," in a suit brought for a balance of the purchase-money, it being shown that vendees made no profit, and believed the quarry unprofitable, *held*, that vendor was not entitled to recover, and it was error to submit to the jury the question of possible profits. *Krum v. Mersher*, 9 Atl. Rep. (Pa.) 334.

Stipulations that the law imports into a contract become as effectually a part of its terms as though they were expressly written therein. *Snow v. Ind., B. & W. R. Co.*, 7 West. Rep. (Ind.) 264.

It is an implied term in every contract with a carrier, that if a loss is caused "by the act of God, or the public enemy, or a defect inherent in the thing carried," the carrier shall be excused. See *Nugent v. Smith*, L. R. 1 C. P. D. 423. For meaning of "act of God" see article on ACT OF GOD.

**2. Offer and Acceptance—Discharge by Agreement.**—Where to either party to a written contract is reserved the option of rescinding it before a certain day, and one party before the day returns the contract, begging for an extension of the time for its performance, this is equivalent to a rescission if the extension is not agreed to. *Thayer v. Allison*, 109 Ill. 180.

If one man employ another in the capacity of clerk, provided that each shall have a right to put an end to the

tract for domestic service may be determined by the servant upon giving the customary notice, and by the master upon giving the customary notice, or paying the servant his wages for the length of time to which he is entitled to notice. The length of the notice is regulated by the custom of the place where the contract is made.<sup>1</sup> When the hiring is for no certain time, and the wages are not paid at fixed periods, the contract may be determined at the will of either party, without giving any notice.<sup>2</sup>

**66. Discharge by Performance.**—When the terms of a contract have been fulfilled the contract is discharged. In order that performance may work a discharge, both the parties must have done all that the contract required them to do. When one party has performed his part of an agreement he is free from further liability, but the contract is not discharged until the other party also has performed his part of the agreement.<sup>3</sup>

If there be a partial or total failure of performance, the contract is broken.

**67. Payment of Less than is Due—By Promissory Note.**—It is an old rule of the common law that the payment of a sum less than that which is due cannot operate as a satisfaction of the debt.<sup>4</sup>

relation at any time upon giving one month's notice to the other, the employment may be determined by complying with the express terms of the agreement.

Under a contract of employment for a stated term at a sum certain, which gives the employer the right to discharge the employee for "unfitness," and constitutes him sole judge of the sufficiency of reasons for discharge, he has no right to discharge the employee before the expiration of the term because he refuses to consent to a reduction in wages. *Winship v. Portland League Base-ball & Athletic Assn.*, 7 Atl. Rep. (Me.) 706, 78 Me. 571.

1. *Parker v. Ibbetson*, 4 C. B. N. S. 347; Add. on Confs. 438-9; Whart. on Confs., § 718; Leake, 673.

In England, the hiring of a servant without any engagement as to the duration of the service is construed to be a hiring for a year, determinable by a month's warning, or the payment of a month's wages. *Nowlan v. Ablett*, 2 C. M. & R. 54. Such an implication does not generally exist in America.

2. Thus in *Coffin v. Landis*, 46 Pa. St. 426, the defendant employed the plaintiff to sell his lands. Nothing was said in regard to the time during which the agreement should continue. The defendant discharged the plaintiff without previous notice, and the court held that he was justified in doing so, as the agreement was determinable at the will of either party, without warning to the other.

3. The performance of a contract should be a fair and reasonable performance of that which the parties intended should be done—not a performance which merely satisfies the letter of the agreement, but a substantial *bona fide* compliance with its spirit. When and by whom a contract should be performed, and whether or not certain acts amount to a performance, are questions which can only be answered by referring to the agreement itself.

4. If one man owes another one hundred dollars, and the creditor agrees to accept fifty dollars in satisfaction of his claim, and gives the debtor a receipt in full, he may immediately afterwards sue him for the other fifty dollars. But if the creditor receives some collateral thing in satisfaction, it is a good discharge of the debt. The courts will not inquire into its value. Thus, a horse worth fifty dollars might be received in satisfaction of a debt of one thousand dollars, while a payment in cash of five hundred dollars would leave the debtor liable to a suit for the balance of the debt. The reason for this difference is, that money having a fixed value, a small sum cannot possibly be worth as much as a larger; whereas a collateral thing, for all that appears, may be worth as much as, or more than, the debt. It was accordingly held in the early cases, that a promissory note for a less amount than the debt could not be received in satisfaction. "If £5 be no satisfaction for £15, why is a simple con-



When a creditor accepts a promissory note from his debtor, the question arises whether the note is an absolute extinguishment of the debt, or an extinguishment conditional upon its payment at maturity.

In England, and in most of the United States, in the absence of other evidence, the presumption is that a promissory note was intended as a conditional payment, so that if it be not paid at maturity payment of the debt may be enforced as if the note had not been given.<sup>1</sup> In Massachusetts, Maine, and Vermont the presumption is that it was intended as an absolute payment.<sup>2</sup> The difference, however, is only one of presumption, for it is universally held that if the creditor accepts the note in full satisfaction and discharge of the debt, his only remedy is upon the note.<sup>3</sup>

**68. Tender.**—As performance will discharge a contract, so in some cases will an attempt to perform, although actual performance be not accomplished.<sup>4</sup>

tract to pay £5 a satisfaction of another simple contract of three times the value?" *Cumber v. Wane*, 1 Strange, 426; s. c., 1 Sm. L. C. 633.

But this doctrine has been overruled by the modern cases, and it is now held that a promissory note may be a good satisfaction, although it be for a less amount than the debt. *Goddard v. O'Brien*, L. R. 9 Q. B. D. 39; s. c., 21 Amer. L. Reg. N. S. 637; *Mechanics' Bank v. Huston*, 11 W. N. C. (Pa.) 389.

If a promissory note may be a satisfaction for a sum greater than its face value, there seems to be no reason why a money payment should not have the same effect, for a promissory note cannot possibly be worth more than its face value in cash. It is probable that the old doctrine of the common law will sooner or later be abandoned, and a creditor who chooses to receive a partial payment in satisfaction of his demands be held to his agreement. See *Goddard v. O'Brien*, L. R. 9 Q. B. D. 39.

1. *Sard v. Rhodes*, 1 M. & W. 153; *Sayer v. Wagstaff*, 5 Beav. 423; *Peter v. Beverly*, 19 Pet. (U. S.) 532; *Robinson v. Read*, 9 B. & C. 455; *Maillard v. Duke of Argyll*, 6 Sc. N. R. 938; *In re London, etc., Bank*, 34 L. J. Ch. 418; Article on "Payment in Something Else than Money," 11 Cent. L. J. 360; *Morriss v. Harveys*, 75 Va. 726; *Sayre v. King*, 17 W. Va. 562; *In re Parker*, 11 Fed. Rep. 397.

Where the debtor gives a new security which is void and avoided, the creditor may sue him on the original contract. *Walker v. Mayo*, 3 New Eng. Rep. (Mass.) 195.

2. 2 Pars. on Contrs. (7th Ed.)\* 624, and notes.

3. So, if the creditor is guilty of laches, and omits duly to present the bill or note, and to give notice of its dishonor if not paid, the instrument becomes money in his hands as between him and the person from whom he received it. *Peacock v. Pursell*, 14 C. B. N. S. 728. So if the note were originally received as cash, as bank bills are usually received, the payment would be absolute. *Guardians of the Poor v. Greene*, 1 H. & N. 889.

4. Thus, if a vendor tenders goods in pursuance of the terms of a contract, and satisfies all the requirements of the contract with respect to delivery and so forth, but the vendee refuses to accept them, the vendor may successfully maintain or defend an action for the breach of the contract. *Startup v. Macdonald*, 6 M. & G. 593.

But when performance consists in the payment of money, a tender of payment does not discharge the contract, but rather establishes the liability of him who makes the tender, for, in general, he is liable to pay the sum which he tenders whenever he is called upon to do so. But it puts a stop to accruing damages or interest for delay in payment, and if an action be brought for the debt it entitles the defendant to costs. *Cornell v. Green*, 10 S. & R. (Pa.) 14.

In order that a man may profit by his tender, he must from the time of making it continue ready and willing to carry it into effect. Consequently, if after having made a tender he refuses to pay his debt, he loses the benefit of his tender.

The tender must be an actual production of the money, and a proffer of it to the creditor. The entire sum due must be offered in such a form that the credi-

**69. Impossibility.**—A contract may be impossible of performance at the time when it is made; or it may become impossible by events happening subsequently to its formation.

**70. Known to Both Parties.**—A contract to do a thing which both the promisor and promisee know to be physically impossible of performance imposes no obligation upon either party.<sup>1</sup>

**71. Legal Impossibility.**—A contract to do a thing which is legally impossible is void.<sup>2</sup>

**72. Non-existence of Subject-matter.**—When a contract is made upon the supposition that a certain thing is in existence, and it turns out that the thing never was in existence, or had been destroyed at the time when the contract was made, the agreement is void as having been made under a mistake.<sup>3</sup>

tor may take the exact amount of his debt. The tender must be unconditional. A debtor has no right to annex any conditions to which the creditor has a right to object. For instance, he has no right to demand a receipt in full. But if he merely asks a receipt for the amount which he tenders, the tender will be good. See article on "The Requisites to a Valid Tender," 17 Amer. L. Reg. N. S. 745, where the cases are collected. See title TENDER.

1. No expectation is created in the breast of the promisee, and therefore no wrong is done him if the promise is not fulfilled. It is not so much the impossibility of performance which renders the agreement invalid, as it is the absence of that true consent which is the life of every contract. "I think," said Brett, J., in *Clifford v. Watts*, L. R. 5 C. P. 588, "it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said, that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted." Accordingly, if a man should bind himself to do something which may be deemed to be within the range of possibility, but which has never yet been done, and is not even known to be possible, he would be responsible in damages if he failed to perform his agreement. A contract to construct a vessel which should be able to cross the Atlantic in five days would very probably be valid at the present day, although such a thing has never yet been done; while one hundred years ago such a contract would have been thought absurd. "I am not prepared to say," said Willes, J., in the case last cited,

"that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non performance, and cannot set up by way of defence that the thing was impossible." The domain of impossibility is being constantly narrowed by the increase of scientific knowledge.

2. Where a servant agreed, in consideration of certain services to be rendered to himself, to discharge a debt due to his master, it was held that the agreement was void, because it was legally impossible for the servant to discharge a debt due to his master. *Harvy v. Gibbons*, 2 Lev. 161. See also *Faulkner v. Lowe*, 2 Ex. 595; *Stevens v. Coon*, 1 Pinney (Wis.), 356.

3. The parties make no contract because the thing which they supposed to exist, and the existence of which was indispensable to the making of their contract had no existence. *Gibson v. Pelkie*, 37 Mich. 380; *Franklin v. Long*, 7 Gill & John. (Md.) 407; *Strickland v. Turner*, 7 Ex. 208.

Where a cargo of corn was sold while on its way by sea to London, and it turned out that prior to the sale the cargo had been destroyed, it was held that the contract of sale was invalid. "It appears to me clearly," said Lord Cranworth, "that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought." No such thing existing, the contract was void. *Couturier v. Hastie*, 5 H. L. C. 673.

So a covenantee was discharged from the performance of his covenant to dig



**73. Known to One Party.**—When the impossibility of performance is known to the promisor, but not known to the promisee, the former is liable in damages for a failure to perform.<sup>1</sup>

If the possibility is known to the promisee, but not to the promisor, the former cannot sue the latter for a failure to perform.<sup>2</sup>

**74. Effect of Change in Law.**—Parties must always be considered as contracting with reference to the law as it existed at the time of the contract. If performance of a contract becomes wholly or in part impossible by reason of a change in the law, the contract is to that extent discharged.<sup>3</sup>

one thousand tons of potter's clay yearly, upon the discovery that at the time of making the covenant there was not so much as one thousand tons of clay under the land. *Clifford v. Watts*, L. R. 5 C. P. 577.

Where A by an agreement in writing "leased" to B "all the clay that is good No. 1 fire-clay on his land" described for a term of three years, subject to the condition that B "shall mine or cause to be mined, or pay for, not less than 2000 tons of clay every year, and shall pay therefor twenty-five cents per ton for every ton of clay monthly as it is taken away," it was held that if clay of the quality mentioned and in quantity sufficient to justify its mining could not by the use of due diligence be found on the land, then there was no obligation to pay the amount agreed on in case of failure to mine. *Brick Co. v. Pond*, 38 Ohio St. 65; *Cook v. Andrews*, 36 Ohio St. 178.

In an action by one railroad company against another for breach of contract to co-operate in securing such legislation as would result in an appropriation of public lands for the roads, it appearing that all available lands were exhausted, so that the effort would necessarily have been futile, *held*, that the plaintiff could not recover. *Dubuque S. W. R. Co. v. Ced. Rap. & Mo. Riv. R. Co.*, 66 Iowa, 366.

One who agrees with a mortgagee to pay a mortgage on its assignment to him is released from his promise by a foreclosure and sale by the mortgagee. *Un. Sav. Inst. v. Hill*, 139 Mass. 47.

Where a contract is entered into upon an assumption of the parties of the existence of a certain fact as to which it afterwards appears that the parties were mutually mistaken, the contract obligation ceases. *Muhlenberg v. Henning*, 9 Atl. Rep. (Pa.) 144.

1. If a married man promises to marry a single woman who does not know that he is already married, he is

liable for a breach of his promise. *Wild v. Harris*, 7 C. B. 999; *Millward v. Littlewood*, 5 Ex. 775.

2. *Leake on Cont.* 692.

3. *Atkinson v. Ritchie*, 10 East. 534; *Mayor of Berwick v. Oswald*, 3 E. & B. 665; *Brown v. Mayor of London*, 9 C. B. N. S. 726; s. c., in Ex. Ch. 13 C. B. N. S. 828; *Jones v. Judd*, 4 N. Y. 412; *Brick Presby. Ch. v. N. Y.*, 5 Cowen (N. Y.), 538.

The laws subsisting at the time of making a contract and where it is to be performed enter into and form a part of it as if they were expressly referred to or incorporated in its terms. *Holbrook v. Ives*, 7 West. Rep. (Ohio) 201.

In *Baily v. De Crespigny*, L. R. 4 Q. B. 180, the defendant demised certain premises to the plaintiff, and covenanted that neither he nor his assigns would, during the term, permit any but ornamental buildings to be erected on a certain paddock fronting the demised premises. Subsequently a railroad company took the paddock, under powers given to them by an act of Parliament, and built a railway station upon it. In an action for breach of the covenant it was held that the defendant was discharged from covenant by the act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform.

See also *Exposito v. Bowden*, 7 E. & B. 763, 783. The outbreak of war dissolves a partnership previously existing between subjects of two hostile countries. *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; 16 Johns. (N. Y.) 438; *Matthews v. McStea*, 91 U. S. 7, 9; *The William Baggally*, 5 Wall. (U. S.) 377, 407; *Taylor v. Hutchinson*, 25 Gratt. (Va.) 536; *Hubbard v. Matthews*, 54 N. Y. 43, 48, 49. If a creditor has an agent in the country of the enemy, payment by the debtor to the agent resident there is lawful. *Ward v. Smith*, 7 Wall. (U. S.) 447; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; *Kershaw v. Kelsey*, 100 Mass. 561, 573; *Rodgers v. Bass*,

**75. Temporary Change.**—When the impossibility created by the law is only temporary, the contract will be suspended, but will revive again when the impediment is removed.<sup>1</sup>

46 Tex. 505; *Hale v. Wall*, 22 Gratt. (Va.) 424. And so is the investment there by the agent of money in his hands. *Bar-tow Co. Commrs. v. Newell*, 64 Ga. 699. A provision in a contract of insurance that no action shall be maintainable on it unless begun within twelve months next after the occurrence of the loss, does not in case of war between the countries of the contracting parties operate like a statute of limitations by letting the term open and expand itself so as to receive within it the term of legal disability created by the war, and then close together at each end of that period, so as to complete itself as though the war had never occurred, but by having become impossible of performance by law is wholly discharged. *Semmes v. Ins. Co.*, 13 Wall. (U. S.) 158. Where by the terms of a contract for work and labor the full price is not to be paid until the work is completed, and a complete performance becomes impossible by act of the law, the contractor may recover for the work actually done at the full prices agreed upon. *Jones v. Judd*, 4 N. Y. 411.

To discharge the contract the law must make performance impossible not merely more expensive or burdensome. *Baker v. Johnson*, 42 N. Y. 126.

1. In one case a vessel was detained in port for two years by an embargo, yet the owners were held responsible for not performing their contract when the embargo was removed. *Hadley v. Clarke*, 8 T. R. 259; *Baylies v. Fettyplace*, 7 Mass. 325; *Palmer v. Lorillard*, 16 Johns. (N. Y.) 348; *Odlin v. Ins. Co.*, 2 Wash. C. C. 312; *McBride v. Ins. Co.*, 5 Johns. (N. Y.) 299. In *Statham v. Ins. Co.*, 93 U. S. 24, the court was called upon to pass upon the effect of the non-payment of the stipulated annual premium in a policy of life insurance conditioned to be void on non-payment of the premium, where the failure to pay was caused by the intervention of war between the territories in which the insurance company and the assured respectively resided, which made it unlawful for them to hold intercourse. A majority of the court held: 1. That such a policy "is not an insurance from year to year like a common fire policy, but the premiums constitute an annuity the whole of which is the consideration for the entire insurance for life; and the condition is a condition subsequent, making by its non-perform-

ance the policy void." 2. That time is of the essence of the contract, and a failure to pay involves an absolute forfeiture, but that under the circumstances if the company insisted on a forfeiture the assured was entitled to the equitable value of the policy arising from the premiums actually paid, i.e., the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred. *Compare Crawford v. Ins. Co.*, 5 C. L. J. 100; *Abell v. Ins. Co.*, 18 W. Va. 400. 3. That the doctrine of revival of contracts suspended during war "cannot be invoked to revive a contract which it would be unjust or inequitable to revive—as where (as here) time is of the essence of the contract, or the parties cannot be made equal." *Waite, C. J.*, and *Strong, J.*, dissented, holding that failure to pay the annual premium when it matured put an end to the policy, notwithstanding the default was occasioned by the war. *Acc.*, *Dillard v. Ins. Co.*, 44 Ga. 119; *Worthington v. Ins. Co.*, 41 Conn. 372; *Tait v. Ins. Co.*, 1 Flipp. (U. S. C. C.) 288. *Clifford and Hunt, JJ.*, dissenting, held that the contract was only suspended during the war and revived when peace ensued. *Acc.*, *Ins. Co. v. Duerson*, 28 Gratt. (Va.) 630; *Ins. Co. v. Hilliard*, 37 N. J. L. 444; *Cohen v. Ins. Co.*, 50 N. Y. 610; *Sands v. Ins. Co.*, 50 N. Y. 626; *Hamilton v. Ins. Co.*, 9 Blatchf. (U. S. C. C.) 234; *Ins. Co. v. Atwood's Admx.*, 24 Gratt. (Va.) 497; *Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614; *Stratham v. Ins. Co.*, 45 Miss. 581; *Ins. Co. v. Clopton*, 7 Bush (Ky.), 179.

Where the condition is possible at the date of the instrument, and subsequently becomes impossible by the act of God, or of the law, or of the obligee, the obligation and the condition both become void. *Co. Litt.* 206, *a*; *Taylor v. Taintor*, 16 Wall. (U. S.) 366, 369; *Brown v. Dillehanty*, 4 S. & M. (Miss.) 713; *People v. Bartlett*, 3 Hill (N. Y.), 570; *Badlam v. Tucker*, 1 Pick. (Mass.) 284; *People v. Manning*, 8 Cow. (N. Y.) 297; *Whitney v. Spencer*, 4 Cow. (N. Y.) 39; *Blake v. Niles*, 13 N. H. 459; *Scully v. Kirkpatrick*, 79 Pa. St. 324, 331; *Marshall v. Craig*, 1 Bibb (Ky.), 386, 390; *Hopkins v. Commonwealth*, 18 C. L. J. 77; *People v. Tubbs*, 37 N. Y. 586; *Belding v. State*, 25 Ark. 315. When a person arrested in one State on a criminal charge,

**76. Subsequent Impossibility.**—When the performance of a contract, which was possible when made, becomes impossible, the question arises whether the promisor is liable in damages for his failure to perform.

**77. Absolute Undertakings.**—The general rule is, that when a party has undertaken absolutely to do a thing, he is not excused from liability by the occurrence of events which render the performance of his promise impossible.<sup>1</sup>

and released under his own and his bail's recognizance that he will appear on a day fixed, and abide the order and judgment of the court on process from which he has been arrested, goes into another State, and while there is, on the requisition of the governor of a third State, for a crime committed in it, delivered up, and is convicted and imprisoned in such third State, the condition of the recognizance has not become impossible by act of law so as to discharge the bail; "the law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities." *Taylor v. Taintor*, 16 Wall. (U. S.) 366; s. c., 36 Conn. 242. And see *Cain v. State*, 55 Ala. 170; *U. S. v. Van Fossen*, 1 Dill. (U. S. C. C.) 406; *Devine v. State*, 5 Sneed (Tenn.), 623; *Withrow v. Commonwealth*, 1 Bush (Ky.), 17; *State v. Horn*, 70 Mo. 466. Arrest and detention of the principal by Federal authority precluding his appearance will discharge the bail. *Commonwealth v. Overby*, 80 Ky. 208; *Commonwealth v. Terry*, 2 Duv. (Ky.) 383; *Commonwealth v. Webster*, 1 Bush (Ky.), 616; *Belding v. State*, 25 Ark. 315. Compare *In re James*, 18 Fed. Rep. 853; *Shook v. People*, 39 Ill. 443. Subsequent arrest and detention under the law of the same State or delivery of the principal by the governor of the same State on requisition of the governor of another State is such an act of the law as discharges the bail from liability. *State v. Allen*, 2 Humph. (Tenn.) 258; *Caldwell's Case*, 14 Gratt. (Va.) 698; *People v. Bartlett*, 3 Hill (N. Y.), 570; *State v. Adams*, 3 Head (Tenn.), 259; *Fuller v. Davis*, 1 Gray (Mass.), 612; *Way v. Wright*, 5 Metc. (Mass.) 380; *Medlin v. Commonwealth*, 11 Bush (Ky.), 605; *Peacock v. State*, 44 Tex. 11; *Smith v. Kitchens*, 51 Ga. 158. Compare *Wheeler v. State*, 38 Tex. 173; *Ingram v. State*, 27 Ala. 17; *Mix v. People*, 26 Ill. 32.

1. *School District v. Dauchy*, 25 Conn. 535.

"We think it firmly established, both

by decided cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control." *Per Blackburn, J.*, in *Ford v. Cotesworth*, L. R. 4 Q. B. 134.

Where a charter-party required a ship to be loaded with the usual dispatch, it was held to be no answer to an action for delay in loading that a frost had stopped the navigation of the canal by which the cargo would have been brought to the ship in the ordinary course. *Kearon v. Pearson*, 7 H. & N. 386; *Engster v. West*, 35 La. Ann. 119. And an absolute contract to load a full cargo of guano at a certain island was not discharged by there not being enough guano there to make a cargo. *Hills v. Sughrue*, 15 M. & W. 253. See also *Thiis v. Byers*, L. R. 1 Q. B. D. 244. So where a contractor undertook to erect a bridge according to certain plans and specifications, he was not excused from performing his contract although he found that it was impossible to execute part of the work in the manner described in the plans. *Thorn v. Mayor of London*, L. R. 9 Ex. 163; in *Ex. Ch.* L. R. 10 Ex. 112; *Aff'd in H. L.* L. R. 1 App. Ca. 120. See also *Jones v. St. John's College (Oxford)*, L. R. 6 Q. B. 115, 124.

A shipbuilder contracted to build, to a model to be approved by the purchaser, a vessel of certain specified dimensions and capacity. The ship, actually built to the approved model and delivered under a reservation of claim of damages, was deficient in carrying capacity to the extent of nearly 200 tons. In an action by the purchaser for damages for breach of contract, *held*, that it was no defence to show that it was impossible to build a seaworthy ship of the required dimension and carrying capacity according to the model. *Gillespie & Co. v. Howden & Co.*, 12 C. of S. Cas. (Sc.) 800.

If a lessee agrees absolutely to assign

**78. Duty Imposed by Law.**—Where the duty or charge is imposed upon the party by the law, and not by his own contract, he will be excused from liability if performance of the duty becomes impossible without any default on his part.<sup>1</sup>

**79. Destruction of Subject-matter.**—Contracts whose performance depends upon the continued existence of a specified thing, are discharged by the destruction of the thing from no default of either party.<sup>2</sup>

his lease, the lease containing a covenant not to assign without license, the contract is binding, and he must procure the lessor's consent. *Lloyd v. Crispe*, 5 Taunt. 247. *Compare Canham v. Barry*, 15 C. B. 597; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500. Where a railroad company agreed unconditionally to make a connection for the promisee with another railroad company, non-performance was held not excused by the refusal of the latter company to permit the connection to be made. *Railroad Co. v. Reichert*, 58 Md. 261, 274.

Where one contracts to build a house on the land of another, and performance becomes impracticable either by reason of a latent defect in the soil or the contract being to finish and deliver the house by a day named by reason of the accidental destruction of the building shortly before that day, he is not excused from performance; and performance not being excused, he cannot retain instalments paid on account. *Tompkins v. Dudley*, 25 N. Y. 272; *School Dist. v. Dauchy*, 25 Conn. 530; *Stees v. Leonard*, 20 Minn. 404; *School Trustees v. Bennett*, 27 N. J. L. 513. See *Dermott v. Jones*, 2 Wall. (U. S.) 1.

Still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse. *Jones v. U. S.*, 96 U. S. 24, 29; *The Harriman*, 9 Wall. (U. S.) 161; *Harmony v. Bingham*, 12 N. Y. 99; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Yonqua v. Mixon*, 1 Pet. C. C. 221; *Dodge v. Van Lear*, 5 Cr. C. 278; *Eddy v. Clement*, 38 Vt. 486; *Bacon v. Cobb*, 45 Ill. 47; *Hand v. Baynes*, 4 Whart. (Pa.) 204; *Bank v. Bent*, 5 Allen (Mass.), 113; *Harrison v. Railway Co.*, 74 Mo. 364; *Adams v. Nichols*, 19 Pick. (Mass.) 275.

A contract is not to be treated as having become impossible of performance if by any reasonable construction it is still capable in substance of being performed. *The Teutonia*, L. R. 4 P. C. 182. *Compare Jones v. Holm*, L. R. 2 Ex. 335; *Williams v. Vanderbilt*, 28 N. Y. 217; *White v. Mann*, 26 Me. 361.

1. *Paradine v. Jane*, Aleyn, 26; *Phillips v. Stevens*, 16 Mass. 238; 2 Story on Cont. § 1334.

2. *Price v. Pepper*, 13 Bush (Ky.), 42; *Dexter v. Norton*, 47 N. Y. 62; *School Dist. v. Dauchy*, 25 Conn. 530; *Wells v. Calman*, 107 Mass. 514; *Thomas v. Knowles*, 128 Mass. 22; *Lovering v. Coal Co.*, 54 Pa. St. 291; *Walker v. Tucker*, 70 Ill. 527; *The Tornado*, 108 U. S. 342; *Brumby v. Smith*, 3 Ala. 123. *Contra*, *Niblo v. Binsse*, 3 Abb. App. Dec. 375; *Whelan v. Ansonia Clock Co.*, 97 N. Y. 293; *Cook v. McCabe*, 53 Wis. 250; *Hollis v. Chapman*, 36 Tex. 1. *Compare Lord v. Wheeler*, 1 Gray (Mass.), 282; *Rawson v. Clark*, 70 Ill. 656.

In *Taylor v. Caldwell*, 3 B. & S. 826, A agreed to give B the use of a music-hall on certain specified days, for the purpose of holding concerts. Before the days for performance arrived the music-hall was destroyed by fire. There was no clause in the contract providing for such a contingency. The court held that both parties were excused from performance of the contract. "Where, from the nature of the contract," said Blackburn, J., "it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

A contracted to erect certain houses, and B agreed to pay \$2950 for the same, and to advance the money in instalments as the work progressed. After B had advanced \$2048 under the contract, and before completion and delivery by A, the

**80. Personal Capacity of Parties.**—A contract whose performance depends upon the personal capacity of the parties is discharged by their death or incapacitating illness.<sup>1</sup>

houses were destroyed by fire without the fault of either party. *Held*, in an action by A for the balance of the contract price, that he could not recover. *Lawing v. Rintles*, 2 S. E. Rep. (N. Car.) 252.

If one agrees to buy and another to sell a warehouse which is destroyed by inevitable accident before the contract time arrives, each party is discharged from his obligation. *Powell v. Day*, *Sher.*, etc., R. Co., 12 Or. 488.

A lessee who had covenanted to work certain coal-mines was held to be excused from further performance of his covenant upon the mines becoming exhausted. *Walker v. Tucker*, 70 Ill. 527; *Dewey v. School District*, and note, 19 Amer. L. Reg. N. S. 550. But where the lessee in a mining lease covenants in unqualified terms to pay a fixed minimum rent, he is liable though the mine should turn out to be not worth working. *Marquis of Bute v. Thompson*, 13 M. & W. 487; *McDowell v. Hendrix*, 67 Ind. 513; *Wharton v. Stoutenburgh*, 46 N. J. L. 151.

The accidental destruction of a leasehold building, or the tenant's occupation being otherwise interrupted by inevitable accident, does not determine or suspend the obligation to pay rent. *Leeds v. Cheetham*, 1 Sim. 146; *Lofft v. Dennis*, 1 E. & E. 474; *Gates v. Green*, 4 Paige (N. Y.), 355; *Linn v. Ross*, 10 Ohio, 412; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44; *Peterson v. Edmondson*, 5 Harr. (Del.) 378; *Niedelet v. Wales*, 16 Mo. 214; *Fowler v. Bott*, 6 Mass. 63; *Robinson v. L'Engle*, 13 Fla. 482. But a lessee who, during the late civil war, was dispossessed by the military authorities and deprived of the use and control of the demised premises, his lessor having gone within the lines of the enemy, was held to be discharged from liability to the lessor for the rent accruing during the period of such dispossession. *Gates v. Goodloe*, 101 U. S. 612. And see *Harrison v. Myer*, 92 U. S. 111; *Coogan v. Parker*, 2 S. C. 255.

It is held in this country that the lessee of apartments in a building, his lease giving him no interest in the soil upon which the building stands, is released from his covenant to pay rent by the accidental destruction of the edifice. *Graves v. Berdan*, 26 N. Y. 498; *Ainsworth v. Ritt*, 38 Cal. 89; *McMillan v. Solomon*,

42 Ala. 356; *Womack v. McQuarry*, 28 Ind. 103. And see *Winton v. Cornish*, 5 Ohio, 477; *Kerr v. Merchants' Exchange Co.*, 3 Edw. Ch. (N. Y.) 315; *Stockwell v. Hunter*, 11 Metc. (Mass.) 448; *Bank v. Boston*, 118 Mass. 125; *Buerger v. Boyd*, 25 Ark. 441. *Contra*, *Helburn v. Moffard*, 7 Bush (Ky.), 169.

In *Whitaker v. Hawley*, 25 Kans. 674, it was held that where by a single instrument real and personal property were leased for a gross rental, the personalty being a substantial part of the leased property, upon a total destruction by accident the lessee was entitled to an abatement of the rent equal to the proportionate rental value of the personalty. But see *Bussman v. Ganster*, 72 Pa. St. 285; *Magaw v. Lambert*, 3 Pa. St. 444; *Sheets v. Selden*, 7 Wall. (U. S.) 416, 424.

Where the tenant covenants to keep the building in repair, and at the end of the term to deliver it up in as good condition as when he received it, though the landlord protects himself by an insurance if the building is destroyed by fire, the tenant having rebuilt in performance of his covenant, has no claim upon the insurance money. *Ely v. Ely*, 80 Ill. 532. But the tenant having repaired, the insurance company can recover from the landlord the insurance which it has paid. *Darrell v. Tibbitts*, 5 Q. B. 560. In *Whitaker v. Hawley*, 25 Kans. 674, it was held that a stipulation in the lease that the lessee should insure for the benefit of the lessor "limits and qualifies the promise to pay rent, and that as the former becomes operative, the latter ceases to have force."

1. *Hall v. Wright*, E. B. & E. (96 E. C. L. R.) 793.

In *Robinson v. Davison*, L. R. 6 Ex. 269, the defendant agreed to play the piano at a concert to be given by the plaintiff on a specified day. Upon the day in question she was unable to perform, on account of illness. The plaintiff sued her for breach of contract, but failed to recover. "This," said *Bramwell, B.*, "is a contract to perform a service which no deputy could perform. and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind in the



**81. Option to Perform in One of Two Ways.**—If a party has an option to perform his contract in one or other of two modes, and one of those modes becomes impossible, he is bound to perform it in the other mode.<sup>1</sup>

**82. Impossibility Caused by Party.**—When impossibility of performance is caused by the act of one of the parties, it is equivalent to a breach.<sup>2</sup>

**83. Discharge of Contract by Breach—Forms of Breach.**—A party to a contract may break it in one of three ways: (a) by renouncing his liabilities under it; (b) by rendering performance of his promise

performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must in my judgment be taken to have been conditional, and not absolute." See also *Spalding v. Rosa*, 71 N. Y. 40. "No action lies on an agreement promising to pay for tuition for a specified time, if during the whole of that time the promisor was prevented by illness from attending and receiving the tuition." *Stewart v. Loring*, 5 Allen (Mass.), 306.

Where a contract of service is terminable on giving a certain number of days' notice, if the servant becomes incapacitated to perform by *vi majeure* the necessity of notice is dispensed with. *Fuller v. Brown*, 11 Met. (Mass.) 440; *Hughes v. Wamsutta Mills*, 11 Allen (Mass.), 201.

A contract to marry is so far personal that executors in the absence of special damage to the personal estate cannot sue upon it. *Chamberlain v. Williamson*, 2 M. & S. 408; *Hovey v. Page*, 55 Me. 142. Nor does an action upon it survive against the personal representatives of the promisor. *Wade v. Kalbfleisch*, 58 N. Y. 282; *Stebbins v. Palmer*, 1 Pick. (Mass.) 71; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Chase v. Fitz*, 132 Mass. 359; *Lattimore v. Simmons*, 13 S. & R. (Pa.) 183; *Grubb's Admr. v. Sult*, 32 Gratt. (Va.) 203. See also *Farrow v. Wilson*, L. R. 4 C. P. 744; *Scully v. Kirkpatrick*, 79 Pa. St. 324; *Allen v. Baker*, 86 N. Car. 91; *Siler v. Gray*, 86 N. Car. 566; *Yerrington v. Green*, 7 R. I. 589. So a contract by a corporation with an individual to employ him for a stipulated time is dissolved by dissolution of the corporation. *People v. Ins. Co.*, 91 N. Y. 174.

Where a contract creates between the parties merely a personal relation, the death of either dissolves it—as, for instance, a contract whereby a party agrees to receive and sell machines for the manufacturer. *Howe Sew. Mac. Co. v. Rosensteel*, 24 Fed. Rep. 583. Nor can the executor insist that the other party shall accept performance by himself in place of the decedent. *Shultz v. Johnson's Admr.*, 5 B. Mon. (Ky.) 497. A check given for a good consideration is not revoked by the death of the drawer before its presentment. *Lewis v. International Bk.*, 13 Mo. App. 202.

1. *Barkworth v. Young*, 4 Drew. 25; *Da Costa v. Davis*, 1 B. & P. 242.

The rule of law is, that where the condition of a bond is to do one of two things, if one cannot be performed, unless it has become impossible by the act of the obligee, the obligor is bound to perform the other. *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, 443.

If the conditions of a bond are impossible when it is made, the bond is single. If of two conditions one is impossible when it is made, the other must be performed. A condition is not impossible if it may be performed by the concurrence of the obligee, and in such case, if the obligee neglect or refuse to act, the condition is waived. *Pindar v. Upton*, 44 N. H. 358.

Where there is an option to perform in one of two ways and one becomes impossible, the presumption should be that the promisor should lose his election rather than that the promisee should lose the whole benefit of his contract. *Jacquinet v. Boutron*, 19 La. Ann. 30.

If one thing becomes impossible after the choice is determined, it is the same as if there had been an unconditional contract to do that thing. *Brown v. Royal Ins. Co.*, 1 C. & E. 853.

2. See, *infra*, BREACH.

impossible; (c) by totally or partially failing to perform what he has undertaken.

**84. Breach by Renunciation.**—If before the time for performance of a contract has arrived one party announce to the other that he does not intend to perform his promise, the latter may treat the contract as broken, and bring an action immediately against the former for the breach. It is not necessary that he should postpone his suit until the time for performance has arrived.<sup>1</sup>

1. *Halloway v. Griffith*, 32 Iowa, 409; *Howard v. Daly*, 61 N. Y. 362; *Burtis v. Thompson*, 42 N. Y. 246; *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *Grau v. McVicker*, 8 Biss. C. Ct. 13; *Nilson v. Morse*, 52 Wis. 240; *Zuck v. McClure*, 98 Pa. St. 541. *Contra* in *Massachusetts*, *Daniels v. Newton*, 114 Mass. 530.

It might be argued that a contract could not be broken before the time when performance is due, because until then the promisee would not be entitled to performance, and therefore could not be injured by a refusal to perform. But the contractual relation begins immediately upon the making of the contract, and not at the time fixed for performance. Each party has a right to have this relation continued until the contract has been performed. "It is true, . . ." said Cockburn, C. J., in *Frost v. Knight*, L. R. 7 Ex. 111, 114, "that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is . . . a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly."

The case of *Hochster v. De La Tour*, 2 E. & B. 678, is a leading case, and a

good illustration of this principle. The defendant, on the 12th of April, agreed to employ the plaintiff as a courier for three months, the employment to begin upon the 1st of June. On the 11th of May the defendant wrote to the plaintiff that he had changed his mind, and declined his services. The plaintiff brought an action for breach of the contract on the 22d of May. The defendant claimed that the action was prematurely brought, as the service was not to begin until the 1st of June. The court, however, held that the refusal of the defendant to perform amounted to a breach, and entitled the plaintiff to bring his action immediately. In the recent case of *Frost v. Knight*, L. R. 7 Ex. 111, *supra*, an action was brought for the breach of a promise of marriage. The promise was to marry the plaintiff on the death of the defendant's father. While the father was still living the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement; whereupon the plaintiff, without waiting for the father's death, at once brought her action, and it was held that she was entitled to recover. See opinion of Cockburn, C. J., in which the law upon this subject is very fully and clearly stated.

In a lease of premises for a term of twenty-one years, determinable by the lessee at the end of the first four years by a six months' notice, the lessor covenanted to rebuild the premises after the expiration of the first four years of the term upon a six months' notice from the lessee requiring him to do so. Before the expiration of the first four years of the term the lessor on many occasions told the lessee that he would be unable to procure the money for rebuilding the premises. The lessee, in consequence of this statement by the lessor, gave the requisite notice, under the provisions of the lease, to determine the term at the end of the first four years. After the determination of the lease he continued to occupy the premises for some months, paying rent to the lessor's mortgagees,

on the chance, as he stated, of the lessor's procuring the money to rebuild. The lessor being, however, unable to rebuild the premises, the lessee claimed damages against him for breach of the covenant to do so. *Held*, that the covenant to rebuild never having been actually broken, because the lessee had before the time for its performance determined the term, he could not recover unless there had been a breach of contract by anticipation within the doctrine of *Hochster v. De la Tour*, 2 E. & B. 678, and *Frost v. Knight*, 7 L. R. Ex. 111, by reason of a wrongful repudiation of his covenant by the lessor before the time of performance had arrived; that what had been said by the lessor did not under the circumstances of the case amount to such a repudiation; and that if it did, such repudiation before the time of performance arrived would not amount to a breach of the contract, unless the lessee elected to treat it as putting an end to the contract except for the purposes of an action for such breach, and the lessee had not under the circumstances so elected, and that he could not therefore maintain his claim. *Quere*, whether the doctrine of *Hochster v. De la Tour* can be applicable to the case of a lease or other contract containing various stipulations, where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor. *Johnstone v. Milling*, 16 Q. B. D. 460; 55 L. J. Q. B. 162; 54 L. T. N. S. 629; 34 W. R. 238.

An agent bought real estate in his own name and made a part payment, partly with money furnished by the principal and partly by his own note, giving back a mortgage to secure the note. He afterwards deeded the property to his principal but made a mistake in the name, which he promised to have corrected. The principal went into possession relying on said promise. The deed was returned, but it was shortly afterwards discovered that there was still a mistake in the grantee's name, and when asked to have the deed corrected the agent refused to do anything more about the title. In an action to recover the amount given to the agent by his principal, *held*, that the agent's refusal to carry out his part of the contract was equivalent to an abandonment on his part, and gave plaintiff the right to rescind and recover back his money. *Nothe v. Nomer*, 10 East. Rep. (Conn.) 210.

If a contract is wrongfully terminated by one party, the other party is entitled

to recover for the breach thereof, without showing that he continued to be ready and willing to perform his part after such termination. *Bond v. Carpenter*; 8 Atl. Rep. (R. I.) 539.

A agreed to deliver at his convenience 400,000 brick to B. B refused to take more brick after some had been delivered, and A offered to deliver the balance. *Held*, that A was not obliged to tender all the brick in order to put B in default, and that A's right of action for a breach of contract was not waived by the fact that several times afterwards he offered to deliver the brick. *Canda v. Wick*, 100 N. Y. 127.

B agreed in writing to purchase from A rails to be rolled by the latter, "and to be drilled as may be directed." He refused to give directions for drilling, and at his request A delayed rolling any of the rails until after the time prescribed for their delivery, and then B advised A that he should decline to take any rails under the contract. *Held*, that B was liable in damages for the breach of the contract, and also that A was not bound to roll the rails and tender them to B. *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264; s. c., 7 Sup. Ct. Rep. 875, 17 Fed. Rep. 472. See also *Allen v. Pennell*, 51 Iowa, 537; *Butler v. Butler*, 77 N. Y. 472.

Where the defendant agreed to allow the plaintiff to dig sand on the former's land at places to be designated by the defendant, a refusal to designate a place was held to be a breach of the contract. *Hurd v. Gill*, 45 N. Y. 341; *Warner v. Wilson*, 4 Cal. 310.

When on the day fixed for the performance of a contract one of the parties refuses to perform unless unreasonable conditions are acceded to, there is a breach, which is not cured by the party changing his mind four hours afterwards and offering to perform. *Bell v. Hoffman*, 92 N. Car. 273.

A contracted to furnish B with 300 tons of steel, to be delivered as B might designate. A failed, and B going to A's place of business found it closed, but was told that A would open again in about a week. After a week had elapsed he went again, and was again told that A would start up in a short time. In about a month after the failure he called again on A with reference to the steel, and A said the thing was up, and there was no chance of starting again. *Held*, that this indicated no waiver of the demand, specification or designation necessary of time of delivery requisite to render



The promisee is not bound to treat the renunciation as a breach. He may, if he pleases, treat it as inoperative; but in that case he keeps the contract alive for the benefit of the other party, as well as his own. If the promisor withdraw the notice of his intention not to perform before the promisee has elected to treat it as a breach, the latter loses his right to treat the contract as broken, and the parties are in the same position that they would have been in if the notice had never been given.<sup>1</sup> So if the promisee declines

A liable for a breach of the whole contract. *Spratt v. Mer. & Man. Nat. Bk.*, 7 Atl. Rep. (Pa.) 98.

Where one party to a contract has refused to take further steps in its execution, the other need not wait for him to do so, especially if the subject-matter of it is spoiling in consequence of the delay. *Hudson v. Feige*, 58 Mich. 148.

The rule that one who has done anything that cannot be undone cannot demand a rescission, does not apply to things left undone with knowledge that the contract is repudiated. *Metr'n El. R. Co. v. Manh. El. R. Co.*, 11 Daly (N. Y.), 373; s. c., 14 Abb. N. Cas. (N. Y.) 103.

Default or refusal is a cause of action on which the promisor may recover any loss he has incurred thereby; as in the case of an action for non-acceptance of goods, for not furnishing a cargo, etc. So with a special contract, e.g. *Roberts v. Bury Commissioners*, L. R. 4 C. P. 755; 5 C. P. 310; *Lovell v. Ins. Co.*, 111 U. S. 264; *Black v. Woodrow*, 39 Md. 194; *Curtis v. Smith*, 48 Vt. 116; *Hawley v. Smith*, 45 Ind. 183, 202; *Kugler v. Wiseman*, 20 Ohio, 361; *Smith v. Railroad Co.*, 36 N. H. 458, 493. Or he may rescind the contract and recover back any money he has already paid under it. *Giles v. Edwards*, 7 T. R. 181; *U. S. v. Behall*, 110 U. S. 338; *Seipel v. Ins. Co.*, 84 Pa. St. 47. He may rescind the contract and recover the value of what he has done for defendant's benefit in performance of it. *Chicago v. Tilley*, 103 U. S. 146; *Greene v. Haley*, 5 R. I. 260; *Connelly v. Devoe*, 37 Conn. 570; *Blood v. Enos*, 12 Vt. 625; *Derby v. Johnson*, 21 Vt. 17; *Moulton v. Trask*, 9 Met. (Mass.) 577; *Canada v. Canada*, 6 Cush. (Mass.) 15.

Where one party to a contract under seal refuses to perform his part, the other may either sue on the contract for damages for the breach, or rescind the contract and recover in *assumpsit* the money paid for which he received no benefit. *Am. Life Ins. Co. v. McAden*, 109 Pa. St. 399.

Where a person on a contract of sale covenants to pay a sum whose amount is to be contingent on certain events, and is to be ascertained by arbitrators to be selected by the parties respectively to the contract, such person if he prevent any arbitration may be sued on a *quantum valebat*. *Humaston v. Tel. Co.*, 20 Wall. (U. S.) 20.

The mere insolvency of one of the parties to an executory contract of sale is not equivalent either to a rescission or a breach: it simply relieves the vendor from an agreement to give credit. *Pardee v. Kenady*, 100 N. Y. 121.

Payment for work done under a contract after breach thereof, without deduction for such breach, is not a waiver of the right to terminate the contract. *Bond v. Carpenter*, 8 Atl. Rep. (R. I.) 539.

The breach may occur after the contract has been partly performed, by a refusal to proceed with performance. In *Cort v. Ambergate R. Co.*, 17 Q. B. 127, the plaintiffs agreed to supply the defendants with 3900 tons of railway chairs, to be delivered in certain quantities at specified dates. After the plaintiffs had delivered 1787 tons, according to the contract, the defendants desired them not to send any more, as they would not be wanted and would not be accepted. The plaintiffs then stopped making the chairs and sued the defendants on the contract: and the court held that they were entitled to recover.

In *Massachusetts* it is held that a renunciation of the contract before performance is due does not amount to a breach. *Daniels v. Newton*, 114 Mass. 530. But that an absolute refusal to perform after the time for performance has arrived does amount to a breach, even when the contract is by its terms to continue in the future. *Parker v. Russell*, 133 Mass. 74.

1. *Frost v. Knight*, L. R. 7 Ex. 112, 113, *supra*; *Nilson v. Morse*, 52 Wis. 240; *Zuck v. McClure*, 98 Pa. St. 541; *Howard v. Daly*, 61 N. Y. 375.

Where a plaintiff may elect to avoid or affirm a contract, or to ratify or disown

to accept the refusal as a breach and insists that the contract shall continue in force, it enables the other party to take advantage of any supervening circumstances which would justify him in refusing to complete it.<sup>1</sup>

**85. Impossibility Created by one Party.**—As the renunciation of a contract before performance is due is equivalent to a breach, and entitles the injured party to sue immediately, so if one party by his own act makes the performance of his promise impossible, the other may at once bring an action against him for a breach.<sup>2</sup>

an act done on his behalf, the institution of a suit which necessarily implies that the contract is affirmed or the right ratified, if the suit is brought with full knowledge of all material facts, is a waiver of the right to avoid the contract or to disown the act, and defeats an action subsequently brought on that ground. *Warren v. Spencer Water Co.*, 3 New Eng. Rep. (Mass.) 112.

1. In *Avery v. Bowden*, 5 E. & B. 714, the defendant agreed by charter-party to load a cargo on the plaintiff's ship at Odessa. After the ship arrived at Odessa the defendant's agent told the master that he had no cargo for the vessel, and that he had better go away; but the master refused to leave, and continued to demand a cargo. Before the ship's laying days had expired war was declared between Russia and Great Britain, and the vessel was obliged to sail from Odessa in ballast. The plaintiff afterward sued the defendant for a breach of the charter-party; but it was held that, as there had been no actual failure of performance before the war broke out (the days within which the defendant was entitled to load not having then expired), and as the renunciation had not been accepted as a breach by the plaintiff's agent, the defendant was entitled to the discharge of the contract which took place upon the declaration of war, and therefore the plaintiff could not recover.

2. *Heard v. Bowers*, 23 Pick. (Mass.) 455, 460; *Newcomb v. Brackett*, 16 Mass. 161; *Butrick v. Holden*, 8 Cush. (Mass.) 233; *James v. Burchell*, 82 N. Y. 108; *Wolf v. Marsh*, 54 Cal. 228; *Harris v. Williams*, 3 Jones L. (N. Car.) 483; *Packer v. Steward*, 34 Vt. 127; *Dill v. Pope*, 29 Kans. 289; *Rensens v. Mexican Nat. Construction Co.*, 22 Fed. Rep. 522; *Burton v. Shotwell*, 13 Bush (Ky.), 271.

In *Planché v. Colburn*, 8 Bing. 14, the defendants engaged the plaintiff to write a treatise on Costume and Ancient Armor, for publication in "The Juvenile

Library." The plaintiff commenced the work, but before he had completed it the defendants abandoned the publication; and the court held that the plaintiff might treat the contract as broken and bring an action immediately. See also *Shaffner v. Killian*, 7 Ill. App. 620. And in another case a person agreed to act as the agent of an insurance company for five years. Before the five years were expired the company was wound up voluntarily; and it was held that the agent might sue the company at once and recover his salary for the five years. *Ex parte Maclure*, L. R. 5 Ch. Ap. 737. See also *Seipel v. Ins. Co.*, 84 Pa. St. 47; *Lovell v. Ins. Co.*, 111 U. S. 264.

A was employed by B, a firm, "to sell goods for them" for one year from January 1, 1884, at a fixed annual salary; about the middle of the year B became insolvent and made an assignment, and later wrote A that his services would not be required after July 1. *Held*, in an action by A to recover, that as there was nothing in the contract itself, nor in the testimony *dehors* the instrument, to indicate an implied understanding that the employment was contingent upon the existence of the firm for a year, the fact that B had become insolvent did not absolve him from the obligation to pay A his salary as agreed; further, that the notice that the services of A would not be required after a specified date would not have the effect of rescinding the contract without A's assent. *Vanuxem v. Bostwick*, 11 East. Rep. (Pa.) 725.

Where a man promised to marry a woman on a future day, and before the day married another woman, it was held that he was instantly liable to an action for breach of his promise. *Short v. Stone*, 8 Q. B. 358; *Sheahan v. Barry*, 27 Mich. 218. And where a man contracted to execute a lease on a future day for a certain term, and before the day executed a lease to another for the same term, it was held that he might be sued at once for breaking the contract. *Ford v. Tiley*, 6.

**86. By Non-Performance.**—A contract is broken if either party fail to perform any of its terms.

B. & C. 325. And again, where a man contracted to sell and deliver specific goods on a future day, and before the day sold and delivered them to another, he was immediately liable to an action at the suit of the person with whom he had first contracted. *Bowdell v. Parsons*, 10 East, 359; *Crist v. Armour*, 34 Barb. (N. Y.) 378; *Raymond v. Minton*, L. R. 1 Ex. 244.

Where, under a building contract, A entered upon performance of the contract, performed a part, and furnished a part of the materials in accordance with the terms of the contract, and was ready to complete the same, when B, the other party, took possession of the building and the materials furnished by A, and completed the work on the building without A's consent, it was held that the latter had a right to treat the contract as rescinded, and to sue and recover for the work, labor, and materials furnished by him at their reasonable market value. *Bonnett v. Glatfeldt*, 8 West. Rep. (Ill.) 637.

A party who disables himself from performing his contract before default by the other party, thereby waives the performance of acts by the latter which but for the disability he would be bound to perform as conditions precedent to a recovery on the contract. *Woolner v. Hill*, 93 N. Y. 576; *Hawley v. Keeler*, 53 N. Y. 114.

One who, by his own fault, has prevented performance by the other party, cannot claim exemption from liability. *Smith v. Roe*, 7 Col. 95; *Sinnott v. Mullin*, 82 Pa. St. 333.

A failure of a building contractor to complete the works by a day named, caused by the failure of the other parties to supply plans, etc., the former is excused and the latter cannot take advantage of a provision in the contract making it determinable at their option upon a failure of performance by the contractor. *Roberts v. Bury Commissioners*, L. R. 5 C. P. 310, 329; *McAndrews v. Tippet*, 39 N. J. L. 105; *Weeks v. Little*, 89 N. Y. 566; *Van Buren v. Digges*, 11 How. (U. S.) 461.

Where a condition can be performed only in the obligee's presence, his absence is an excuse. 1 Rolle Ab. 457, n.; *Williams v. Bank*, 2 Pet. (U. S.) 96, 102; *Majors v. Hickman*, 2 Bibb (Ky.), 217. A covenant to make within a year such assurance as the covenantee's counsel shall

devise, is discharged if the covenantee does not tender an assurance within the year. 1 Rolle. Abr. 446, pl. 12.

Where a bond is executed with a condition that it shall become absolute in case certain services are performed by the obligee within a specified time, the refusal of the obligor to accept performance will have the effect of actual performance so far as to give the obligee a right of action upon the bond. *Boardman v. Keeler*, 21 Vt. 77; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359.

On the other hand, where the promisor is prevented from performing his contract by the default of the promisee, the performance is excused. *U. S. v. Peek*, 102 U. S. 64; *Hammer v. Breidenbach*, 31 Mo. 49; *Marshall v. Craig*, 1 Bibb (Ky.), 379, 386; *Stewart v. Keteltas*, 36 N. Y. 388; *Parker Vein Coal Co. v. O'Hern*, 8 Md. 197; *Gallagher v. Nichols*, 60 N. Y. 438; *Wilt v. Ogden*, 13 Johns. (N. Y.) 56; *Fredenburg v. Turner*, 37 Mich. 402; *Shulte v. Hennessy*, 40 Iowa, 352; *Sutton v. Tyrell*, 12 Vt. 79; *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 39; *McKee v. Miller*, 4 Blatchf. (U. S. C. C.) 222; *Ashcraft v. Allen*, 4 Ired. L. (N. Car.) 96.

"One who prevents the performance of a condition, or makes it impossible by his own act, cannot take advantage of the non-performance." *Nav. Co. v. Wilcox*, 7 Jones L. (N. Car.) 481; *Jones v. Walker*, 13 B. Mon. (Ky.) 163; *Camp v. Barker*, 21 Vt. 469; *Ruble v. Massey*, 2 Md. 636; *Bright v. Taylor*, 4 Sneed (Tenn.), 159; *Jones v. Railroad Co.*, 14 W. Va. 514.

In an action against a master for not teaching his apprentice, a plea that the latter refused to be taught is good. *Raymond v. Minton*, L. R. 1 Ex. 244. Where A promised B to pay him \$200 annually for C's support and maintenance, and B promised to support and maintain C, but C refused to be supported by B, it was held that no action would lie in favor of B against A for failure to pay. *Cornell v. Cornell*, 96 N. Y. 108; *Ellen v. Topp*, 6 Ex. 424, 442; *McGrath v. Herndon*, 4 T. B. Mon. (Ky.) 480.

A contract, the fulfilment of which becomes unreasonable, will not be enforced at the instance of a party who by his own conduct has produced such a result. *Duncan v. Cent. Pass. R. Co.*, 9 Ky. Law Repr. 92.

**87. Effect of Breach—Absolute Promises.**—When the promises of both parties are absolute and independent of each other, upon a breach of his promise by one party the other may sue him without averring that he has performed his own promise, and it is no defence to such an action for the defendant to plead that the plaintiff has failed to perform his part of the agreement.<sup>1</sup>

**88. Conditional Promises.**—Conditions, as regards the time when they are to be performed, are either subsequent, concurrent, or precedent.

**89. Conditions Subsequent.**—A contract may contain a provision that, upon the doing of some act or the happening of some event, the relation of the parties shall come to an end.<sup>2</sup>

1. This may be illustrated by the old case of *Ware v. Chappel*, Style's Rep. 186, decided in 1649. "Ware brought an action of debt for £500 against Chappel upon an indenture of covenants between them, viz., that Ware should raise five hundred soldiers and bring them to such a port, and that Chappel should find shipping and victuals for them to transport them to Galicia; and for not providing the shipping and victuals at the time appointed was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time, and to this plea the plaintiff demurs. Roll, C. J., held that there was no condition precedent, but that they are distinct and mutual covenants, and that there may be several actions brought for them; and it is not necessary to give notice of the number of men raised, for the number is known to be five hundred; and the time for the shipping to be ready is also known by the covenants; and you have your remedy against him if he raise not the men as he hath against you for not providing the shipping."

"What is the reason," said Holt, C. J., in *Thorp v. Thorp*, 12 Mod. 455, 464. "that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be that A shall have the horse of B, and A agree that B shall have his money, they may make it so; and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must

be then averred; as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given for the horse." See *Long v. Caffrey*, 93 Pa. St. 526; *Hard v. Seeley*, 47 Barb. (N. Y.) 428.

These cases illustrate the character of absolute promises. The consequences which result from their breach are the same to-day as they were when these cases were decided. It must, however, be borne in mind that the rules for determining whether promises are absolute or not have changed very much since the seventeenth century, and that promises which would formerly have been held to be absolute would not be so construed at the present day. In ancient times questions of this kind were decided upon a subtle and technical construction of the words of a contract, and very little regard was paid to the evident sense and intention of the parties. Thus it was said by Fineux, C. J., in 15 H. vii. 10, pl. 17: "If I covenant with a man that I will marry his daughter, and he covenants with me that he will convey an estate to me and his daughter and the heirs of our two bodies begotten, if I afterwards marry another woman, or his daughter another man, still I shall have an action of covenant against him to compel him to convey the estate; but if the covenant were that he should convey an estate to us two for the cause aforesaid, then no action would lie until we were married." At the present day the question is determined "by the intention and meaning of the parties as it appears on the instrument, and by the application of common-sense to each particular case." *Tindal, C. J., in Stavers v. Curling*, 3 Bing. (N. Cas.) 368.

2. See, *ante*, PROVISIONS FOR DISCHARGE.

**90. Conditions Concurrent.**—When we speak of concurrent conditions we mean that each party is to perform his promise at the same time with the other. If, therefore, one party fail to perform at the time, the other is discharged from the performance of his promise. But he cannot sue the party by whom the contract was broken unless he has performed, or was ready and willing to perform, his own part of the agreement.<sup>1</sup>

1. "Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale." Mr. Sergeant Williams' 5th rule in notes to *Pordage v. Cole*, 1 Wms. Saunds. 310. See also *Campbell v. Gittings*, 19 Ohio, 347; *Williams v. Healy*, 3 Denio (N. Y.), 363; *Gayley v. Price*, 16 Johns. (N. Y.) 267; *Dunham v. Pettee*, 4 Seld. (N. Y.) 508; *Lester v. Jewett*, 1 Kern. (N. Y.) 453.

In bringing an action for the breach of a concurrent condition the plaintiff must always aver that he has performed, or was ready and willing to perform, his own promise. A very common example of this kind of condition occurs in the sale of goods. "The general rule in executory agreements for the sale of goods is that the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions, in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance, or offer to perform, or averring readiness and willingness to perform his own promise." *Benj. on Sales*, § 592. In *Morton v. Lamb*, 7 T. R. 125, the plaintiff sued the defendant for not delivering some corn in pursuance of an agreement that the defendant should deliver the corn at a certain place within one month from the time of the sale. The plaintiff averred that he was ready and willing to receive the corn, but that the defendant did not deliver it. At the trial the plaintiff recovered a verdict. The defendant then moved that the judgment should be arrested, because it was not averred that the plaintiff had tendered to him the price of the corn, or was ready to have paid for it on delivery. The court sustained the motion. "Both things," said Lord Kenyon, C. J., "the delivery

of the corn by one and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it." See *Gazley v. Price*, 16 Johns. (N. Y.) 267; *Swan v. Drury*, 22 Pick. (Mass.) 485; *Benj. on Sales*, § 592, where many cases are collected in the notes.

In the case of a contract containing mutual and dependent covenants, either an offer of performance or readiness to perform by one party must be shown, before he can charge the other with a breach. *Neis v. Yocum*, 9 Sawy. C. Ct. 24; *Rappanier v. Bannon*, 7 Cent. Rep. (Md.) 420.

In an agreement that a lessee may at any time before the expiration of his term purchase the land for \$3250, and that lessee shall have a prior right of purchase at a greater sum, and shall have notice in order to avail himself of the right, the execution of the conveyance, and the payment of the purchase-money, are mutual and dependent covenants. Neither party can put the other in default without a tender of performance, and the lessee must tender the money before he becomes entitled to a conveyance. *Heine v. Treadwell*, 13 Pac. Rep. (Cal.) 503.

Where a party agreed on the payment by another of certain sums of money to a third person to assign certain certificates of sale of land, and it was held that the covenants were independent, and that in a suit by the party bound to assign a general averment of readiness on his part to perform was sufficient. *Slocum v. Despard*, 8 Wend. (N. Y.) 615. See *Northrup v. Northrup*, 6 Cowen (N. Y.), 296; *Champion v. White*, 5 Cowen (N. Y.), 509; *Robb v. Montgomery*, 20 Johns. (N. Y.) 15. But see *Parker v. Parmele*, 20 Johns. (N. Y.) 130; *Adams v. Williams*, 2 W. & S. (Pa.) 227; *Halloway v. Davis, Wright*, 129. Justice would seem to require that such stipulations should be considered as dependent. *Leonard v. Bates*, 1 Blackf. (Ind.) 172, n.; *per Shaw, C. J.*, in *Kane v. Hood*, 13 Pick. (Mass.) 281.

**91. Conditions Precedent.**—If one party make the performance of his promise conditional upon a prior performance by the other party, the latter cannot sue the former for a breach of contract without averring that he has performed his part, or was ready and willing to perform it, but was prevented by the act of the promisee. And if the party who is to perform his promise first wholly fail to perform, the other is discharged.<sup>1</sup>

1. *People v. Glann*, 70 Ill. 232.

In the case of a condition precedent in a contract, there must be compliance therewith or an excuse for non-compliance shown, both at law and in equity. *Barney v. Giles*, 11 N. E. Rep. (Ill.) 206.

Condition in contract must be fulfilled before action lies. *Moore v. Campbell*, 12 N. E. Rep. (Ind.) 495.

Where performance of one act is to precede that of another, the legal obligation to perform the latter is dependent upon the performance of the former as a condition precedent. *De Kay v. Bliss*, 4 N. Y. St. Repr. 728.

A agreed to sell to B a machine deliverable at a certain point, the freight charges not to exceed a specified sum. *Held*, the freight charges exceeding that sum, that B was not bound to take it, and claim from A a reduction; he could repudiate the contract. *Johnson v. Latimer*, 71 Ga. 470.

If one contracts to do work subject to the approval of the agent of the other party to the contract, such approval is an essential prerequisite to the right of action for the price. *Denver, S. Park, etc., R. Co. v. Riley*, 7 Col. 494.

A lease provided that it should not be binding on the lessee until he should be appointed to a certain office. *Held*, that there was no binding contract, and that the lessor did not become bound upon the lessee's electing, notwithstanding his failure to obtain the office, to take the lease. *King v. Warfield*, 9 Atl. Rep. (Md.) 539.

Where an agreement specified that advertisements should be inserted to the value of £90 in part payment of goods to be purchased to the amount of £360, *held*, that the plaintiff was not entitled to recover in respect of the £90 worth of advertisements, without taking the £360 worth of goods. *Minshull v. Brinsmead*, 1 C. & E. 97.

A agreed to and did assign to B a half interest in a lease of a gold and quicksilver mine for "\$750 cash and \$1250 when 250 flasks of quicksilver should be produced." *Held*, that in the absence of a showing that 250 flasks had been pro-

duced, A could not recover from B the amount stipulated, without proving that B had failed to make reasonable efforts to operate the mine in view of the outlay attending it and the prospects in its development. *Ray v. Hodge*, 13 Pac. Rep. (Or.) 599.

Where by the terms of an agreement to furnish materials, in which no time of delivery is specified, payments therefor are required to be made from time to time, at times specified, if, upon specific demand of payment, with notice that it will be insisted on as a condition precedent of further delivery of materials, payment is refused, the other party may properly refuse to continue to furnish materials. *Palmer v. Breen*, 34 Minn. 39.

A proposal was made to an insurance company for an insurance on the life of the proposer, who made, on a form issued by the company, statements as to his state of health and other matters, and a declaration that the statements were true and were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon the terms that no insurance should take effect till the premium was paid. Before tender of the premium there was a material alteration in the state of the health of the proposer, and the company refused to accept the premium or to issue a policy. *Held*, that the nature of the risk having been altered at the time of the tender of the premium there was no contract binding the company to issue a policy. *Quare*, whether, if there had been no alteration in the risk, the company would have been legally entitled to refuse to accept the premium and to issue a policy. *Canning v. Farquhar*, 16 Q. B. D. 727.

An action was brought by an architect against a county to recover for the value of services rendered in making certain plans for a jail-building, which plans had been accepted conditionally by the county board of supervisors, provided that a bid should be accepted from some reliable party for the building of the jail. The board of supervisors refused to open any of the bids received and rejected plaintiff's claims on the ground that he had been



guilty of improper acts in getting his plans provisionally accepted. *Held*, that it was within the discretion of the board to refuse to open or accept any of the bids based upon plaintiff's plans, and that the condition upon which plaintiff was entitled to compensation never having happened, he could not recover. *Hall v. Co. of Los Angeles*, 13 Pac. Rep. (Cal.) 854.

Where, in an action for damages for breach of contract, it appears that the performance of their part of the covenant by defendants was a condition precedent to the performance of the contract on the part of the plaintiffs; that plaintiffs were able and willing to do their share, and had done acts preparatory to its performance—the defendants cannot maintain as a defence that there was a want of mutuality in the contract which would excuse a non-performance by them. *Jones v. Foster*, 30 N. W. Rep. (Wis.) 697.

One party to a contract which imposes reciprocal obligations upon both parties may have a right to rescind it by reason of the failure of performance of conditions by the other party, but he must, if he wish to rescind for such cause, return to the other party what he has received, so as to put him in the same condition he was in before. *Doughten v. Camden B'g & Loan Ass'n*, 7 Atl. Rep. (N. J.) 479; 41 N. J. Eq. 556.

A paid B \$50 for a lot, agreeing in the deed to erect a house of a certain description thereon. *Held*, on his failure to do so, that A, after a reasonable time, upon tendering back the money, was entitled to a rescission of the contract. *Willard v. Ford*, 16 Neb. 543.

It is competent for a party by his contract to make the performance of work and services by him a condition precedent to his right to receive any pay for them, and he cannot, in an action upon the contract, recover without proof of performance, unless the defendant has waived such performance. *Keller v. Oberreich*, 30 N. W. Rep. (Wis.) 524.

Waiver of performance or extension of the time therefor in the case of a condition precedent is equivalent to the performance thereof at the stipulated time, and leaves the original contract intact. *Barton v. Gray*, 57 Mich. 623.

Money paid towards an unperformed condition precedent may be recovered, if there has been no acceptance or waiver, but not otherwise. *Keller v. Oberreich*, 67 Wis. 282.

A agreed to build a house for B by a certain time and to pay himself from a mortgage to be negotiated by him. The

house was not completed at the time stipulated, but A was allowed to continue work for two months, when B took possession. *Held*, that B could not defend A's suit in assumpsit for the value of work done and materials furnished, B having waived the stipulation as to time and having prevented A's negotiating a mortgage. *Foster v. Worthington*, 58 Vt. 65.

Where a party claims to have completed a contract, and the other party, with knowledge of his claim and that the condition of it has not been performed, has made a payment upon it, without any objection or notice of non-acceptance, such payment operates as a waiver of the condition of the contract. *Keller v. Oberreich*, 30 N. W. Rep. (Wis.) 524.

Where one loans money without security to a man of very limited means, stipulating that it shall be repaid in monthly instalments, and upon default in any instalment the whole to become due, it was held that time is of the essence of the contract, and the waiver of forfeiture was not presumed from the lender accepting a payment after default in one of the instalments. *Bishop v. Lawrence*, 2 S. W. Rep. (Ky.) 499.

Whenever it appears to have been the intention of parties to a contract that the performance of one stipulation should not be a condition precedent to the performance of another, effect will be given to such intention; but where the intention is to rely on previous performance of the stipulation, and not on the remedy for non-performance, performance is a condition precedent. *Larimore v. Tyler*, 88 Mo. 661.

Where an action was compromised upon terms, one of which was that the defendant should pay the plaintiff £150, and another that the plaintiff should pay a third party's claim against the defendant, *held*, that the payment of the third party's claim by the plaintiff was not a condition precedent to the plaintiff's right to sue for the £150. *Lockhart v. Webster*, 1 C. & E. 71.

The defendants purchased cotton at L., under price limits designated by plaintiff, and shipped it to the latter at H., it being orally agreed that the plaintiff should report the classification of the contract at H., if there was any falling off, either in grade or quality. *Held*, in a suit to recover an alleged balance of an account, that the stipulation that the plaintiff should report any falling off in weight or grades not being a condition precedent to the plaintiff's right to re-

cover under the agreement, and it not being stated that the report should be made immediately or within from three to five days after classification, that time was not of the essence of the agreement, and that it was error for the court to instruct the jury to the effect that the plaintiff could not recover if he did not make the reports within a reasonable time, and if such failure on his part induced the defendants to continue their shipments to him. *Watson v. Walker*, 48 W. Rep. (Tenn.) 576.

In Louisiana a contract conditioned upon an event dependent on the will of either party is not dissolved of right upon non-performance of the condition, but the same must be judicially sought. Therefore, under a contract which grants a railway company right of way conditioned upon the completion of the road within a certain time, the company may proceed under the contract until a dissolution is judicially demanded. *Gayden v. Louisville, N. O. & T. R. Co.*, 1 South. Rep. (La.) 792.

The following rules are given by Mr. Sergeant Williams in his notes to *Portage v. Cole*, 1 Wms. Saund. 319:

"If a day be appointed for the payment of money or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act." *Thorp v. Thorp*, 12 Mod. 460; 1 Salk. 171, *per* Holt, C. J.; *Seeters v. Opie*, 2 Saund. 350, *per* Hale, C. J.; *Wilks v. Smith*, 10 M. & W. 355; *Eastern Counties R. Co. v. Philipson*, 16 C. B. 2; *Mayor of Norwich v. Norfolk R. Co.*, 4 E. & B. 397; *Northampton v. Parnell*, 15 C. B. 630; 29 E. B. & E. 220; *Underhill v. The Saratoga & W. R. Co.*, 20 Barb. (N.Y.) 455; *Edgar v. Boyes*, 11 S. & R. (Pa.) 445; *Stevenson v. Kleppinger*, 5 Watts (Pa.) 420; *Lowry v. Mehaffy*, 10 Watts (Pa.) 387; *Goldsbrough v. Orr*, 8 West. 217; *Robb v. Montgomery*, 20 Johnson (N. Y.), 15.

The principle of this rule has been misapplied in various cases, as in *Terry v. Duntze*, 2 H. Bl. 389.

In that case A covenanted to build a house for B and finish it on or before a

certain day in consideration of a sum of money which B covenanted to pay A by instalments as the building proceeded. Held, that the finishing of the house was not a condition precedent to the payment of the money; that A might maintain an action of debt against B for the whole sum, though the building was not finished at the time appointed, on the ground that part of the money was to be paid before the house could be completed. This case was followed in *Seers v. Fowler*, 2 Johns. (N. Y.) 272, and *Havens v. Bush*, 2 Johns. (N. Y.) 387. But in *Cunningham v. Morrell*, 10 Johns. (N.Y.) 203, these two cases were overruled, and the authority of *Terry v. Duntze* repudiated. *Cunningham v. Morrell* was followed in *McLure v. Rush*, 9 Dana (Ky.), 64, and in *Allen v. Sanders*, 7 B. Mon. (Ky.) 593, overruling the earlier cases of *Cradock v. Aldridge*, 2 Bibb (Ky.), 15, and *Mason v. Chambers*, 4 Litt. (Ky.) 253. See, to the same effect, *Kettle v. Harvey*, 21 U. S. 301; *Lord v. Belknap*, 1 Cush. (Mass.) 279; *Tompkins v. Elliot*, 5 Wend. (N.Y.) 496.

In the case of contracts for the purchase and sale of real estate, where the purchaser covenants to pay the purchase money by instalments, and the vendor covenants to convey by deed either on the last day of payment or on some day previous, the covenant to pay the instalments falling due before the day appointed for conveying by deed are independent of the covenant to convey, and an action may be maintained for such instalments without showing any conveyance or offer to convey, but the conveyance and offer to convey is a condition precedent to the right to insist upon the payment of an instalment falling due either on or after the day of conveyance. *Grant v. Johnson*, 1 Seld. (N. Y.) 247. In this case the plaintiff agreed to sell to the defendant a piece of land, and covenanted to give possession of the land on the first of November, 1845, and to convey by deed on the first of May, 1846; and the defendant covenanted to pay \$950 as follows, viz., \$200 on the first of April, 1846; \$200 on 1st of April, 1847; \$275 on 1st of April, 1848; and \$275 on 1st of April, 1849. The plaintiff gave the possession of the premises, and the defendant paid the first instalment according to the terms of the agreement. The action was brought to recover the second instalment, and it was held that the conveyance by deed was a condition precedent to the payment of any instalment after the first, and therefore the plaintiff was not en-



**92. Breach in Vital Matter.**—If the breach be in a matter which upon a fair and reasonable construction of the contract the parties may be deemed to have considered as vital to its existence, or which they have expressly stated shall be vital, it will discharge the promisee from the performance of his promise.<sup>1</sup>

titled to recover without averring a performance or tender of performance of such condition. See also *Bland v. Atwater*, 4 Conn. 3; *Leonard v. Bates*, 1 Blackf. (Ind.) 172; *Kane v. Hood*, 13 Pick. (Mass.) 281. But see *Weaver v. Childress*, 3 Stew. 361.

"When a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money or is to be performed, no notice can be maintained for the money or before performance." *Thorp v. Thorp*, 12 Mod. 460; 1 Salk. 171; *Bland v. Atwater*, 4 Conn. 9; *Dey v. Dox*, 9 Wend. (N. Y.) 129; *Morris v. Sliter*, 1 Denio (N. Y.) 59; *Rider v. Pond*, 18 Barb. (N. Y.) 179.

It may also be laid down as a rule, that stipulations or promises may be dependent upon the nature of the acts to be performed and the order in which they must necessarily precede and follow each other. "Where the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent without express words." *Per Shaw, C. J.*, in *Milldam Foundry v. Hovey*, 21 Pick. (Mass.) 439; *Thomas v. Cadwallader*, Willes, 496; *Knight v. New Eng. Worsted Co.*, 2 Cush. (Mass.) 286. In *Combe v. Greene*, 11 M. & W. 480 the plaintiff demised a dwelling-house and premises to the defendant, and the defendant covenanted that he would expend £100 in improvements and additions to the dwelling-house, under the direction of some competent surveyor to be appointed by the plaintiff. *Held*, that the appointment of a surveyor was a condition precedent to the defendant's liability to expend the £100. In *Miller v. Pittsburg & Cleveland R. Co.* 40 Pa. St. 237, there was a subscription to the stock of a railroad company on the express condition that the road should be located and constructed along a prescribed route. The road was so located, and the subscriber paid one or more instalments on his

shares, but neglected to pay the balance as the calls were made. Before the construction was completed the company suspended operations. An action was brought by the company for the balance of the subscription. *Held*, that the road having been located, as stipulated though not completed, the company was entitled to recover. But see *Macintosh v. M. C. R. Co.* 14 M. & W. 548.

Where a contract for the erection of a mill stipulates that "the whole mill, with all machinery, shall be completed and delivered in perfect running order within four months from date, provided the timber required to be used in constructing the building and placing the machinery therein is delivered on the ground . . . within 40 days after the receipt of the bill for said lumber by the party of the second part," if the party of the second part fails to deliver the lumber as stipulated, the condition as to the four months' time becomes inoperative, and the party of the first part remains bound only to use reasonable diligence. *Starr v. Gregory Con. Min. Co.*, 13 Pac. R. (Mont.) 5.

In an action by A for the breach of a contract by B for the construction and erection of machinery upon a steamboat to be furnished by A, where the work was to be done in 60 days but the boat was not completed in time to enable B to complete its work in that time, the court charged the jury, "If the jury find that after the day named for the completion of the contract, the work not being then completed, the boat was not then in readiness to receive it, yet if the boat was thereafter made ready, and the defendants proceeded under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement, and such additional time as may have been lost in the prosecution of the work, occasioned by delay in the construction of the boat; and failing in this, they are liable for the consequences of such failure and delay." *Held*, a proper statement of law as applicable to the facts of the case. *McGowan v. Am. P'd Tan Bark Co.*, 7 Sup. Ct. Rep. 1315.

1. In the absence of an express stipula-

tion, a term is considered of vital importance when it goes to the root of the matter, so that a breach of it would frustrate the main object of the contract. For example, in *Poussard v. Spiers*, L. R. 1 Q. B. D. 410, it was held that the failure of a singer, who was to take the principal female part in a new opera, to perform in the opening and early performances, went to the root of the matter and discharged the other party. And see *Spalding v. Rosa*, 71 N. Y. 40.

Where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. Mr. Sergeant Williams in notes to *Pordage v. Cole*, 1 Wms. Saund. 310; *Duke of St. Albans v. Shore*, 1 H. Bl. 270; *Graves v. Legg*, 9 Ex. 709; *Grey v. Frier*, 4 C. & F. 565; *Dakin v. Williams*, 11 Wend. 67.

The fact that a penalty for non-performance is named in the contract will not operate as a bar to a suit for rescission where the amount of the penalty is insufficient to give adequate damages at law. *Wilson v. Roots*, 10 N. E. Rep. (Ill.) 204; s. c., 8 West. Rep. 67.

When the contract fixes the time within which it is to be performed, and it appears from its nature, or the circumstances connected with its performance, that the parties intended to make the time an essential element of the agreement, time will be deemed of the essence of the contract, and strict compliance therewith will be compelled. *Carter v. Phillips*, 10 East. Rep. (Mass.) 561; s. c., 10 N. E. Rep. 500, 3 New Eng. Rep. 907.

A contract was entered into by a skilled machinist and inventor for the establishment and development of a manufacturing enterprise, on a paying basis, within a reasonable time. *Held*, that time was of the essence of the contract, and that a delay for such a length of time as to render certain stock of the company worthless entitled such company to a rescission. *Wilson v. Roots*, 10 N. E. Rep. (Ill.) 204.

A contract for carrying on the business of manufacturing, purchasing, and selling cloths provided that it might be terminated by either party on giving 60 days' notice to the other, and that if terminated by one named, the other should have the right to purchase within the said 60 days. *Held*, that time was of the essence of the contract to purchase. *Carter v. Phillips*, 10 N. E. Rep. (Mass.) 500; s. c., 3 New Eng. Rep. 907.

A and B made a written agreement whereby A sold to B the product in pig-

iron of 14,000 tons of iron ore, to be shipped as rapidly as possible during the season of 1880 to B at Cleveland; such portion of the product as is made after the close of navigation of 1880 to be shipped to Cleveland on the opening of navigation of 1881, or as near the opening as possible. The product was 8000 tons. 3400 tons were shipped in 1880, 3500 were ready at the opening of navigation in May, 1881, and the other 1100 tons were manufactured later. B refused to receive that which was shipped in 1881, and A sued for breach of the contract. *Held*, that time was of the essence of the contract, and A failing to fulfil its part of the contract, or to tender performance, cannot sue for the breach. *Cleveland Rolling Mill Co. v. Rhodes*, 7 Sup. Ct. Rep. 882; s. c., 121 U. S. 255.

The Shippers' Compress Company entered into a contract with the Va. & Tenn. Air Line, an association composed of the N. & W. R. Co. and other corporations, by which the latter agreed to fill with cotton a certain amount of room on board the steamers L. and L. at the port of N. said cotton to be placed on board on October 18 and 19, 1881, on which dates the steamers were to be loaded and made ready to sail for Europe. The cotton was not delivered until several days after the time agreed upon; and in consequence of the delay the Shippers' Compress Co. was, by the terms of its charter-party, compelled to pay a large sum for demurrage, after having given the proper agent of the Va. & Tenn. Air Line repeated and timely notice of the consequences which would result from its failure to deliver the cotton in time. *Held*, that the subsequent acceptance of the cotton by the Compress Co., was not a waiver of the stipulation as to time, and that it could recover the amount of demurrage so paid in an action against the Air Line. *N. & W. R. Co. v. Ship. Comp. Co.*, 2 S. E. Rep. (Va.) 139.

In general, time is not, unless so declared by the parties, of the essence of the contract; but this rule has exceptions, as if the thing sold be of greater or less value according to the efflux of time, then time is of the essence of the contract. *Wilson v. Roots*, 8 West. Rep. (Ill.) 67.

In a contract for the sale of land, time is not ordinarily of the essence, unless it is so expressed. *Smith's Ex. v. Proffitt's Adm'x*, 1 S. E. Rep. (Va.) 67.

Time was held to be of the essence of the contract in *Presidio Min. Co. v. Bullis*, 4 S. W. Rep. (Tex.) 860; and in *Ames v. Brooks*, 9 East. Rep. (Pa.) 534.

If the parties expressly state that the non-performance of a certain term shall be vital to the existence of their contract, a breach of that term will work a discharge.<sup>1</sup>

**93. Entire Contracts.**—Sometimes the promise of one party is conditional upon the entire performance of his part of the contract by the other party. When this appears to be the intention of the parties the promisor must perform the whole of his part of the contract before he can recover anything from the other party, and a partial breach will discharge the promisee from the performance of his promise.<sup>2</sup>

1. "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently express such an intention, it will not be a condition precedent." Blackburn, J., in *Bettini v. Gye*, L. R. 1 Q. B. D. 187, *infra*.

It was on this ground that the case of *Lowber v. Bangs*, 2 Wall. (U. S.) 728, was decided. In that case a vessel named the *Mary Bangs*, while on a voyage to Melbourne, was chartered at Boston for a voyage from Calcutta to the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch." Before the master was advised of this engagement the vessel had sailed to Manila, which is much out of the direct course from Melbourne to Calcutta. She arrived at Calcutta more than three months after the time at which she ought to have arrived if she had gone there directly from Melbourne. Freights in the mean time had largely fallen. After the arrival of the *Mary Bangs* the charterers engaged another vessel, which they loaded with the cargo intended for the *Mary Bangs*. The case thus showed that the object of the voyage had not been frustrated. In a suit to recover damages for a breach of the charter-party, the court below held that the charterers were not justified in repudiating the contract. This ruling was reversed by the Supreme Court of the United States, which held, that the parties, when they made their contract, intended that the clause "to proceed with all possible despatch" should be a condition precedent to any liability of the charterer, and that as the plaintiff had broken that clause he was not entitled to recover.

See also *Davison v. Von Lingen*, 113 U. S. 40; *Glaholm v. Hays*, 2 M. & G. 257.

In *Filley v. Pope*, S. C. U. S., No. 21, October Term, 1885 (not reported), where the contract was for the sale of five hundred tons of No. 1 pig-iron, "shipment from Glasgow," it was held that the buyer was justified in refusing to accept such iron shipped from Leith. "The term 'shipment from Glasgow,'" said Gray, J., "defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer." The court also said that in a commercial contract a statement descriptive of the subject-matter was ordinarily to be regarded as a warranty or condition precedent upon the failure or non-performance of which the party aggrieved might repudiate the whole contract. In such contracts, therefore, every term is regarded as important, and if one party fail to perform his promise in strict accordance with the agreement, the other is discharged.

A agreed to sell and B to buy iron for shipment in March from Great Britain to New York. A shipped no iron in March, but in April secured the option to purchase an equal quantity of the kind specified shipped by another party in March. B refused to receive this iron because it was not shipped by A. *Held*, a breach of contract on B's part. *Cunneham v. Judson*, 100 N. Y. 179, reversing 30 Hun (N. Y.) 63.

2. The leading case upon this point is that of *Cutter v. Powell*, 6 T. R. 320; s. c., 2 Sm. L. C. \*1. In that case the defendant, being at Jamaica, delivered to T. Cutter, the intestate, the following note: "Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The sum agreed

to be paid was larger than the usual wages of a second mate. The ship sailed on the 2d of August, and arrived in Liverpool on the 9th of October. Cutter did his duty as second mate until the 20th of September, when he died. It was held that the intestate's representatives could not recover, either on the express contract or on a *quantum meruit*. "The agreement is conclusive," said Grose, J.; "the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty guineas or to nothing, for such was the contract between the parties. . . . It may fairly be considered that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage." See also *Harris v. Liggett*, 1 W. & S. (Pa.) 301; *Martin v. Shoenberger*, 8 W. & S. (Pa.) 367; *Hartley v. Decker*, 89 Pa. St. 470; *Behn v. Burness*, 3 B. & S. (113 E. C. L. R.) 751, and n.; *Leonard v. Dyer*, 26 Conn. 177.

In this country it is generally held that where one engaged under an entire contract for personal services, after part performance is by sickness disabled from fully performing or dies, an action lies in his favor or his administrator's, as the case may be, to recover on account of the work actually performed, but as to the measure of the recovery the cases are not harmonious. *Clarke v. Gilbert*, 26 N. Y. 279; *Wolfe v. Howes*, 20 N. Y. 197; *Coe v. Smith*, 4 Ind. 79; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, 27 Vt. 759. And see *Lakeman v. Pollard*, 43 Me. 463; *Ryan v. Dayton*, 25 Conn. 188; *Green v. Gilbert*, 21 Wis. 401. As to sickness, which it was held plaintiff should have foreseen, and which therefore did not excuse non-performance, see *Jennings v. Lyon*, 39 Wis. 553.

A party to an entire contract who has partly performed it, and subsequently abandons the further performance according to its stipulations voluntarily and without fault on the part of the other, or his consent thereto, can recover nothing for such part performance. *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51.

A agreed to build a house for B, subject to inspection and approval by C, payments to be made in instalments on or before a specified day, or as soon

thereafter as a specified stage of the work was completed. Seven instalments had been paid, C approving of the work. The eighth instalment was to be paid when the exterior was finished, and one half of the interior wood-work finished, the cooking-range set, and the plumbing done. All but setting the cooking-range was done, but C had not approved when the building was burned. *Held*, that the contract was entire, and that A was not entitled to the eighth instalment. *Newman Lumber Co. v. Purdum*, 41 Ohio St. 373.

A agreed to store for B from October until May from 15,000 to 30,000 barrels of lime, and to deliver it at the end of his wharf in May. For this he was to receive fifteen cents per barrel. In November, after 20,000 barrels had been received, they caught fire and the lime was ruined by slaking. A was in no way responsible for the fire. *Held*, that the contract was an entirety, and that A could recover nothing for storage, and could not retain a sum paid him on account thereof. *Archer v. McDonald*, 36 Hun (N. Y.), 194.

A contract for the digging of an artesian well, which in express terms provides that the contractor shall be entitled to be paid for work thereunder "only on the completion of the whole work," is an entire contract; and it is not competent for the other contracting party, in a suit to recover for the non-performance of the contract, to allow a credit of \$500 for work done, for the purpose of sustaining an attachment on the ground of non-residence. *Simonds v. Pearce*, 31 Fed. Rep. 137.

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. See *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Quigley v. De Haas*, 82 Pa. St. 267, 273; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231. In *Johnson v. Johnson*, 3 B. & P. 162, the plaintiff had purchased from the same persons two parcels of real estate, the one for £700, the other for £300, and had taken one conveyance for both. After having paid the purchase-money and taken possession, he was evicted from the smaller parcel in consequence of a defect in the title derived under the purchase, and thereupon brought an action for money had and received to recover back the £300, at the same time

refusing to give up the parcel of land for which £700 had been paid. *Held*, that he was entitled to recover. "Although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts, and that the one part was sold for £300 and the other for £700." *Per* Lord Alvanley. See also *Mayfield v. Wadswley*, 3 B. & C. 357; *Robinson v. Green*, 3 Met. (Mass.) 159; *Mayor v. Pyne*, 3 Bing. 285; *Perkins v. Hart*, 11 Wheat. (U. S.) 237, 251; *Withers v. Reynolds*, 2 B. & Ald. 882; *Sickels v. Pattison*, 14 Wend. (N. Y.) 257; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36, 47; *Snook v. Fries*, 19 Barb. (N. Y.) 313; *Carleton v. Woods*, 8 Foster (N. H.), 290; *Robinson v. Snyder*, 25 Pa. St. 203.

On a certain steamer was shipped by C. & Co. to P. & Co. a lot of iron containing a certain quantity of each of two kinds of iron. The iron of one kind was accepted, but that of the other kind rejected, being of inferior quality. By the agreement these were distinct and separate quantities of iron which C. & Co. agreed to sell and deliver for different prices. *Held*, that the contract of sale was not entire but severable in its nature, allowing the purchaser to receive that distinct part of the property complying with the terms of the contract, and reject the other distinct part that failed to agree with the description; that by so doing P. & Co. did not rescind the contract, but were entitled to recover from C. & Co. under the contract what they had paid upon the iron not accepted, and for any loss arising from a change in the market price. *Pierson v. Crooks*, 4 N. Y. St. Repr. 578.

And the rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. Thus if a ship is to be built upon a special contract, and it is part of the terms of that contract that given portions of the price shall be paid according to the progress of the work, namely, part when the keel is laid, part when at the light plank, and the remainder when the ship is launched, there arises a separate contract for each instalment; and therefore, when the keel is laid or any other part of the ship for which an instalment is to be paid is completed, it has been held in England, and to some extent here, that an action lies immediately for the one party to recover the instalment, and that part of the ship becomes by the payment the property of the other.

*Woods v. Russell*, 5 B. & Ald. 942. See also *Clarke v. Spence*, 4 A. & E. 448; *Laidler v. Burlinson*, 2 M. & W. 602; *Cunningham v. Morrell*, 10 Johns. (N. Y.) 203. This doctrine is denied in *Andrews v. Durant*, 1 Kern. (N. Y.) 35. See also *Wood v. Bell*, 5 E. & B. 772; 6 E. & B. 355; *Moody v. Brown*, 34 Me. 107.

Under a contract for building a State road, warrants were issued for such portion of the work as had up to that time been accepted and not yet paid for. The township resisted the payment of these warrants on the ground that the contract was an entire one, and that a previous suit thereon was a bar to subsequent recovery. *Held*, that the consideration of the contract was apportioned as to the items covered by the several warrants, and the contract was severable. *Township of E. Union v. Comrey*, 9 Atl. Rep. (Pa.) 290.

A contract to cut, cure, and stack hay on a ranch, at so much per ton, which does not specify what number of tons are to be cut nor any given number of acres to be mown, and under which neither the work to be done nor the amount to be paid is in gross, is a separable and not an entire contract; and when the hay is burned the loss falls on the owner, and the contractor, being innocent, can recover for his labor notwithstanding. *Hindrey v. Williams*, 12 Pac. Rep. (Colo.) 436.

But the mere fact that the subject of the contract is sold by weight or measure and the value is ascertained by the price affixed to each pound or yard or bushel of the quantity contracted for, will not be sufficient to render the contract severable. *Clark v. Baker*, 5 Met. (Mass.) 452. In *Davis v. Maxwell*, 12 Met. (Mass.) 286, the plaintiff agreed with defendant to work on the farm of the latter for the period of "seven months, at \$12 per month." *Held*, that the contract was entire; that eighty-four dollars were to be paid at the end of seven months, and not \$12 at the end of each month, and that the plaintiff on leaving the defendant's service without good cause before the seven months expired was not entitled to recover anything of the defendant. See also *Baker v. Higgins*, 21 N. Y. 397.

The sale of a specific number of packages of an article at a given price a package is an entire contract; a purchaser cannot rescind it as to some packages and affirm it as to others. *Mansfield v. Trigg*, 113 Mass. 350.

B subscribed for one copy of A's book in ten portfolios of \$15 each, the portfolios to be issued at intervals of about two months and payments to be made for each portfolio upon delivery. A delivered to B two portfolios, which were paid for; but B refused to accept or pay for any further deliveries, claiming that his signature to the contract was obtained by fraud. In an action by A to recover the price of the remaining eight numbers, it was held that the contract was one entire agreement, and not a contract containing ten distinct agreements; and that B could not avoid the contract or give evidence tending to show the fraud alleged until he had returned, or offered to return, the two portfolios which he had received and paid for. *Barrie v. Earle*, 143 Mass. 1.

A contract provided for the delivery of 5000 tons of ore at \$10 per ton, the buyer to pay for a certain number of tons per month, but contained no stipulation as to the number of tons to be delivered each month, or when the delivery should be completed. Under the contract the first payment was made before any ore was delivered; and certain future payments were withheld, on the ground that the quality of the ore was inferior, not that the payments had not become due by reason of non-delivery of the ore. *Held*, by virtue of the terms of the contract and the conduct of the parties, that the contract was entire. *W. Rep. Mining Co. v. Jones & Laughlins*, 108 Pa. St. 55.

The parties executed through a broker the following contract of sale: "J. H. C., broker in chemicals, dye-stuff, etc. Baltimore, Oct. 8, '83. Sold to Messrs. B., C. & Co. for account of Mr. H. H. S., about 400 to 500 tons raw kainit, German, test not less than 233, for shipment from Germany to Wilmington, N. C., during Oct. or Nov. '83, at \$925 per ton, 2240 lbs. invoice weight, *ex ship* in bulk at Wilmington, payable cash on arrival of vessel; seller has option of shipment from N. Y. out of vessel sailing from Germany not later than Nov. '83, if direct shipment unobtainable; in either case seller to give buyer name of vessel from which he proposes making delivery as soon as received by him. (Signed) J. H. C." The above contract of sale was indorsed "accepted" by both parties to the action. The contract was subsequently modified so as to make the amount sold 575 tons. The goods were subsequently shipped, but owing to the leaky condition of the vessel, a portion of the cargo was left behind and the appellant offered to de-

liver 508 tons, which the appellees refused to accept, and the goods were thereupon sold on their account. In an action to recover the difference between the amount realized and the contract price, *held*, that the contract signed by the parties was an agreement to sell upon the conditions therein expressed, and that the buyers were not bound to accept a less quantity than was called for by the agreement. *Salmon v. Boykin, Carmer & Co.*, 10 East. Rep. (Me.) 166.

Where several distinct articles are bought at the same time for different prices, even if of the same general description so that a warranty of quality would apply to each, the contract is not entire, but is in effect a separate contract for each article sold, and a right of rescission exists as to each article if the warranty in regard to it is broken. *Young v. Conant Mfg. Co. v. Wakefield*, 121 Mass. 91.

If the consideration to be paid is single and entire, the contract must be held to be entire although the subject of the contract may consist of several distinct and wholly independent items. *Miner v. Bradley*, 22 Pick. (Mass.) 457. In this case the defendant put up at auction a cow and 400 pounds of hay, both of which the plaintiff bid off for \$17, which he paid at the time. He received the cow and was refused the hay by the defendant, who had used it. The action was brought to recover the value of the hay. Defendant objected that the contract was entire; the plaintiff could not recover back the price paid or any portion of it without rescinding the whole contract, and that this could not be done without returning the cow. The objection was sustained. "Had the plaintiff bid off the cow at one price and the hay at another, although he had taken one bill of sale for both, it would have come within the principles of the above case [*i.e.*, *Johnson v. Johnson*, 3 B. & P. 162]; but such was not the fact. And it seems to us very clear that the contract was entire, that it was incapable of severance, that it could not be enforced in part and rescinded in part, and that it could not be rescinded without placing the parties in *statu quo*. See also *Jones v. Dunn*, 3 W. & S. (Pa.) 109; *Biggs v. Wisking*, 14 C. B. 195; *White v. Brown*, 2 Jones (N. Car.), 403; *Dula v. Cowles*, 2 Jones (N. Car.), 454.

A, for a consideration in gross, was insured against loss by fire to the amount of \$2400; viz., \$2000 on two connecting dwelling-houses, \$1000 on each, and \$400



**94. Acceptance of Partial Performance.**—If, however, the promisee accepts a partial performance of an entire contract, he may in some cases be sued by the promisor upon an implied contract to pay as much as that which he has received is reasonably worth.<sup>1</sup>

on a building in the rear of the others. *Held*, the contract was entire, subject in all its parts to the condition imposed by the insurance company, and that a violation of one of the conditions of the policy as to part of the risk affected the whole risk. *Kelly v. Humboldt Fire Ins. Co.*, 11 East. Rep. (Pa.) 496.

Where the subject of sale is an entire lot of growing timber, and the price is not apportioned, the contract is entire. *Alcott v. Hugus*, 105 Pa. St. 350.

A contract is said to be apportionable when the amount of consideration to be paid by the one party depends upon the extent of performance by the other. If A and B agree together that A shall enter into the service of B and continue for one year, and that B shall pay him therefor the sum of \$100; and A enters the service accordingly and continues half of the year and then leaves, he will not be entitled to recover anything on the contract. *Ex parte Smyth*, 1 Swanst. 337, n. (a). Contracts have been held apportionable in which the service to be performed was specific and fixed, but the consideration to be paid was left to be implied by law. In *Roberts v. Havelock*, 3 B. & Ad. 404, a ship belonging to the defendant having come into port in a damaged state, the plaintiff was employed and undertook to put her into thorough repair. Before the work was completed a dispute arose between the parties, and the plaintiff refused to proceed until he was paid for the work already done, for which this action was brought. The defendant objected that the action did not lie, inasmuch as the plaintiff had not completed his contract, and as long as that was the case the work already done was unavailable for the purpose for which it had been required. And the case of *Sinclair v. Bowles*, 9 B. & C. 92, in which A, having undertaken for a specific sum of money to repair and make perfect a given article, and having repaired it in part, but not made it perfect, it was held he was not entitled to recover for what he had done, was cited as in point. Lord Tenterden said: "There is nothing in the present case amounting to a contract to do the whole repairs, and make no demand until they are completed. The plaintiff was entitled to say that he would proceed no further with the repairs till he

was paid what was already due," and the plaintiff recovered. See also *Withers v. Reynolds*, 2 B. & Ad. 882; *Sickels v. Pattison*, 14 Wend. (N. Y.) 257; *Wade v. Haycock*, 25 Pa. St. 382.

1. If one party without the fault of the other fails to perform his side of the contract in such a manner as to enable him to sue upon it, still if the other party have derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law generally therefore implies a promise to pay what it is reasonably worth. The cases may be arranged in three classes: those arising on contracts of sale; those arising on contracts to do some specific labor upon the land of another, as to erect buildings or build roads and bridges; and those arising upon ordinary contracts for service. The leading case of the first class is *Oxendale v. Wetherill*, 9 B. & C. 386. That was an action to recover the price of 130 bushels of wheat sold and delivered by the plaintiff to the defendant at 8s. per bushel. The defendant claimed that the contract was for 250 bushels, and that as the plaintiff had not fully performed, he was not entitled to recover anything. *Held*, that he was entitled to recover. "The defendant having retained 130 bushels after the time for completing the contract had expired, was bound by law to pay for the same." *Per Bayley, J.* See also *Reed v. Rann*, 10 B. & C. 441; *Ship-ton v. Casson*, 5 B. & C. 378.

In *Massachusetts* it has been held that if the vendee of a specific quantity of goods sold under an entire contract receives a part thereof, and retains it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and he becomes liable to the vendor for the price of such part. *Bowker v. Hoyt*, 18 Pick. (Mass.) 555.

In *New York* the case of *Oxendale v. Wetherill* has been entirely repudiated, and it is there held that the vendor in such case is not entitled to any remedy. *Champlain v. Rowley*, 13 Wend. (N. Y.) 258, 18 Wend. (N. Y.) 187; *Mead v. Degolyer*, 16 Wend. (N. Y.) 632; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Paige v. Ott*, 5 Denio (N. Y.), 406; *Oakley v. Morton*, 1 Kern. (N. Y.) 25. Also

If the party whose performance is a condition precedent be prevented from performing his promise by the act of the other party, he will be discharged from further performance, and may recover damages on a *quantum meruit* or in an action on the contract if he

in *Ohio*. *Witherow v. Witherow*, 16 Ohio, 238.

One of the most important cases of the second class is *Hayward v. Leonard*, 7 Pick. (Mass.) 181. The plaintiff contracted in writing to build a house for the defendant at a certain time and in a certain manner on defendant's land, and afterwards built the house within the time and of the dimensions agreed on, but in workmanship and materials varying from the contract. The defendant was present almost every day during the building, and had an opportunity of seeing all the materials and labor, and objected at times to parts of the materials and work, but continued to give directions about the house, and ordered some variations from the contract. He expressed himself satisfied with a part of the work from time to time, though professing to be no judge of it. Soon after the house was done he refused to accept it, but the plaintiff had no knowledge that he intended to refuse it till after it was finished. *Held*, that the plaintiff might maintain an action against the defendant on a *quantum meruit* for his labor, and on a *quantum valebant* for the materials. See *Smith v. First Cong. Meeting-house in Lowell*, 8 Pick. (Mass.) 178; *Taft v. Montague*, 14 Mass. 282; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Snow v. Ware*, 13 Metc. (Mass.) 42; *Lord v. Wheeler*, 1 Gray (Mass.), 282; *Hayden v. Madison*, 7 Greene (Me.), 76; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; *Kettle v. Harvey*, 21 Vt. 301; *Burn v. Miller*, 4 Taunt. 745; *Chapel v. Hickes*, 2 C. & M. 214; *Thornton v. Place*, 1 M. & R. 218. But see *Ellis v. Hamlen*, 3 Taunt. 52; *Sinclair v. Bowles*, 9 B. & C. 92; *Wooten v. Read*, 2 Sm. & M. (Miss.) 585; *Hilm v. Wilson*, 4 Mo. 41; *White v. Oliver*, 36 Me. 93. As to the third class, see *Britton v. Turner*, 6 N. H. 481. *Contra*, *Eldridge v. Rowe*, 2 Gil. (Ill.) 91; *Miller v. Goddard*, 34 Me. 102; *Olmstead v. Beale*, 19 Pick. (Mass.) 529; *Davis v. Maxwell*, 12 Metc. (Mass.) 286; *Swanzy v. Moore*, 22 Ill. 63; *Hansell v. Erickson*, 28 Ill. 257.

An instruction in an action against a county by a contractor to recover a balance claimed to be due under a contract for putting inside blinds in the courthouse, that if the jury found that the con-

tractor had done the work for the county, and the county had accepted the work, or had gone into possession of, and had used the blinds, they should find for the plaintiff for the reasonable value of the blinds, although they should find that the contract had not been complied with, was held correct as a principle of law, and warranted by the evidence, it appearing that the blinds remained in the courthouse, were used, and not rejected by any formal order of the commissioners' court until after the contractor had sold his claim to *bona fide* purchasers. *Campbell v. Hildebrandt*, 3 S. W. Rep. (Tex.) 243.

Compensation may be allowed for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract is not wilful, and the other party has availed himself of and been benefited by such labor and materials. *Pinches v. Swedish Evan. Luth. Church*, 10 Atl. Rep. (Conn.) 264, and cases cited therein.

The party for whom work was contracted to be done is not obliged to accept anything in place of what was contracted for. Where work done upon another's building in no respect fulfils the purpose contracted for, or affords any comfort or gratification to the owner, no acceptance thereof will be implied by law from the fact of its being permitted to remain. *Presb. Ch. v. Hoopes Co.*, 7 Cent. Rep. (Md.) 432; s. c., 10 East. Rep. 815.

Where a builder contracts to do certain repairs on a house for an agreed sum, without stipulating as to when the money shall be payable, and when the repairs have been only partially completed the house is destroyed by fire, the builder is entitled to recover compensation *pro rata* upon the contract price for the repairs then completed. *Weis v. Devlin*, 3 S. W. Rep. (Tex.) 726.

A contracted to make and put certain fixtures into the defendant's church, by a certain day, for a gross sum, to be paid on completion and acceptance. After the work was partly done and before the appointed day the church was destroyed by fire without the fault of either party. *Held*, A might recover *quantum meruit*. *Haynes v. Second Bapt. Ch.*, 88 Md. 285; s. c., 57 Am. Rep. 413.



prove that he was ready and willing to perform his promise, but was prevented from doing so by the act of the defendant.<sup>1</sup>

**95. Breach in Minor Matter.**—When the breach is in a matter which the parties may be deemed to have considered of minor importance, which may be compensated for in damages, the party injured is not discharged from the further performance of his contract. He is bound to proceed with performance as if the breach had not occurred, and seek his remedy in an action for damages for whatever injury he has suffered.<sup>2</sup>

1. *Planché v. Colburn*, 8 Bing. 14; *Goodman v. Pocock*, 15 Q. B. 576; *Cort v. Ambergate R. Co.*, 17 Q. B. 127; *Hall v. Rupley*, 10 Pa. St. 231; *Moulton v. Trask*, 9 Metc. (Mass.) 577; *Hoagland v. Moore*, 2 Blackf. (Ind.) 167; *Woolner v. Hill*, 93 N. Y. 576; *United States v. Behan*, 110 U. S. 339; *Bannister v. Read*, 1 Gilman (Ill.), 92; *Selby v. Hutchinson*, 4 Gilman (Ill.), 319; *Webster v. Enfield*, 5 Gilman (Ill.), 298; *Derby v. Johnson*, 21 Vt. 17; *Clark v. Marsiglia*, 1 Denio (N. Y.), 317.

One who has been prevented from executing a contract by the conduct of the other contracting party, may recover a reasonable sum for work and labor done, money expended in the performance of the contract, and materials furnished, and in addition an equivalent sum for the profits which he would have realized from the performance. *Kendall Bank Note Co. v. Comm'rs of Sinking Fund*, 79 Va. 563; *Cent. Lunatic Asylum v. Flanagan*, 80 Va. 116.

2. In *Bettini v. Gye*, L. R. 1 Q. B. D. 183, the plaintiff, a singer, agreed with the director of the Royal Italian Opera that he would undertake the part of first tenor in the theatres, halls, and drawing-rooms in the United Kingdom. The agreement was in writing, and contained this clause: "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals." The plaintiff broke this clause by failing to arrive in London until two days before the opera began. The defendant refused to proceed with the engagement, claiming that the breach discharged him from the further performance of the contract. The plaintiff then sued him for a breach of contract. In delivering the judgment of the court. Blackburn, J., said: "We think that we are to look to the whole contract and . . . see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest

of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it, and may be compensated for in damages." As the court were of opinion that the stipulation did not go to the root of the matter, the defendant was held to be liable for the breach of contract, and the plaintiff recovered.

In *MacAndrew v. Chapple*, L. R. 1 C. P. 643, an action was brought against a freighter for not loading a cargo. The charter-party contained a clause that the ship should "with all convenient speed, . . . proceed to Alexandria, . . . and there load a cargo of cotton." The ship deviated from her course, and arrived at Alexandria a few days later than she would have done if she had gone there direct. The ship had not been taken up for any particular cargo, and a small loss in freight was the only result of the delay. The court held that the delay afforded no justification to the freighter for refusing to load a cargo, but that his remedy for any damage that had accrued by reason of the delay was by a cross action. "It seems to be now settled," said Willes, J., ". . . that a delay or deviation which . . . goes to the whole root of the matter deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter." In other words, the breach of a clause which on its face does not go to the root of the matter will nevertheless discharge the contract if it appear that in fact it frustrated the object of the parties.

Another example of a condition which does not go to the root of a contract is a warranty upon an executed sale of goods. "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet col-

**96. Effect of Accepting Substantial Performance.**—The breach of a term which in the first instance would have justified a party in repudiating the contract cannot be taken advantage of as a discharge if the party have received a substantial performance of the contract.<sup>1</sup>

lateral to the express object of it." Lord Abinger, C. B., in *Chanter v. Hopkins*, 4 M. & W. 404. Upon the breach of a warranty the vendee may sue the vendor for damages, but cannot return the goods. If a man sell a horse to another and warrant that he is sound, the purchaser, having accepted the horse, cannot return him upon discovering that he is not sound, unless there be an express condition in the contract which gives him that privilege. His only remedy is an action for damages for the breach of the warranty. *Kase v. John*, 10 Watts (Pa.), 109; note to *Chandelor v. Lopus*, 1 Sm. L. C. (8th Am. Ed.) 353. Or, if he have not paid the price, he may wait until he is sued for the purchase-money, and then take advantage of the breach as a proof of failure of consideration and in mitigation of damages. 1 Sm. L. C. (8th Am. Ed.) 34.

1. Mr. Sergeant Williams, in his notes to *Pordage v. Cole*, 1 Wms. Saund. 310, lays down the following rule: "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration."

The leading cases upon this point are *Boone v. Eyre*, 1 Hy. Bl. 273, note (a); *Duke of St. Albans v. Shore*, 1 Hy. Bl. 179. See also *Fothergill v. Walton*, 2 J. B. Moore, 630; *Stavers v. Curling*, 3 Bing. (N. Cas.) 355; *Franklin v. Miller*, 4 A. & E. 599; *Fishmongers' Co. v. Robinson*, 5 M. & G. 131, 198; *Storer v. Gordon*, 3 M. & S. 308; *Ritchie v. Atkinson*, 10 East, 295; *Havelock v. Geddes*, 10 East, 555; *Jonassohn v. Great Northern R. Co.*, 10 Ex. 434; *Gould v. Webb*, 4 E. & B. 933; *Milldam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Tileston v. Newell*, 13 Mass. 406; *Bennet v. Pixley*, 7 Johns. (N. Y.) 249; *Obermyer v. Nichols*, 6 Binn. (Pa.) 159; *Morrison v. Galloway*, 2 Harris & J. (Md.) 461; *Todd v. Summers*, 2 Gratt. (Va.) 167; *Lewis v. Weldon*, 3 Rand. (Va.) 71; *McCullough v. Cox*, 6 Barb. (N. Y.) 386; *Payne v. Bettisworth*, 2 A. K. Marsh. (Ky.) 427;

*Keenan v. Brown*, 21 Vt. 86; *Tompkins v. Elliot*, 5 Wend. (N. Y.) 496; *Grant v. Johnson*, 5 Barb. (N. Y.) 337; s.c., 6 Barb. (N. Y.) 337; 1 Seld. (N. Y.) 247; *Pepper v. Haight*, 20 Barb. (N. Y.) 429.

"If a party promise to build a house upon the land of another and to dig a well on the premises and to place a pump in it, and the owner of the land covenants seasonably to supply all materials and furnish a pump, it is very clear that the stipulation to furnish materials is dependent and constitutes a condition, because the builder cannot perform on his part until he has the material; so to put a pump into the well. But the stipulation to dig a well is not conditional, because it goes to a small part only of the consideration, and does not necessarily depend on a prior performance on the part of the owner, and because a failure can be compensated in damages, and the remedy of the owner is by an action on the contract." *Shaw, C. J.*, in *Knight v. New England Worsted Co.*, 2 Cush. (Mass.) 286.

*Obermyer v. Nichols*, 6 Binn. (Pa.) 159. Upon a lease of a mill the lessor covenanted to put up improvements. The improvements were not put up. *Held*, that lessor could recover rent, the failure not going to the whole consideration. The defendant was allowed to set off his loss by the non-erection of the improvements.

In *Ligget v. Smith*, 3 Watts (Pa.), 331, plaintiff agreed to build a warehouse and use certain mortar in its construction. Mortar was not used according to the contract. *Held*, that this did not constitute an entire defence to an action on the contract, but that the defendant might set off whatever damage he had sustained.

Thus in *Carter v. Scargill*, L. R. 10 Q. B. 564, the plaintiff, who was the publisher of a newspaper, sold out his business and plant to the defendant, and, in the event of the business being proved to realize a clear profit of £7 per week, the defendant agreed to pay to the plaintiff in several instalments the sum of £400. The defendant entered into possession of the business and afterward sold it. The plaintiff brought an action for the

ments, and the defendant set up as a defence that the business was not to be worth £7 clear profit per

The court held that, assuming it would have been a good defence if the contract had remained executory, the defendant, having had a substantial part of the consideration, could not take advantage of it. See also observations of Williams, J., in *Behn v. Messers, 3 B. & S. (113 E. C. L. R.) 755*; *Parke, B., in Graves v. Legg, 9 B. & S. 16-17*. In the leading case of *Boone v. Eyre, 1 Hy. Bl. 273, n.*, the defendant covenanted to convey to the plaintiff the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £100 per annum for his life. The breach of the contract was the non-payment of the annuity. The defendant pleaded that the plaintiff was not, at the time of the contract, legally possessed of the negroes on the plantation, and so had not a good title to convey. The court held that the plaintiff was not bound, Lord Mansfield observing that the plea were to be allowed, any negro not being the property of the plaintiff would bar the action. See *Pustie, 32 L. J. Q. B. 179*; 2 Pars. on 530 and n.

It is, however, that the right to rescind the contract as discharged should be limited to a mere right to bring an action for damages, it is necessary that the plaintiff should have received a substantial part of the consideration. If that part remains to be done by the promises to the root of the contract, the contract may be rescinded, although the plaintiff has received a partial performance. The case of *Ellen v. Topp, 124*, furnishes us with an illustration of this principle. There a master took to teach his apprentice the trades of auctioneer, appraiser, and corn factor. The apprentice was to serve for five years. After three years expired the master abandoned the contract of corn factor. The apprentice presented himself from his master's service. The master sued on the indenture of apprenticeship for the desertion of the apprentice, and claimed that although the undertaking to teach the trade of corn factor might have been a condition precedent in the beginning, yet as the apprentice had received the benefit of three years' instruction, he had received a substantial part of the consideration, and was therefore put to his election for damages. But the court

held that he could not recover. "The construction of an instrument," said Pollock, C. B., "may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantor in accepting less." Then, referring to *Boone v. Eyre, 1 Hy. Bl. 273, n.*, he went on to say: "The defendant . . . might have objected to the transfer, if the plaintiff had no good title to the negroes and refused to pay. . . But this is no objection to the soundness of the rule, which has been much acted upon. . . It cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue *must be the substantial part of the contract*; and if, in the case of *Boone v. Eyre*, two or three negroes had been accepted and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it. . . To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn factor, so as to say that one is more the substantial part of the contract than another."

Where the matter in controversy in the action had been compromised and settled by a written contract, which was partially performed by the defendant, such partial performance by defendant and the acceptance of its benefits by the plaintiff was held to place it out of the plaintiff's power to abandon the contract and sue for the original consideration: he must resort to his action for damages on the contract, if any he has sustained. *Love v. Van Every, 9 West. Rep. (Mo.) 913*.

*B.*, a company, in execution of a contract made with *C.*, a company, which contract *C.* had the privilege of electing to affirm or rescind, assigned to *C.* \$5500 worth of the stock of *C.* Later, a bill in equity having been filed by *B.* for a specific execution of the contract, it was held that if a rescission should be elected by *C.*, the bill in equity ought not to be dismissed till the stock assigned by *B.* was returned. *Appeal of Brush Electric Light Co., 11 East. Rep. (Pa.) 648*.

If the contract is one of exchange, and

**97. Severable Contracts.**—When a contract is severable, that is, “when the part to be performed by one party consists of several distinct and independent items, and the price to be paid by the other is apportioned to each item,”<sup>1</sup> upon a breach by one party of any one item, the question arises whether the other party is justified in repudiating the whole contract, or is bound to proceed with performance and seek his remedy in an action for damages for whatever injury he may have sustained by the breach.<sup>2</sup>

The rule in *England*, as established by the recent cases, is, that a breach of any part of a severable contract will entitle the injured party to a right of action, but will not discharge him from the performance of the remainder of the contract, unless it be equivalent to a refusal to perform the balance of the contract, or be of such a character as to wholly frustrate its object.<sup>3</sup> This rule has

one party has parted with the property received, he cannot demand a rescission. *Smith v. Prittenham*, 109 Ill. 540.

A gave to B 150 bonds of a stock company in consideration that B would perform certain acts, make certain loans and advances of money to the company, for the purpose of carrying out the objects for which it was organized, and also purchase of A certain additional bonds at an agreed price, and loan A a certain sum of money. B performed his part of the contract, except as to the making of the loan to A and the purchase of the last-mentioned bonds, which he fraudulently refrained from performing. *Held*, in an action of trover by A to recover the value of the 150 bonds, that B was entitled to an instruction in substance “that, if several considerations entered into the contract to induce A to part with the bonds, and three of these had been fully and honestly performed by the loans and advances made by B, A could not rescind the contract and maintain an action for the full value of the bonds, unless upon repayment of the sums which B had lent or advanced; and further, that if it was impossible from the nature of the transaction to restore B to the condition in which he was before the contract, A could not avail himself of the benefit of the loans, advances, services, and other acts rendered either to himself or to the company for whom he acted, and at the same time rescind the contract and recover back the consideration for these loans, etc., but must seek his remedy in damages for the injury he has sustained by the wrongful and fraudulent failure of B to perform the contract for the loan and purchase, which was the fourth consideration. *Snow v. Alley*, 11 N. E. Rep. (Mass.) 764.

As between vendor and vendee, a court of equity would not deny the vendor rescission of a contract for the reason that the vendor had by his disposition of a part of the property fraudulently purchased, made it impossible for the parties to be placed *in statu quo*. If the vendee retained all the purchased property rescission must be complete, the rule of law applying; but to the extent the fraudulent party disposed of or incumbered the purchased property to third parties without notice, the vendor, claiming rescission, would be excused from refunding or offering to refund that part of the consideration received, representing or equalling the portion of the property disposed of or incumbered by the vendee. *Preston v. Spalding*. 8 West. Rep. (Ill.) 481.

In settlement of certain notes and accounts, A paid B \$50 in cash and conveyed land for a fixed price equalling the balance of the indebtedness, and received the notes and accounts. *Held*, that B could not rescind in part by rescinding the conveyance and retaining the \$50. *Worley v. Moore*, 97 Ind. 15.

1. 2 Pars. on Conns. \*517.

2. The parties may, of course, insert a provision in their contract that if either of them fail in the performance of any one part, the other may treat the contract as at an end. It is only in the absence of such an express provision that the question we are now considering can arise.

3. In *Simpson v. Crippin*, L. R. 8 Q. B. 14, the defendants agreed to supply the plaintiffs with from six to eight thousand tons of coal, to be delivered into the plaintiffs' wagons at the defendants' collieries in equal monthly quantities during the period of twelve

not been adopted by the supreme court of the United States,<sup>1</sup>

months. During the first month the plaintiffs sent wagons to receive only one hundred and fifty-eight tons. Immediately after the first month had expired the defendants informed the plaintiffs that they should treat the contract as at an end. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more iron. The court held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract.

In *Freeth v. Burr*, L. R. 9 C. P. 208, the defendant contracted to sell to the plaintiffs two hundred and fifty tons of pig-iron, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days after delivery of each parcel. The delivery of the first one hundred and twenty-five tons was not completed for nearly six months. The plaintiffs refused to pay for this, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendants' default, but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach of the contract by the plaintiffs, declined to deliver any more iron. *Held*, that the mere refusal to pay for the first parcel did not warrant the defendant in treating the contract as abandoned, and that the plaintiffs were entitled to damages for the breach. "In cases of this sort," said Lord Coleridge, C. J., at pp. 13, 214, "where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."

Where, by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract." This is the English rule. See, on this subject, *Hoare v. Rennie*, 5 H. & N. 19; *Monassohn v. Young*, 4 B. & S. 296; *Simpson v. Crippin*, L. R. 8 Q. B. 14, *supra*; *Roper v. Johnson*, L. R. 8 C. P. 167; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Freeth v. Burr*, L. R. 9 C. P. 208, *supra*; *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P. 15; *Brandt v. Lawrence*, L. R. 1 Q. B. D.

344; *Reuter v. Sala*, L. R. 4 C. P. D. 239; *Honck v. Muller*, L. R. 7 Q. B. D. 103; and *Mersey Steel Co. v. Naylor*, L. R. 9 Q. B. D. 648; *Aff'd in H. L.*, L. R. 9 App. Cas. 434, where the rule, as stated by Lord Coleridge, in *Freeth v. Burr*, L. R. 9 C. P. 208, is quoted with approval by Earl Selborne, L. C., at p. 438.

Payment for a previous delivery under a contract for delivery of goods by instalments *held* not a condition precedent to the right to claim the next delivery; and *also held*, that purchasers by postponing payment, under erroneous advice, had not so acted as to show an intention to repudiate the contract, or so as to release the sellers from further performance. *Mersey Steel & Iron Co. v. Naylor, Benson & Co.*, 9 App. Cas. 434; 51 L. T. N. S. 637.

In an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customer served or belonging at any time to the master, his successors, or assigns; *held*, that if, on the construction of the undertaking, it was not limited to interference with persons who were customers during the employment of the servant, the undertaking was severable, and capable of enforcement in respect of persons who were customers during the employment. *Baines v. Geary*, 35 Ch. D. 154; 56 L. T. N. S. 567.

1. The question arose, and was thoroughly discussed, in the recent case of *Norrington v. Wright*, 21 Amer. L. Reg. N. S. 395; *Aff'd by S. C. of U. S.*, No. 13, Oct. Term, 1885, 42 Legal Int. (Phila.) 466. In that case the contract was for the sale of five thousand tons of old T. iron rails, to be shipped at the rate of about one thousand tons per month, beginning in February, 1880—the whole to be shipped before August of the same year. Four hundred tons were shipped in February, and eight hundred and eighty-five tons in March. In April the shipments exceeded one thousand tons, and in the succeeding months fell short of that amount. The February shipment was delivered and paid for, but the buyers (the defendants), upon learning the amount shipped in February, March, and April, declined to accept further shipments. The plaintiffs then brought an action against them for their refusal to accept the balance of the iron in compliance with the contract. The court below held that they could not recover,



although it has been followed in many of the State courts.<sup>1</sup>

but said that they regarded the point as involved in serious doubt, and hoped that the case might be carried to the supreme court of the United States. Upon an appeal to the supreme court the judgment was affirmed. "The plaintiff," said Gray, J., in delivering the opinion of the court, "instead of shipping about one thousand tons in February and about one thousand tons in March, as stipulated in the contract, shipped only four hundred tons in February, and eight hundred and eighty-five tons in March. His failure to fulfil the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

1. The English rule has been followed in *Pennsylvania*. Some of the following cases may seem to be contrary to the English rule, but they may be distinguished upon the ground that there was a breach of the contract by anticipation—a prospective refusal to perform. *Shinn v. Bodine*, 60 Pa. St. 182, is an example of this class of cases. *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 352. In *Morgan v. McKee*, 77 Pa. St. 228, defendants bought 4000 barrels of oil from plaintiffs, and eight similar papers of the same date were executed to them each for the delivery of 500 barrels a month, cash on delivery. Plaintiffs on demand refused to deliver the oil on one of the appointed days. The defendants, on the next day for delivery, gave notice of rescission on the ground of previous default. *Held*, that plaintiffs might recover for the refusal of the defendants to accept and pay for the oil subsequently tendered at the appointed times. *Scott v. Kittanning Coal Co.*, 89 Pa. St. 232, 238; *Graver v. Scott*, 80 Pa. St. 88; *Stoddart v. Smith*, 5 Binn. (Pa.) 355. In *Quigley v. De Haas*, 82 Pa. St. 267, it was held that contracts of this nature are *prima facie* severable, but that where it can be shown that such was not the intention of the parties, they will be construed entire.

A agreed to furnish B with a certain quantity of steel of various specified brands and prices, to be delivered as B should require it. A became insolvent after having failed to respond to B's demand for a partial lot, and his property was sold at sheriff's sale. *Held*, that, notwithstanding, B should have continued to make demand. *Merch. & Man. Bank*

*v. Spratt*, 108 Pa. St. 97. See also, in *New York*, *Snook v. Fries*, 19 Barb. (N. Y.) 313; *Swift v. Opdyke*, 43 Barb. (N. Y.) 274; *Talmage v. White*, 3 Jones & Spencer (N. Y.), 218; *Tipton v. Feitner*, 20 N. Y. 423; *Patridge v. Gildermeister*, 1 Keyes (N. Y.), 93; *Lee v. Beebe*, 13 Hun (N. Y.), 89; *Sickels v. Pattison*, 14 Wend. (N. Y.) 257. In *Massachusetts*, see *Newton v. Winchester*, 16 Gray (Mass.), 208; *Winchester v. Newton*, 2 Allen (Mass.), 492; *Miner v. Bradley*, 22 Pick. (Mass.) 459, 460. Compare *Dwinel v. Howard*, 30 Me. 258; *Haines v. Tucker*, 50 N. H. 309; *Tyson v. Doe*, 15 Vt. 571; *Keenan v. Brown*, 21 Vt. 86; *Gallup v. Burnell*, *Brayt.* (Vt.) 191; *Taylor v. Gallup*, 8 Vt. 340; *Fletcher v. Cole*, 23 Vt. 114; *Thompson v. Conover*, 3 Vroom (N. J.), 466.

On a contract for sale of goods by successive deliveries and payments, a default in respect to one or more will not discharge the other party unless it is evident that the defaulting party intends no longer to fulfil. *Blackburn v. Reilly*, 47 N. J. L. 290; s. c., 54 Am. Rep. 159; *Kirkland v. Oates*, 25 Ala. 465; *Drake v. Goree*, 22 Ala. 409, 415.

If A contracts to deliver 500 tons of coal to B as ordered, in quantities not to exceed 200 tons per month, and less than is ordered is delivered and accepted, B cannot demand the deficiency the following month in addition to the 200 tons for that month. *Johnson v. Allen*, 78 Ala. 387; s. c., 56 Am. Rep. 34. And it was held that A's failure to deliver each month the full quantity ordered was a separate breach accruing at the end of each month.

Where one contract relates to separate matters, a breach as to one matter does not excuse the other party from performance as to the other matter. *Tucker v. Billing*, 3 Utah, 82; *Dunlap v. Petrie*, 35 Miss. 590; *Trimble v. Green*, 3 Dana (Ky.), 357; *Hewitt v. Berryman*, 5 Dana (Ky.), 165; *Dibol v. Minott*, 9 Iowa, 403; *McDaniels v. Whitney*, 38 Iowa, 60; *Robson v. Bohn*, 27 Minn. 333, 346; *Sawyer v. Railroad Co.*, 22 Wis. 403; *Goodwin v. Merrill*, 13 Wis. 658; *Allen v. McKibbin*, 5 Mich. 454; *Norris v. Harris*, 15 Cal. 227. It has been held in many cases that a contract of this kind is practically made up of several distinct agreements. *Coleman v. Hudson*, 2 Sneed (Tenn.), 463; *Cole v. Cheovenda*, 4 Col. 17; *More v. Bonnet*, 40 Cal. 251; *Purdy v. Bullard*, 41 Cal. 444; *Lomis v. Bank of Rochester*, 10 Ohio St. 327;

**Discharge of Right of Action.**—The right of action which arises from a breach of contract may be discharged (1) by the act of parties;<sup>1</sup> (2) by the judgment of a court;<sup>2</sup> (3) by lapse of time.<sup>3</sup>

1. **Discharge by Operation of Law.—Merger.**—The acceptance of a higher security for the payment of a debt is an extinguishment of the lower security for the same debt.<sup>4</sup>

**Alteration of Written Instrument.**—If a written instrument be altered in a material particular it is thereby discharged.<sup>5</sup>

**Appointing Debtor Executor.**—At the common law if a creditor appointed his debtor his executor, the debt was thereby extinguished.<sup>6</sup> But at the present day a debtor who has been appointed executor of his creditor is considered as a trustee for creditors and legatees of the amount of the debt.<sup>7</sup>

**Marriage.**—As a general rule, a contract made between parties who subsequently intermarry is extinguished by the marriage. This results from the principle that husband and wife are one in law.<sup>8</sup>

Kennedy v. Schwartz, 13 Nev. 229; Dugan v. Anderson, 36 Md. 567; Maryland Fertilizing Co. v. Lorentz, 44 Md. 218. *Contra*, King Philip's Mills v. Slater, 12 R. I. 82. Compare also Bradley v. King, 44 Ill. 339; Catlin v. Tobias, 26 N. Y. 217; Smith v. Lewis, 40 Ind. 98. See article on the Rescission of Divisible Contracts, 15 Amer. Law Rev. 623; and Mr. Landreth's note to the case of Norrington v. Wright, 21 Amer. Law Reg. N.S. 398-408, where the cases, both English and American, are collected and reviewed.

1. See RELEASE; ACCORD AND SATISFACTION; ARBITRATION AND AWARD.

2. See JUDGMENTS.

3. See STATUTES OF LIMITATION.

4. See MERGER.

5. An action cannot be maintained upon a written contract which has been materially altered without the defendant's consent, after being signed by him. Osgood v. Stevenson, 9 East. Rep. (Mass.) 545.

An alteration which only does what the law would do—that is, only expresses what the law implies—is not a material alteration. 2 Pars. on Conts. \*720.

It may be laid down as a general rule, that a man is discharged from liability "if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. *Per* Lord Campbell, in Gardner v. Walsh, 5 E. & B. (85 E. C. L. R.) 89.

It was formerly held that an alteration by a mere stranger would discharge an

instrument. Pigot's Case, 11 Rep. 27. But it is now held that a spoliation by a stranger, or an accidental alteration through mistake, will not affect the validity of the instrument. Neff v. Horner, 63 Pa. St. 327; United States v. Spalding, 2 Mason (U. S. C. C.), 478. Thus, where the seal was torn off a deed by a stranger the instrument was not avoided. Rees v. Overbaugh, 6 Cowen (N. Y.), 746. And where the indorsements on a bill of exchange were cancelled under a mistake by running a pen through them, it was held not to affect the rights of the parties. Wilkinson v. Johnson, 3 B. & C. 428; Raper v. Birkbeck, 15 East, 17. And see 2 Pars. on Conts. \*716 *et seq.*; Byles on Bills, \*323, and notes; 1 Greenleaf on Ev. §§ 564-568.

If an instrument is altered by the consent and agreement of the parties, it amounts to a new contract. Myers v. Nell, 84 Pa. St. 369.

If an instrument be lost or accidentally destroyed, the rights of the parties remain unchanged, but are rendered more difficult of proof. In an action on a negotiable instrument alleged to be lost the defendant may demand an indemnity against possible claims. See Byles on Bills (7th Am. Ed.), \*381 *et seq.*, and notes.

6. Co. Litt. 264 b, n. 1 (H. & B's. notes).

7. Ipswich Mfg Co. v. Story, 5 Met. (Mass.) 313; Pusey v. Clemson, 9 S. & R. (Pa.) 208; 2 Shars. Blk. 512, n.

8. Phillips v. Barnet, L. R. 1 Q. B. D. 439, 440.

But a covenant or contract by a man with a woman is not destroyed by their marriage where the act to be performed is future, to be done after the marriage is determined.<sup>1</sup>

**Arrest for Debt.**—Before arrest for debt was abolished, the arrest of a debtor upon a *capias ad satisfaciendum* amounted to a discharge and satisfaction of the debt.<sup>2</sup>

**Bankruptcy.**—A bankrupt law provides a statutory mode of discharge. By procuring a discharge in bankruptcy the debtor is released from those debts which are provable under the provisions of the bankrupt law.<sup>3</sup>

**100. Rescission for Misrepresentation.**—A contract may be rescinded when the entering into the same has been induced by a false representation, fraudulent or otherwise,<sup>4</sup> made by a party

1. If a man in contemplation of marriage executes a bond conditioned for the payment of a sum of money to his intended wife if she survive him, the bond is not released by their marriage. *Milbourn v. Ewart*, 5 T. R. 381; *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83.

2. *Sharpe v. Speckenagle*, 3 S. & R. (Pa.) 467; *Snevily v. Read*, 9 Watts (Pa.), 396; *Lathrop v. Briggs*, 8 Cowen (N. Y.), 171; *Ransom v. Keyes*, 9 Cowen (N. Y.), 128; Sm. on Contrs. \*109.

3. See BANKRUPTCY.

4. *Cohen v. Ellis*, 4 N. Y. St. Repr. 721; *Optical Co. v. Jackson & Co.*, 63 Miss. 21; *Whitman v. Bowden*, 2 S. E. Rep. (S. Car.) 630; *Rosenthal v. Mahon*, Exr, 65 Md. 418; *In re Murray*, 21 Ir. L. Times, 358; *Rorer Iron Co. v. Trout*, 2 S. E. Rep. (Va.) 713.

A contract assented to by one party on the faith of material misrepresentations by the other party will be rescinded at the option of the party injured, although the misrepresentations were made neither fraudulently nor negligently. But until rescission the contract is binding. *Yeater v. Hines*, 24 Mo. App. 619.

A bill lies in equity to set aside and rescind the exchange of real estate brought about by false representations. *Witherwax v. Riddle*, 9 West. Rep. (Ill.) 794.

A party who has been induced to buy stock through false representations may rescind his contract and recover back the purchase-money. *Bridge v. Penniman*, 36 Alb. L. Jour. (N. Y.) 54; *Poole v. West Point Butter and Cheese Ass'n*, 2 Ry. & Corp. L. J. (Neb.) 63.

Where the owner of stock in a coal company sold 392 shares of the same, through his agent, for \$4000, upon false representations as to material facts which, if true, vitally affected the value of the

stock, such representations being relied on and inducing the purchase, and the sum paid being out of all proportion to the value of the stock, such sale was held rescissible on the ground of fraud. *Booth v. Smith*, 117 Ill. 370.

One who is induced to enter into a contract for the purchase of a chattel in payment of a precedent debt, and in reliance upon representations made by the vendor as to the character and quality thereof, which prove false and fraudulent, may rescind the contract and return the chattel, and such rescission may be set up in the reply in an action brought by him to recover the original debt. *Johnson v. Hillstrom*, 33 N. W. Rep. (Minn.) 547.

The obtaining a note from a debtor by getting him intoxicated is not a fraud preventing ratification of the note without a new consideration. *Lyon v. Phillips*, 106 Pa. St. 57.

Where a person signs an instrument without reading it or, if he cannot read, without asking to have it read to him, the legal effect of the signature cannot be avoided by showing his ignorance of its contents, in the absence of some fraud, deceit, or misrepresentation having been practised upon him. But the rule is otherwise, and the instrument will be held void where its execution is obtained by a misrepresentation of its contents; the party signing a paper which he did not know he was signing and did not really intend to sign. *Burroughs v. Pac. Guano Co.*, 1 South. Rep. (Ala.) 212; *Rothschild v. Frensdorf*, 21 Mo. App. 318; *Smentek v. Cornhauser*, 17 Ill. App. 266; *McKinney v. Herrick*, 66 Iowa, 414; *Weller's Appeal*, 103 Pa. St. 594; *Hazard v. Griswold*, 21 Fed. Rep. 178; *Tufts v. Tufts*, 3 Utah, 361. And the general rule does not apply in favor of one who



thereto, provided such representation be one of fact [this rule does not apply to cases of actual fraud], as distinguished from either matter of law<sup>1</sup> or mere opinion or intention,<sup>2</sup>—that it be

by word or act has induced the omission to read. *Palmer v. Hartford Fire Ins. Co.*, 4 New Eng. Rep. (Conn.) 470.

When a contract has been reduced to writing, and one of the parties refuses to sign it unless a certain construction, stated by him, should be put upon it, the other party who by his silence and conduct has induced him to sign it will be estopped from claiming a different construction, otherwise it would be a fraud. *Flint v. Johnson*, 4 New Eng. Rep. (Vt.) 375; s. c., 9 Atl. Rep. 364; 11 East. Rep. 459.

Where circumstances prevent one who by fraud has been induced to enter into a contract from rescinding it, he is not for this reason deprived of a remedy. He may keep what he has received and sue for, damages, or may proceed in equity for relief, offering to restore, etc. *Gould v. Cayuga Co. Bk.*, 99 N. Y. 333.

If a person is induced by the fraudulent representations of the promoter of a corporation to subscribe for shares of stock in the corporation, and pays his subscription to the person holding the office of treasurer, he cannot, by rescinding the contract, maintain an action for money had and received against the other shareholders, even if the corporation is invalid and the shareholders are partners. *Perry v. Hale*, 143 Mass. 540.

Where a party has been allowed or induced to make a contract perfect in its formal constituents, upon motives different from those which the facts would have offered if known, the contract is never more than voidable. *Stiff v. Heith*, 3 New Eng. Rep. (Mass.) 374.

Where A and B entered into an arrangement to organize a gas company, and B informed A that it was necessary to purchase a license which he undertook to do himself, it was held that fraudulent misrepresentations made by B to A as to the price he had paid for the license gave A a right to rescind the contract, and sue for the money paid with interest. *Hauk v. Brownell*, 9 West. Rep. (Ill.) 165; s. c., 11 N. E. Rep. 416.

A person who has been induced to enter into a contract of partnership by misrepresentations not such as would entitle him to bring an action of deceit for damages, has a right, on the contract being rescinded by the court, to be indemnified against the debts and liabilities of the partnership. This is not giving damages, but is the proper consequence

of rescinding the contract. *Newbigging v. Adam*, 34 Ch. D. 582, where the nature and extent of the right to indemnity on rescission of a contract are considered.

A does not lose his right to bring a suit for the rescission of a contract between B and himself by the bringing of a suit *quia timet* by B in relation to the same matter. *Metrop. El. R. Co. v. Manh. El. R. Co.*, 11 Daly (N. Y.), 373; s. c., 14 Abb. N. Cas. (N. Y.) 103.

A court of equity will not grant the prayer for a rescission of a contract for the purchase of land because of fraudulent misrepresentations by the vendor as to the character and location of such land, the falsity of which representations the most cursory examination would have disclosed, when it is shown that the vendee sent an agent and afterward went himself to examine the same. *Watson v. Austin*, 63 Miss. 469.

The right to rescind a contract exists when there has been a material change in the subject-matter, before the final consummation of the agreement, brought about by the act of one of the parties, which the party rescinding did not authorize or assent to. *Harris v. Piatt*, 31 N. W. Rep. (Mich.) 135; s. c., 7 West. Rep. 328.

False and fraudulent representations not relating to the subject-matter of the contract are not a defence to an action on the contract. *Blair v. Buttolph*, 33 N. W. Rep. (Iowa) 349.

1. *Martin v. Wharton*, 38 Ala. 637; *Beall v. McGehee*, 57 Ala. 438; *Davis v. Betz*, 66 Ala. 206; *Starr v. Bennett*, 5 Hill (N. Y.), 303; *People v. San Francisco*, 27 Cal. 655; *Insurance Co. v. Brehm*, 88 Ind. 578; *Fish v. Cleland*, 33 Ill. 238; *Insurance Co. v. Reed*, 33 O. St. 283, 293; *Thompson v. Ins. Co.*, 75 Me. 55; *Jaggar v. Winslow*, 30 Minn. 263; *Upton v. Tribilcock*, 91 U. S. 45, 50; *Rashall v. Ford*, 2 Eq. 750; *Beattie v. Lord Ebury*, L. R. 7 H. L. 102, 130; *Seeley v. Reed*, 25 Fed. Rep. 361.

This does not apply where the misstatement of law is absolutely fraudulent. *Townsend v. Cowles*, 31 Ala. 428; *Berry v. Whitney*, 40 Mich. 65; *Stumpf v. Stumpf*, 7 Mo. App. 272; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342; *Moreland v. Atchison*, 19 Tex. 303; *Hirschfeld v. Lond., Br. & S. C. R. Co.*, 2 Q. B. D. 1; *West Lond. Com. Bank v. Kitson*, 13 Q. B. D. 363.

2. *Gage v. Lewis*, 68 Ill. 604; *Perkins*

such as to induce the contract,<sup>1</sup> and that it is made as part of the same transaction.<sup>2</sup> Such a contract, however, is voidable and not void,<sup>3</sup> and cannot be rescinded if the parties cannot be put *in statu quo*,<sup>4</sup> nor after third persons have for value acquired rights

*v. Lougee*, 6 Neb. 220; *Sawyer v. Prickett*, 19 Wall. (U. S.) 146; *Fisher v. N. Y. Com. Pl.*, 18 Wend. (N. Y.) 608; *Long v. Woodman*, 58 Me. 49; *Hazlett v. Burge*, 22 Iowa, 535; *Burt v. Bowles*, 69 Ind. 1; *Vernon v. Keys*, 12 East, 632; 4 Taunt. 488; *Ex parte Burrell*, 1 Ch. D. 552. See also *Gordon v. Parmelee*, 2 Allen (Mass.), 212; *Manning v. Albee*, 11 Allen (Mass.), 520; *Tucker v. White*, 125 Mass. 344; *Sherwood v. Salmon*, 2 Day (Conn.), 128; *Neidefer v. Chastain*, 71 Ind. 363; *Bishop v. Small*, 63 Me. 12; *Lyons v. Briggs*, 22 A. L. Reg. (R. I.) 619; *Davis v. Meeker*, 5 Johns. (N. Y.) 354; *Chrysler v. Canaday*, 90 N. Y. 272; *Shade v. Creviston*, 93 Ind. 591; *Saunders v. Hatterman*, 2 Fred. L. (N. Car.) 32; *Graham v. Pancoast*, 30 Pa. St. 89; *Gordon v. Butler*, 105 U. S. 553.

But where the parties have not equal means of knowledge, or efforts are made to prevent discovery of real value, misstatements as to value may be material. *Allen v. Hart*, 72 Ill. 104; *Griffin v. Farrier*, 32 Minn. 474; *Simar v. Canaday*, 53 N. Y. 298; *Bower v. Fenn*, 90 Pa. St. 359; *Picard v. McCormick*, 11 Mich. 68; *McClellan v. Scott*, 24 Wis. 81.

1. *Bowman v. Carithers*, 40 Ind. 90; *Ely v. Stewart*, 2 Md. 408; *Foy v. Houghton*, 83 N. Car. 467; *Anderson v. Burnett*, 5 How. (Miss.) 165; *Attwood v. Small*, 6 Cl. & F. 444; *Smith v. Kay*, 7 H. L. Cas. 775-6.

And mere lack of proper inquiry is no defence where one party has relied on the fraudulent representations or concealment by the other. *Cent. R. Co. Venez. v. Kisch*, L. R. 2 H. L. 99; *David v. Park*, 103 Mass. 501; *Mead v. Bunn*, 32 N. Y. 275, 280; *Roberts v. Plaisted*, 63 Me. 335; *Upton v. Englehart*, 3 Dill. (U. S.) 496, 501; *Eaton v. Winnie*, 20 Mich. 156; *Olson v. Orton*, 28 Minn. 36; *Carmichael v. Vandebur*, 50 Iowa, 651; *McKee v. Eaton*, 26 Kan. 226; *Bank v. Hunt*, 76 Mo. 439; *Risch v. Von Lilienthal*, 34 Wis. 250.

But the party claiming relief must have acted on the statement of the other, and not on his own judgment. *Hagee v. Grossman*, 31 Ind. 223; *Hough v. Richardson*, 3 Story (U. S.), 659; *Slaughter's Adm'r v. Gerson*, 13 Wall. (U. S.) 379; *Phipps v. Buckman*, 30 Pa. St. 401; *Tuck v. Downing*, 76 Ill. 71.

2. *Fogg v. Pew*, 10 Gray (Mass.), 409;

*McCracken v. West*, 17 Ohio, 16; *Wells v. Cook*, 16 Ohio St. 67; *West B'k of Scot. v. Addie*, L. R. 1 Sc. & D. 145; *Way v. Hearn*, 13 C. B. N. S. 292; *Barnett v. Barnett*, 2 S. E. Rep. (Va.) 733.

3. *Upton v. Englehart*, 3 Dill. (U. S.) 496; *Foreman v. Bigelow*, 4 Cliff. (U. S.) 508; *Nealon v. Henry*, 131 Mass. 153; *Whitcomb v. Denio*, 52 Vt. 382; *Davis v. Betz*, 66 Ala. 206; *Baird v. Mayor*, 96 N. Y. 597; *Oakes v. Turquand*, L. R. 2 H. L. 346, 375-6.

4. *Newbigging v. Adam*, 34 Ch. D. 582; s. c., 55 L. T. N. S. 794; 56 L. J. R. (Ch.) 275; 35 W. R. 597; *Smith v. Brittenham*, 109 Ill. 540; *Stewart v. Houst. & Tex. Cen. R. Co.*, 62 Tex. 246; *Sharp v. Ponce*, 76 Me. 350; *Vogel v. Demorest*, 97 Ind. 440; *Cahn v. Reid*, 18 Mo. App. 115.

To entitle a party to rescind a contract on the ground that he has been fraudulently betrayed into making it and to part with his property, he must return or offer to return that which he has received and place the other party in the same position, as nearly as may be, that he was in before the contract was made. *Snow v. Alley*, 11 East. Rep. (Mass.) 750; s. c., 11 N. E. Rep. 764; *Willingham v. Hoo-ven, etc., & Co.*, 74 Ga. 233.

A party who has been fraudulently led into the making of an entire contract must, upon discovering the fraud, with reasonable promptness avoid the contract as a whole; but where no rights have been actually surrendered and no benefits acquired under it, no formal restoration of the *status quo* is necessary. *Higham v. Harris*, 108 Ind. 246.

Where a shareholder in a company has sold some of the shares originally taken by him, he is not thereby deprived of his right to have the contract (which is a severable one) rescinded as to the remainder on the ground of fraudulent misrepresentation in the company's prospectus, provided that the shares sold were parted with before the fraud was discovered by the shareholder. *Re The Mount Morgan (West) Gold Mine, Limited*; *Ex parte West*, 56 L. T. N. S. 622; s. c., 2 Ry. & Corp. L. Journ. 131. Compare *Clarke v. Dickson*, 27 L. J. Q. B. 223; *West Bk. of Scot. v. Addie*, L. R. 1 Sc. & D. 145; *Francis v. N. Y. & Br. El. R. Co.*, 17 Abb. N. Cas. (N. Y.) 1.

thereunder,<sup>1</sup> and the rescission must take place within a reasonable time,<sup>2</sup> notice of the election to rescind having been communicated to the other party, though this may be done by bringing suit to have the contract set aside. Otherwise the right of rescission will be considered waived by acquiescence.<sup>3</sup> (See also FRAUD; RESCISSION.)

When the other parties to an agreement which is impeached for fraud have put themselves in the position in which they find themselves, with full knowledge that the plaintiff claimed the agreement to be void and fraudulent, and the plaintiff has acted promptly, the rule that he cannot have relief unless he can restore the other parties to the same position which they occupied before they entered into the agreement does not apply. *Metrop. El. R. Co. v. Manh. El. R. Co.*, 11 Daly (N. Y.), 373; s. c., 14 Abb. N. Cas. (N. Y.) 103. See *Hammond v. Pennock*, 61 N. Y. 145; *Hopkins v. Shenader*, 71 Ill. 449; *Harper v. Ferry*, 70 Ind. 264.

Where a person has been induced to take shares in a company by misrepresentation contained in the prospectus, the mere circumstance that the company is insolvent at the time when he takes proceedings to rescind his contract to take shares does not, in the absence of countervailing equities, deprive him of his right to rescind. *Carling v. London & Leeds Bank*, 56 L. J. R. (Ch.) 321.

An executed contract for the sale and delivery of certain mills then in operation at another place, with all the fixtures and appurtenances, and the material of the building where they then were, cannot be rescinded on the ground of having been induced by fraudulent misrepresentations, as the parties could not be restored to their original status. *Stanton v. Hughes*, 1 S. E. Rep. (N. Car.) 852.

A contract can only be avoided for fraud in its inception by rescinding it *in toto*, and by restoring the benefits already received. *Barrie v. Earle*, 3 New Eng. Rep. (Mass.) 114; s. c., 8 East. Rep. 6; *Merrill v. Wilson*, 33 N. W. Rep. (Mich.) 716; s. c., 10 West. Rep. 161.

A mere fall in the value of property will not interfere with the right of rescission, it being in the same condition as when received. *Whitcomb v. Denio*, 52 Vt. 382. Compare *Waddell v. Blockey*, 4 Q. B. D. 678, 683.

One seeking to rescind a contract for fraud need not absolutely tender what he has received if he gives notice of his intention to rescind, and continues in a situation to put the other party *in statu quo*. That the contract was partly executed at the time of the discovery of the

fraud will not in itself prevent a rescission, unless the greater part of the subject-matter thereof has been disposed of. *Amer. Wine Co. v. Brasher*, 4 McCrary C. Ct. 247.

1. *Williamson v. Russell*, 39 Conn. 406; *Kern v. Thurber*, 57 Ga. 172; *Mears v. Waples*, 3 Houst (Del.) 581; s. c., 4 Houst. (Del.) 62; *Titcomb v. Wood*, 38 Me. 561; *Railroad Co. v. Kerr*, 49 Ill. 548; *Sinclair v. Healy*, 40 Pa. St. 417; *Padden v. Taylor*, 44 N. Y. 371; *Hall v. Hinks*, 21 Md. 406; *Lee v. Portwood*, 41 Miss. 109; *Singer Mfg. Co. v. Sammons*, 49 Wis. 316; *Arnett v. Clondas*, 4 Dana (Ky.), 300; *Attenborough v. St. Kath. Dock Co.*, 3 C. P. D. 450; *White v. Garden*, 10 C. B. 919; *Stevenson v. Newnham*, 13 C. B. 285, 303.

2. Whether a person acts with reasonable promptness in rescinding a contract induced by fraud is a mixed question of law and fact, proper to be submitted to a jury. *Chamberlin v. Fuller*, 9 Atl. Rep. (Vt.) 832; s. c., 4 New Eng. Rep. 614.

A vendor must exercise his right of rescission for fraud on the vendee's part within a reasonable time, and he cannot affirm in part and rescind in part. *Lapp v. Ryan*, 23 Mo. App. 436. See *Baird v. Mayor*, 96 N. Y. 567, 598; *Wingate v. King*, 23 Me. 35; *Key v. Jennings*, 66 Mo. 356, 370; *Bradshaw v. Yates*, 67 Mo. 221; *Estes v. Reynolds*, 75 Mo. 563; *Campau v. Van Dyke*, 15 Mich. 371; *Kribbs v. Downing*, 25 Pa. St. 399, 404; *Davis v. Stuard*, 99 Pa. St. 295; *Willoughby v. Moulton*, 47 N. H. 205; *Williamson v. R. Co.*, 28 N. J. Eq. 277; s. c., 29 N. J. Eq. 311; *Clough v. L. & N. W. R. Co.*, L. R. 7 Ex. 34.

Where an applicant for a benefit certificate has misrepresented his true age, which was unknown to the benefit society, but eighteen months are allowed to elapse between the proof of death showing the true age and the determination of a suit thereon by the beneficiary, without an offer on the part of the society to rescind the contract, or refund the money received thereon, it will be estopped from setting up such a defence. *Gray v. Nat. Ben. Ass'n*, 11 N. E. Rep. (Ind.) 477.

3. See cases cited in previous note.

**101. Mistake—Duress—Undue Influence.**—A contract may also be avoided that was entered into through a fundamental mistake,<sup>1</sup> or obtained by duress or undue influence.<sup>2</sup> Where the former is of a kind to exclude real consent, the contract is absolutely void; otherwise only voidable. (See also MISTAKE and DURESS.)

The party defrauded by misrepresentations of the persons with whom he deals, by performing his part of the contract, with a full knowledge of the fraud, is deemed to have ratified it, but is not always barred of a remedy by damages for the fraud. *Nauman v. Oberle*, 8 West. Rep. (Mo.) 253.

1. *Crowe v. Lewin*, 95 N. Y. 423.

While equity will rescind a contract induced by fraudulent representations concerning a material matter, it will not act because of a mistake as to the legal effect of known facts, and particularly where no injury can follow from the mistake. *Seeley v. Reed*, 25 Fed. Rep. 361.

In general, for the mistake of one party only to an instrument relief will not be afforded in equity, as by reformation, so as to subject the other party to obligations or conditions to which he never assented, but relief may be granted when the parties can be placed in their former position. *Benson v. Markoe*, 33 N. W. Rep. (Minn.) 38.

Money voluntarily paid upon a claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to its liability. The illegality of the demand paid constitutes of itself no ground for relief, but there must be in addition some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. *Jefferson Co. v. Hawkins*, 2 South. Rep. (Fla.) 362.

In *Hooper v. Mayor & Corp. of Exeter*, 56 L. J. R. (Q. B. D.) 457, it was held

that harbor-dues paid for exempted articles, in ignorance of the exemption, could be recovered back.

The conditions in a contract for the sale of land provided, amongst other things, that the purchaser should pay a deposit on the purchase-money, and that if he should fail to comply with the conditions his deposit-money should be forfeited to the vendors, who should be at liberty to resell the property. The purchaser paid the deposit, investigated and accepted the title, but when the time came for completion, being unable to find the balance of the purchase-money, he abandoned the contract. The vendors consequently rescinded the contract and forfeited the deposit. Three years after the purchaser heard that on a resale by the vendors under the same conditions an objection had been taken to the title, which had been held fatal, and thereupon brought an action to recover his deposit, on the ground that there had been a mutual mistake and a total failure of consideration. *Held*, that he was not entitled to recover his deposit, this being not only an earnest and security for the completion of the purchase, but "something which creates by the fear of its forfeiture a motive in the payor to perform the rest of the contract." *Soper v. Arnold*, 35 Ch. D. 384.

2. It is not necessary to avoid a contract entered into through fear, that the fear should be such that a person of ordinary courage and resolution would yield to it; but if either party is mentally incompetent to resist pressure improperly brought to bear, there is no consent. *Scott v. Sebright*, 56 L. J. R. (P. D.) 11.



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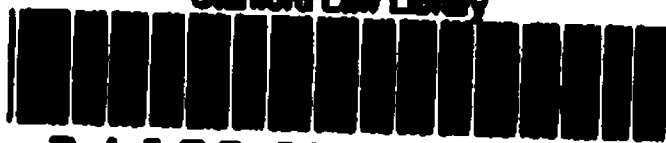








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